COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

June 7, 2024

In the Matter of
Energy North, Inc.

OADR Docket Number: 2021-003
Enf. Document No. 00009931
Groton, MA

RECOMMENDED FINAL DECISION

This appeal arises out of the issuance by the Central Regional Office of the Massachusetts Department of Environmental Protection ("the Department") of a Notice of Intent to Assess a Civil Administrative Penalty ("Penalty Assessment Notice" or "PAN") in the amount of $22,000.00 against Energy North, Inc. ("Petitioner"), for alleged violations of G.L. c. 21E ("Chapter 21E") and the Massachusetts Contingency Plan ("MCP"), 310 CMR 40.0000. The Petitioner is a Massachusetts corporation with a principal office at 2 International Way, Lawrence, Massachusetts. It maintains an office at 25 Westford Road, Ayer, Massachusetts, having previously merged with Ayer Oil Co., Inc. Horgan PFT ¶ 1. The PAN alleges that the Petitioner, a fuel oil delivery company, failed to report a threat of release ("TOR") of fuel oil within two hours of obtaining knowledge of the TOR, in violation of the MCP, and that its violation was willful within the meaning of the Civil Administrative Penalty Act, G.L. c. 21A, § 16, and the Department's Civil Administrative Penalty Regulations at 310 CMR 5.00. The Petitioner claims that it did not commit the alleged violations because its personnel correctly

determined that, based on their observations of the release site, there was no TOR. It also argues that, in any case, its violation was not willful within the meaning of the Civil Administrative Penalty Act, G.L. c. 21A, § 16, and the Department's Civil Administrative Penalty Regulations at 310 CMR 5.00.

In December 2021, a former Presiding Officer of MassDEP's Office of Appeals and Dispute Resolution ("OADR") conducted an evidentiary adjudicatory hearing ("Hearing") to adjudicate this appeal. The former Presiding Officer did not issue a Recommended Final Decision adjudicating this appeal prior to leaving OADR in April 2022. As a result, the Chief Presiding Officer designated me as the substitute Presiding Officer in the appeal to review the evidentiary record and draft a Tentative Recommended Final Decision ("TRFD") pursuant to the Adjudicatory Proceeding Rules at 310 CMR 1.01(14)(a) and 14(c).[1] On September 6, 2023, I issued the TRFD tentatively concluding that the Department erred in issuing the PAN because it had not proven its case by a preponderance of the evidence.

As discussed in detail below, after reviewing the Department's and the Petitioner's respective responses to the TRFD, and based on my additional review of the Hearing evidentiary

[1] 310 CMR 1.01(14)(a) provides in relevant part that:

> Tentative decisions shall not be issued as a matter of routine, but shall be issued . . . [if] the hearing was conducted by a Presiding Officer other than the one who will write the recommended decision and the recommended decision will be adverse to a party other than the Department . . . . Every tentative decision shall be in writing and shall contain a statement of the reasons, including a determination of every issue of fact or law necessary to the decision. The parties shall have seven [business] days from the receipt of the tentative decision to file objections to the decision and supporting arguments with the Department.

310 CMR 1.01(14)(c) in turn provides in relevant part that:

> a tentative decision shall be made by a substitute Presiding Officer upon the record. When the substitute Presiding Officer determines that the credibility of a material witness is an issue necessary to the decision, a new hearing may be held, and may be limited to the examination of that witness.

record and the statutory and regulatory requirements governing the Department's issuance of the PAN, I find that the Department's PAN should be affirmed for only one of the numerous reasons raised by the Department in its objections to the TRFD, specifically, that the Petitioner caused a TOR which it failed to report to the Department within the two hour required time period of the MCP. The Department's other objections to the TRFD lack merit.

I. Procedural History.

Under 310 CMR 1.01(14)(a), the Petitioner and the Department had seven business days from the receipt of the TRFD to file objections to the TRFD or supporting arguments. Within the seven-business day period, the Department filed a 29-page memorandum with six exhibits laying out numerous objections to the TRFD. See Dept. of Env. Protection's Objections to the Presiding Officer's Tentative Recommended Final Decision and Request for Oral Argument Before the Commissioner (Sep. 15, 2023) ("the Department's Objections").[2] The Department also requested oral argument before the Department's Commissioner to present the Department's objections to the TRFD.[3] The same day, the Petitioner filed a brief Statement in Support of the TRFD.

On September 18, 2023, the Chief Presiding Officer issued a Scheduling Order for Issuance of Recommended Final Decision in the appeal ("CPO's September 18th Order") in accordance with his authority as the head of OADR and the broad authority of Presiding Officers under 310 CMR 1.01(5)(a) to "take any action authorized by M.G.L. c. 30A to conduct a just,

[2] As discussed below, at pp. 20-32, the Department's Objections provided, in many instances, more detailed arguments in support of the PAN than in its original post-hearing briefing. However, neither the Department's objections to the TRFD nor the Petitioner's arguments in support of the TRFD adequately addressed the issue of whether the Petitioner caused a TOR which it failed to report to the Department within the two-hour required time period of the MCP. As a result, further briefing was required of the Department and the Petitioner on that causation issue. See below, at pp. 4-5.

[3] 310 CMR 1.01(14)(a) accords the Department's Commissioner "discretion to allow or order the parties [to an appeal] to argue orally before the Commissioner."

efficient and speedy adjudicatory appeal, and to write a fair and impartial recommended decision for consideration by the Commissioner," and OADR's mandate under 310 CMR 1.01(1)(b) to "secure a just and speedy determination of every appeal." The CPO's September 18th Order required the Petitioner to respond to the substance of the Department's Objections by October 2, 2023, and the Department to reply to the Petitioner's response by October 16, 2023. In the CPO's September 18th Order, the Chief Presiding Officer also informed the Parties that he had appointed a panel of four Presiding Officers ("Panel") comprised of myself and my colleagues, Presiding Officers Margaret Stolfa, Jane Rothchild, and Michael Dingle, to review the Department's objections to the TRFD and the Parties' supplemental briefing as ordered by the Chief Presiding Officer. CPO's September 18th Order, pp. 4-5.[4]

On October 2, 2023, the Petitioner filed the Petitioner's Response Memorandum ("the Petitioner's Response"), which largely restated the arguments the Petitioner made earlier in the litigation challenging the $22,000.00 PAN's validity and did not directly address the Department's Objections to the TRFD. On October 16, 2023, the Department filed its Reply to the Petitioner's Response Memorandum which again opposed the TRFD's findings and renewed its request for oral argument before the Commissioner ("the Department's Reply").

The Panel reviewed the Department's objections to the TRFD, the Petitioner's Response, and the Department's Reply to determine the merits of the Department's objections

[4] Presiding Officers Stolfa and Rothchild have been members of the bar for more than 30 years and have significant expertise of Chapter 21E and the MCP, including MassDEP's enforcement of Chapter 21E and MCP requirements; Presiding Officer Dingle has been a member of the bar for more than 40 years and has significant expertise in the litigation of appeals filed with OADR, including MassDEP's evidentiary burden of proof in appeals challenging a MassDEP enforcement order; and I have significant civil litigation experience in complex business matters and land use matters. The Chief Presiding Officer, who heads OADR and appointed the Panel, has been a member of the bar for more than 37 years and has significant administrative and environmental law experience and trial and appellate court experience.

to the TRFD. Based on their review, the Panel determined that the Parties' filings did not adequately address the analysis necessary to determine whether an entity has "caused or is legally responsible for" a threat of release within the meaning of Chapter 21E and the MCP. The Chief Presiding Officer concurred with the Panel's determination and in accordance with his authority as the head of OADR and the directive of 310 CMR 1.01(1)(b) "to secure a just and speedy determination of [this] appeal" issued an Order on October 26, 2023 ("the CPO's October 26th Order") requiring the Petitioner and the Department to address the Panel's determination in further briefing.

On November 8, 2023, the Department submitted its Legal Memorandum Pursuant to the CPO's October 26th Order and renewed its request for oral argument before the Commissioner ("Department Causation Memo"). That same day, the Petitioner submitted its Memorandum Pursuant to the CPO's October 26th Order ("Petitioner Causation Memo").

In preparing this Recommended Final Decision, I listened to the audio recording of the December 2021 Hearing that the former Presiding Officer in the appeal conducted and reviewed the Department's Basic Documents regarding the PAN's issuance,[5] legal briefing of the Parties, the Hearing transcript, pre-filed testimony and pre-filed rebuttal testimony of the Parties' respective witnesses who testified at the Hearing, and all appended exhibits. I also reviewed the Department's Objections to the TRFD[6] and all filings submitted pursuant to the CPO's

[5] "Basic Documents" are those documents in the official file of the Department program that were involved in the decision, order, or determination that is on appeal. Basic Documents generally include (1) all submissions used by the Department in reaching the decision, order, or determination and (2) all documents constituting the Department's decision, order, or determination. Basic Documents do *not* include internal deliberations of the Department. The Department's Basic Documents are admissible and probative as "the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs." G.L. c. 30A, § 11(2); 310 CMR 1.01(8)(a); see also Mass. Guide Evid. 201(b)(2).

[6] See n.2 above, at p. 3.

September 18th Order and October 26th Order. Lastly, I consulted with the other members of the Panel for their learned opinions. After reviewing and carefully considering all the foregoing materials and arguments, I recommend that the Department's Commissioner issue a Final Decision affirming the PAN because, based on a preponderance of the evidence and the governing statutory and regulatory requirements, I find that: (1) the Petitioner caused a threat of release of oil; (2) the Petitioner failed to report a threat of release of oil to the Department in violation of MCP notification requirements; (3) the Petitioner failed to conduct an adequate assessment of the Threat of Release; and (4) the Department properly assessed the $22,000.00 civil administrative penalty amount for the Petitioner's violation.

II. Witnesses.[7]

The evidence in the administrative record consists of pre-filed, sworn, written testimony and exhibits submitted by the parties' respective witnesses. 310 CMR 1.01(12)(f). These witnesses, who were available for cross-examination at the Hearing, were as follows.

A. Witnesses for the Department.

1. Jason G. Ward.

Jason Ward is an Environmental Analyst III with the Emergency Response section of the Bureau of Waste Site Cleanup ("BWSC") in the Department's Central Regional Office which issued the PAN. Ward PFT ¶ 2. He has held this position since 2014. Id. at ¶ 1. Since June 2019, Mr. Ward has been a Licensed Site Professional ("LSP"). Id. at ¶ 6.[8] As part of his duties, Mr.

[7] Witnesses' Pre-Filed Direct Testimony will be referred to as "[Witness] PFT ¶ []" and Pre-Filed Rebuttal Testimony will be referred to as "[Witness] RPFT ¶ []." Exhibits to testimony are referred to as "[Witness] Ex. X". References to the hearing transcript are "Tr. [page]:[lines]."

[8] "An LSP is an environmental scientist or engineer experienced in the cleanup of oil and hazardous material contamination [who is responsible for working with a property owner] to develop and execute a scope of work that will satisfy the state requirements to address contaminated property [as set forth in G.L. c. 21E and the MCP]."

Ward receives notices of releases of oil and hazardous materials made by persons pursuant to Chapter 21E and the MCP. Id. at ¶ 7a. He also evaluates the sufficiency of Immediate Response Actions filed in response to the release of oil or hazardous materials. Id. at ¶ 7b. I find him qualified "by knowledge, skill, experience, training, or education" to render expert testimony in this matter. See In the Matter of Jon L. Bryan, Docket No. DEP-04-767, Recommended Final Decision (July 25, 2005), 2005 MA ENV LEXIS 50, *9; Mass. Guide Evid. 702.

2. Kevin W. Daoust.

Mr. Daoust has worked with the Department since 1995. Daoust PFT ¶ 3. He is currently employed as an Environmental Engineer V and is the Section Chief of the Emergency Response and Risk Reduction section within BWSC in the Department's Central Regional Office. Id. at ¶¶ 2-3. Mr. Daoust supervises emergency response staff (including Mr. Ward) to ensure timely responses to oil and hazardous materials release notifications and oversees the regional office's Emergency Response section's enforcement efforts. Id. at ¶¶ 4A-4B. I find him qualified "by knowledge, skill, experience, training, or education" to render expert testimony in this matter. See Jon L. Bryan, 2005 MA ENV LEXIS 50, at *9; Mass. Guide Evid. 702.

B. Witnesses for the Petitioner.

1. Michael Lanteigne.

Mr. Lanteigne is the Petitioner's service manager. Lanteigne PFT ¶ 1. He has 24 years of experience in the home heating oil industry and has witnessed numerous oil spills in that time. Id. at ¶ 3. Given his relevant experience in the industry and with oil spills, I find him qualified

https://www.mass.gov/how-to/hiring-a-licensed-site-professional. "LSPs are licensed by the [Massachusetts] Board of Registration of Hazardous Waste Site Cleanup Professionals (usually referred to as the 'LSP Board'), based upon education, experience, and passing an examination on applicable regulations and relevant technical issues." Id.

"by knowledge, skill, experience, training, or education" to render expert testimony in this matter. See Jon L. Bryan, 2005 MA ENV LEXIS 50, at *9; Mass. Guide Evid. 702.

2. Kevin Horgan.

Mr. Horgan is the Petitioner's operations manager. Horgan PFT ¶ 1. He possesses a commercial driver's license with all endorsements to drive commercial vehicles delivering hazardous materials and possesses an oil burner technician license issued by the Commonwealth of Massachusetts. Id. He has over 30 years of experience in the heating oil industry and has been delivering oil and servicing oil-burning equipment and tanks during that time. Id. at ¶ 3. He owned a heating oil delivery and service business for 23 years of that time. Id. I find him qualified "by knowledge, skill, experience, training, or education" to render expert testimony in this matter. See Jon L. Bryan, 2005 MA ENV LEXIS 50, at *9; Mass. Guide Evid. 702.

III. Background.

A. The site.

This appeal arises out of an oil spill that occurred at 28 Ridgewood Avenue in Groton, Massachusetts ("Property"). The Property is owned by Barbara Ruskin, as Trustee of the B. Rose Realty Trust. Ward Ex. B, p. 3 (Petitioner's Response to Requests for Information). She uses it as a seasonal residence. Ward Ex. E, p. 28 (Phase I Initial Site Investigation, Immediate Response Action Status & Tier Classification Report of the Petitioner's LSP). The Property consists of approximately 0.46 acres of land developed with a 720 square-foot ranch style, single-family home with a full basement. Ward Ex. C, p. 5 (Release Notification and Immediate Response Action Plan dated June 2019). The building is constructed on a hillside that slopes steeply downward from Ridgewood Road to Knops Pond. Id. The Property is located in a residential area, and residential properties abut the Property to the east and west. Id. According to

the Petitioner's LSP's Phase I Site Assessment Map, the Property is located within an Area of Critical Environmental Concern and a medium yield aquifer, as well as being located within approximately 40 feet of Knops Pond. Id. Ms. Ruskin has been a home heating oil customer of Energy North (or its predecessors[9]) since October 2006. Ward Ex. B, p. 1.

B. The aboveground storage tank.

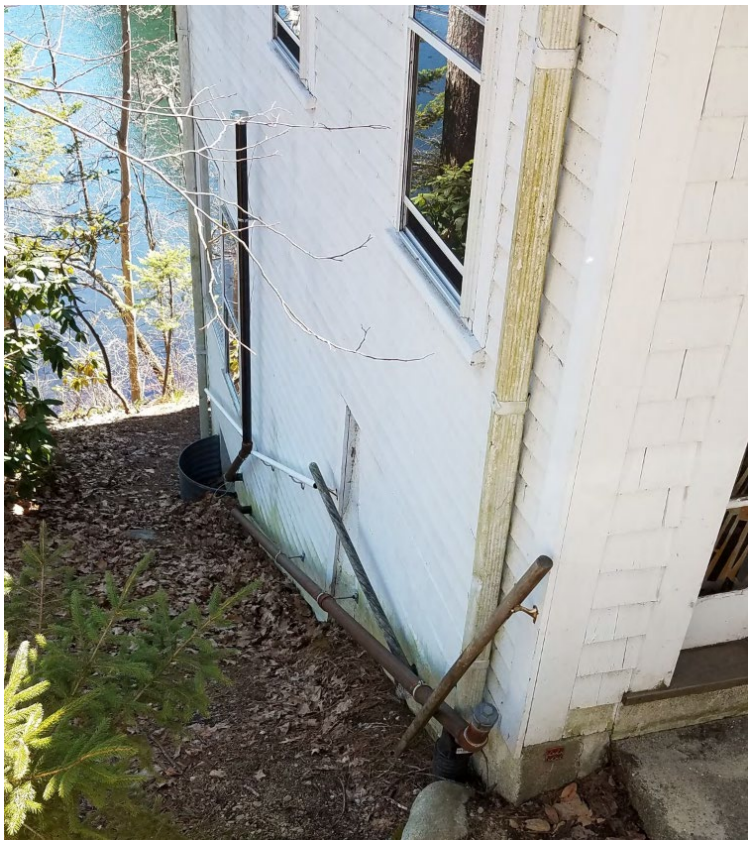
In January 2019, the Property had a single 275-gallon double-walled Roth Industries aboveground storage tank ("AST") for heating oil installed in its basement. Ward Ex. C, p. 4; Horgan PFT ¶ 12; Lanteigne PFT ¶ 12. As its name suggests, the AST is designed to minimize the risk of spillage and is manufactured with two walls: the interior is made from a blow-molded, high-density polyethylene plastic that is designed to be seamless, leak-proof, and corrosion resistant. Horgan PFT ¶ 12; Lanteigne PFT ¶ 12. The outer tank is manufactured from galvanized steel; Tr. 46:13-18; and held shut with rivets. Ward Ex. H, p. 13 (Ruskin Response to Department's Requests for Information); Tr. 123:5-12.

The AST has an alarm designed to alert the operator in the event of a failure of the interior plastic tank. Ward Ex. B, p. 4. This alarm is a rod placed in between the inner and outer tanks. Id. The rod's design allows it to float if oil spills out of the interior tank into the interstitial space between the tanks. Id. This alarm will trigger if any amount of oil is present between the inner and outer tanks. Tr. 47:13-16. At all relevant times, the AST's alarm was operational. Tr. 138:6-15.

[9] Ms. Ruskin had been a customer of Ayer Oil. Ward Ex. B, p. 1. Ayer Oil was acquired by Energy North in or around 2018.

As is common for home oil tanks, the AST has two pipes that emerge from the top. The first is a filler pipe[10] to which a delivery truck fits its hose to fill the AST. Horgan PFT ¶ 3; Lanteigne PFT ¶ 5. The second pipe is a vent pipe. Ward RPFT ¶ 6. The vent pipe serves two functions. First, when the AST is being filled, displaced air passes through the vent pipe to reduce increased pressure in the AST. Tr. 146:4-23. Second, the displaced air passes through a whistle in the pipe, creating a noise that alerts the delivery person that the AST is not yet filled to capacity. Ward Ex. B, p. 4. (Petitioner's Response to MassDEP's Request for Information). The AST's whistle was operating properly at all times. Ward Ex. B, p. 4. Both the vent pipe and fill pipe were two inches in diameter. Tr. 80:20-81:24. The 26-foot fill pipe ran diagonally along the side of the house up to an end cap near the corner of the house. Tr. 80:20-81:24; Ward RPFT ¶ 6; Ward Ex. H, p. 13. The 12-foot vent pipe ran vertically up the side of the house. Tr. 80:20-81:24; Ward RPFT ¶ 6; Ward Ex. H, p. 13. The following photograph introduced in evidence at the Hearing as Ward Ex. J shows the vent pipe (running vertically up the house) and the fill pipe (running along the side of the house):

[10] The filler pipe had a four-gallon capacity. Horgan PFT ¶ 3; Lanteigne PFT ¶ 5.



Ward Ex. J (exterior photograph).

C. Delivery of Oil to the Property on January 16, 2019.

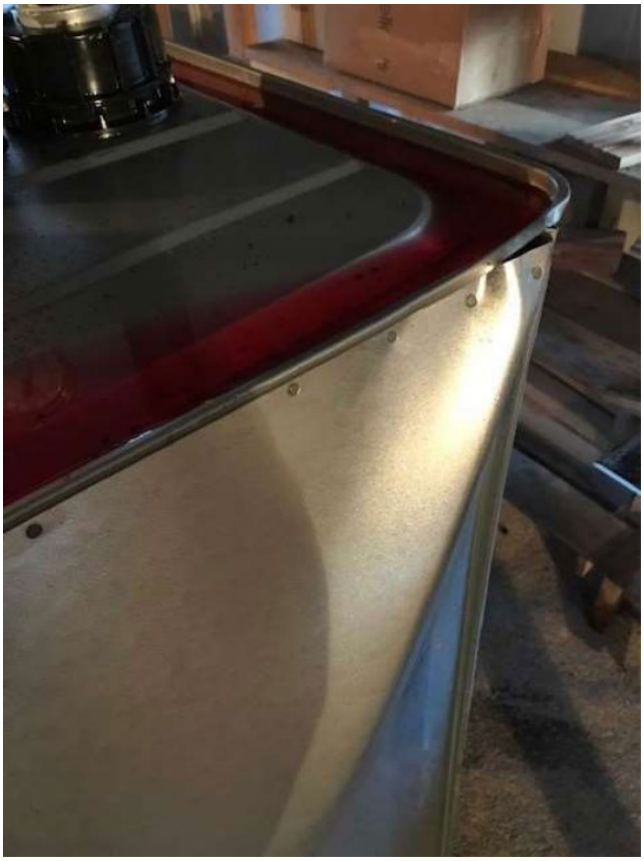
On the morning of January 16, 2019, at approximately 9:25 a.m., Brian Borque, a deliveryman for the Petitioner with five years of experience, made a delivery of #2 fuel oil[11] at the Property. Horgan PFT ¶ 4; Lanteigne PFT ¶ 5. Mr. Borque dispensed 155.3 gallons into the AST. Ward Ex. B, p. 3. Because Ms. Ruskin was on an automatic delivery plan, it is unknown how much oil was in the AST at that time. Ward Ex. B, pp. 2-3. Mr. Horgan interviewed Mr. Borque the morning after the delivery. Horgan PFT ¶ 9. Mr. Borque stated that there was nothing unusual about the delivery. Id. Mr. Borque was aware of the Petitioner's policy to not fill a tank when no whistle was heard. Id. The AST whistle (which was always loud) functioned throughout

[11] #2 fuel oil has essentially the same chemical composition as diesel, although it is primarily used for home heating.

the delivery, and when the whistle stopped, Mr. Borque stopped pumping oil. Id. Mr. Borque did not testify at the adjudicatory hearing.

Ms. Ruskin arrived at the Property that day at about 1:30 p.m. Ward Ex. H, p. 2. At approximately 2:15 p.m., Ms. Ruskin called the Petitioner to let them know of a strong smell of oil in her basement. Ward Ex. B, p. 4. Mr. Lanteigne went to the Property and into the basement. Lanteigne PFT ¶ 3. It was evident that there had been a release of oil into the basement. Id. at ¶ 6. Mr. Lanteigne observed a stain approximately eight feet by eight feet on the concrete basement floor. Id.; Horgan PFT ¶ 6. Based on the size of the stain, both Mr. Lanteigne and Mr. Horgan opined that the amount of oil released was between three and five gallons. Lanteigne PFT ¶ 6; Horgan PFT ¶ 6.

Mr. Lanteigne visually inspected the AST. Ward Ex. B, p. 4. He observed that there was a rupture in the upper part of the AST's outer tank and the presence of #2 fuel oil on top of the AST. Horgan PFT ¶ 8; Lanteigne PFT ¶ 8. Further inspection revealed loose pipe fittings on the outer tank near the vent and fill pipe connections at the top of the AST. Horgan PFT ¶ 8; Lanteigne PFT ¶ 8. He also observed that the seam at the top of the AST had ruptured. Ward Ex. B, p. 4. Ms. Ruskin took the following photograph of the AST, the rupture, and the visible fuel oil that was introduced in evidence at the Hearing as Ward Ex. H, p. 13:



Mr. Lanteigne did not observe any active leaking from the AST, nor was the alarm triggered to alert of oil in between the inner and outer tanks. Ward Ex. B, p. 4. Mr. Lanteigne placed 2 bags of oil absorbent on the basement floor at this time. Id. The absorbent was removed the same day after it was saturated, and new absorbent was placed to capture any residual oil. Id.

From Mr. Lanteigne's observations, there was no evidence that oil had seeped between the basement wall or floor into the environment. Lanteigne PFT ¶ 12. In particular, he did not observe any cracks in the basement floor. Id. at ¶ 11. There was no oil staining on the outside of the foundation, and there was no smell of oil outside. Horgan PFT ¶ 7; Lanteigne PFT ¶ 7. Based on all these observations, Mr. Lanteigne and Mr. Horgan determined that there was not a threat of release and that this was not a spill that required two-hour notification to the Department pursuant to the MCP. Horgan PFT ¶ 8; Lanteigne PFT ¶ 12.

D. January 17 to 22, 2019.

On January 17, 2019, Evan Bonney, the Petitioner's Safety Director, went to the Property. Ward Ex. B, p. 5. In the basement, he noticed a slight odor of oil and observed the same damage that Mr. Lanteigne had seen the previous day. Id. He also observed the area of the spill and noted no cracks in the basement in the stained area. Id. He noticed the oil absorbent on the floor where the basement floor met the wall, and when he went to the exterior behind that wall, he did not smell oil. Id. He concluded that the AST was faulty. Id. Mr. Bonney returned to the office and spoke with Mr. Lanteigne, and they agreed that the release was less than 10 gallons and not reportable. Id. They instructed their personnel to use the oil absorbent and wash the basement. Id. Mr. Lanteigne advised Ms. Ruskin to ventilate her house to assist with odor removal. Id. Later that day, Mr. Lanteigne returned to the site and noticed that the absorbent was still dry. Id.

On January 21, 2019, Mr. Lanteigne removed the remaining dry absorbent from the basement and placed deodorizer. Id. At that time, he observed that all the oil that had spilled was absorbed by less than 2 bags of absorbent. Horgan PFT ¶ 10. According to manufacturer specifications, two fully saturated bags of absorbent would absorb approximately seven to nine gallons of oil. Horgan PFT ¶ 10; Lanteigne PFT ¶ 10. Mr. Horgan and Mr. Lanteigne concluded, based on their visual inspection of the saturation of the absorbent, that the spill was less than 10 gallons. Horgan PFT ¶ 10; Lanteigne PFT ¶ 10. On January 22, 2019, a representative of Roth, the AST's manufacturer,[12] went to the Property and determined that the AST needed to be

[12] The representative, Chris Gobillot, was employed by David Gooding Association, and not Roth Industries. Ward Ex. B, p. 5.

replaced. Ward Ex. B, p. 5. There is no indication what the Roth representative observed during that visit that led him to that conclusion. Id.

E. January 23 to April 11, 2019.

During this time period, there was no evidence of any additional leaking from the AST. Horgan PFT ¶ 14; Lanteigne PFT ¶ 14. The AST was not filled again; Tr. 32:13-21; although it remained in service until approximately April 12, 2019. Tr. 23:7-11, 33:6-10. The Petitioner did not engage an LSP during this time. Tr. 52:21-24.

Ms. Ruskin reported the release to the manufacturer, Roth, under her warranty for the AST. Ward Ex. H, pp. 15-16. On April 3, 2019, Roth sent a letter to Ms. Ruskin regarding the AST. Id. Roth only reviewed photographs of the AST; none of its employees came to the Property to inspect the AST. Id. at p. 15. Roth nevertheless observed, "The extreme expansion of the [AST] combined with the failed rivets and uplifted corner are the results of the tank being pressurized beyond what it is designed to handle." Id. at p. 15. Roth went on to state:

> Based on the above, it is clear that the oil delivery driver failed to stop the flow of oil into the Ruskin tank when the whistle stopped. This resulted in the tank being over-pressurized with the subsequent rivet failure and oil being forced past the seals at the connections in enough quantity to overtop the upraised lip of the secondary tank top and then pool on the concrete floor where the tank is located….
>
> 1. The [AST] has severely distended sides and ends, resulting in extensive creasing of the metal of the outer tank well beyond the acceptable limits.
>
> 2. The visible upper corner of [the AST] has at least one, possibly two, failed rivets which have allowed the corner of the tank top to be lifted up enough to expose the upper edge of the tank wall.

Id. at p. 16. Roth concluded, "Due to the damage the [AST] has sustained, it needs to be removed from service and replaced." Id.

Also during this timeframe, Ms. Raskin reported the smell of oil in the basement to the Petitioner on several occasions throughout early 2019, including on January 30; Ward Ex. H, p. 18; February 4; id. at p. 19; February 10; id. at p. 20; February 15; id.; and April 4, 2019. Id. at p. 26. The Petitioner told her to contact her homeowner's insurance to advise on next steps. Id.

F. April 12, 2019, and later.

Because of the failure of the AST, it was removed in April 2019 (although the exact date is unclear), and a new tank was installed in early April. Tr. 33:6-10. At that time, the Groton Fire Department ("GFD") was called to issue a permit on the new tank. Tr. 16:5-11; Ward PFT ¶ 8. On April 12, 2019, Mr. Ward received a call from the GFD reporting "overwhelming #2 fuel oil odors" in the Property during its visit the previous day. Ward PFT ¶ 8. This was the first time the Department received notice of the release. Ward Ex. A, p. 1 (Release Notification Form). Mr. Ward then contacted Ms. Ruskin and learned of the release. Id. at ¶¶ 8-9. That same day, he did a site visit with Ms. Ruskin, Lt. Tyler Shute of the GFD, and Mr. Lanteigne. Id. At the time of his visit, the AST had already been removed. Tr. 13:15-21. During that visit, Mr. Ward observed the release area in the basement, smelled an obvious fuel oil odor throughout the house, took site photos, and instructed the Petitioner to hire a qualified Remedial Contractor and LSP to clean the Property. Id. He also instructed the Petitioner to file a Release Notification Form ("RNF") with the Department. Tr. 19:14-20:5.

At that time, Mr. Ward determined, based on the discussions he had with Ms. Ruskin and the GFD, and from his own observations, that there had been a sudden release of #2 fuel oil of an unknown quantity. Ward PFT ¶ 9. While he saw no oil on the floor on April 12, 2019, Mr. Ward was concerned that the since-removed AST had posed a threat of release. Ward PFT ¶ 9. He was particularly concerned that oil had seeped into the environment, as he observed cracks in the

basement floor and a seam where the concrete floor met the cinderblock basement walls. Id. at ¶ 19. He approved the Petitioner to test the soil, sample the on-site water supply well, and install a ventilation fan. Ward Ex. C, p. 4. Mr. Ward also assigned the release a release tracking number ("RTN"), 2-20855.[13] Id.; Ward PFT ¶ 19.

After the April 12, 2019, meeting at the Property, the Petitioner hired an LSP, Charles Klinger, and prepared a "Release Notification and Immediate Response Action Plan." Ward Ex. C. Mr. Klinger performed an initial assessment of the Property on April 17, 2019, during which "a fuel oil odor was noted in the basement; no fuel odor was noted on the first and second floors." Id. at p. 7. Mr. Klinger took 11 soil borings from beneath the basement floor. Id. Analysis of those soil samples found reportable concentrations of volatile petroleum hydrocarbons[14] and extractable petroleum hydrocarbons.[15] Id. at pp. 7-8; Ward Ex. K, p. 2 (Basement Soil Site Plan and Soil Analytical Data Summary Tables). Reportable levels of those hydrocarbons were also detected in the Property's air. Ward PFT ¶ 18. Later analysis of the Property's well water detected the presence of naphthalene. Ward Ex. C., p. 8. As a result of soil excavation activities, approximately 4,500 pounds of #2 fuel oil impacted soil were excavated and removed from the Property for proper disposal. Ward PFT ¶ 17.

On July 10, 2019, the Petitioner submitted the RNF for the release. Ward Ex. A. Remedial efforts continued until a Permanent Solution Statement was filed.[16] Tr. 55:10-15.

[13] A release tracking number is "the file number assigned by the Department to a release or threat of release reported in accordance with 310 CMR 40.0300." 310 CMR 40.0006.

[14] Specifically, C_5-C_8 aliphatics, C_9-C_{12} aliphatics, C9-C_{10} aromatics, and naphthalene.

[15] Specifically, C_9-C_{18} aliphatics, 2- methylnaphthalene, and naphthalene

[16] The record does not specify when that report was filed.

G. The Department's enforcement activities.

It is the practice of the Department's Central Regional Office ("CERO" or "the Central Region") that after conferring internally about the merits of a potential civil administrative penalty to assess against a purported environmental violator, it "issue[s] the violator a notice of enforcement conference letter that would briefly describe the violations and typically for the Central Region include a draft Administrative Consent Order with Penalty ('ACOP') to the violator." Tr. 92:1-15. On January 20, 2020, CERO sent the Petitioner a "Notice of Enforcement Conference," in which it provided an unsigned proposed ACOP for the violations alleged in this matter and requested to meet with the Petitioner. Lanteigne Ex. A (Notice of Enforcement Conference). The Petitioner met with the Department, but they did not agree on a resolution at that time. Tr. 96:18-98:7.

On January 7, 2021, nearly one year after issuing its notice of enforcement letter to the Petitioner and nearly two years after the heating oil spillage incident described above occurred at the Property, the Department issued the $22,000.00 PAN at issue in this appeal, alleging that (1) the Petitioner failed to notify the Department within two hours of obtaining knowledge of threat of release likely to be above the reportable quantity of ten gallons, in violation of 310 CMR 40.0312(1),[17] and (2) the Petitioner failed to meet the minimum assessment requirements for an IRA commensurate with the release of oil in the basement and a threat of oil release in the

[17] The Department alleged the following:

> "By failing to provide notification to MassDEP of the threat of release of oil to the environment within two hours of knowledge of the threat of release, [the Petitioner] violated 310 CMR 40.0312(1). Specifically, [the Petitioner] learned of the threat of release of oil to the environment on January 16, 2019 at approximately 1:30 PM and should have provided notification to MassDEP by approximately 3:30 PM that same day. [The Petitioner's] failure to provide notification of the threat of release within two hours of knowledge of the threat of release was willful and not the result of error, as set forth in 310 CMR 5.14." NOI, ¶ 15.

Property, in violation of 310 CMR 40.0414(1).[18] See Notice of Intent to Assess a Civil Administrative Penalty (January 7, 2021) (produced with the Department's Basic Documents).

The Department issued the PAN without first issuing a Notice of Noncompliance ("NON") because it alleges that the Petitioner's violations were willful and not the result of error. Id. at ¶¶ 15-16; Tr. 94:24-95:8, 114:18-20. The Petitioner timely appealed the PAN to OADR. See Notice of Claim (filed January 27, 2021).

IV. Issues for Adjudication.

The former Presiding Officer in the appeal conducted a Pre-Hearing Conference with the parties on March 2, 2021, and issued a Pre-Hearing Conference Report the same day setting forth the following issues for adjudication in this appeal:

1. Whether the Petitioner is liable for the violations alleged in the PAN as the bases for the penalties?

2. Whether the Department properly exercised its discretion in calculating the penalties alleged in the PAN?

[18] The Department alleged the following:

> "Respondent did not hire a Licensed Site Professional to inspect the Property for a release or threat of release of oil, conduct an indoor air quality assessment at the occupied residential dwelling to evaluate for the presence of a Critical Exposure Pathway (i.e., a route by which the released oil could be transported to human receptors), or assess the potential for released oil to have been released to the environment (soil beneath the basement floor) through cracks in the concrete floor. Respondent's actions failed to meet the minimum assessment requirements for an IRA commensurate with the threat of release of potentially up to 275 gallons of oil within an occupied residential dwelling and to the environment, (i.e., the soil beneath the cracked basement floor), in violation of 310 CMR 40.0414(1). . . .
>
> "By failing to meet minimum requirements for assessment under an IRA commensurate with the nature and type and amount of oil released or threatened to be released at the Property, site complexity, and the sensitivity of the site and surrounding human and environmental receptors, Respondent violated 310 CMR 40.0414(1)." NOI, ¶¶ 10, 16.

V. The Department's Objections to the Tentative Recommended Final Decision.

In response to the TRFD, the Department raised numerous objections itemized into several categories. As I noted previously above, the Department's Objections provided, in many instances, more detailed arguments than in its original post-hearing briefing. I have reviewed those objections carefully. Below, I take each objection in turn and either address the argument or indicate where in this Recommended Final Decision I have addressed the argument.

A. The Standard of Review.

The Department states that the TRFD "made legal determinations without properly respecting 'deference to the Department's reasonable interpretations or constructions of the requirements' for reporting a potential threat of oil release." Objections, p. 4 (citing In the Matter of Pioneer Valley Energy Center, LLC, OADR Docket No. 2011-010, Recommended Final Decision (September 23, 2011), 2011 MA ENV LEXIS 109, *26, adopted by Final Decision (November 9, 2011), 2011 MA ENV LEXIS 108). The Department cites the well-established principle that "[a]n administrative agency's interpretation of a statute the agency is charged with enforcing is entitled to 'substantial deference.'" Pioneer Valley Energy Center, 2011 MA ENV LEXIS at *26 (citing Commerce Ins. v. Commissioner of Ins., 447 Mass. 478, 481 (2006); accord Massachusetts Med. Soc'y v. Commissioner of Ins., 402 Mass. 44, 62 (1988) ("[w]here the [agency's] statutory interpretation is reasonable … [we do] not supplant [its] judgment")).

Critically, however, "[t]he principle of according weight to an agency's discretion . . . is 'one of deference, not abdication,'" meaning that "courts will not hesitate to overrule agency [determinations that are] . . . arbitrary, unreasonable, or inconsistent with the plain terms of the [governing statutory and regulatory requirements]." In the Matter of Edwin Mroz, OADR Docket No. 2017-021, Recommended Final Decision (June 7, 2019), 2019 MA ENV LEXIS 57, *44,

adopted by Final Decision (June 18, 2019), 2019 MA ENV LEXIS 63 (citing NSTAR Electric Co. v. Department of Public Utilities, 462 Mass. 381, 386-87 (2012); Warcewicz v. Department of Environmental Protection, 410 Mass. 548, 550 (1992); Moot v. Department of Environmental Protection, 448 Mass. 340, 346 (2007)). Accordingly, a Presiding Officer in an administrative appeal owes no deference to the Department's interpretation or construction of a statutory or regulatory requirement that is arbitrary, unreasonable, or inconsistent with the plain terms of the governing statutory and regulatory requirements. Id.; In the Matter of Brockton Power Co, LLC, OADR Docket Nos. 2011-025 & 026, Recommended Final Decision (July 29, 2016), 2016 MA ENV LEXIS 66, *19-141, adopted by MassDEP Commissioner's Interlocutory Decision (March 13, 2017), 2017 MA ENV LEXIS 21, *5-6 (no deference accorded to MassDEP's interpretation that OADR lacked jurisdiction to adjudicate federal Title VI discrimination claims arising out of MassDEP's issuance of air permit authorizing proposed natural gas power plant in environmental justice community where MassDEP lacked a formal Title VI Grievance Policy required by federal USEPA regulations to review such claims).[19]

Additionally, while the Department cites In the Matter of Kane Built, Inc., OADR Docket No. 2017-037, Recommended Final Decision (December 18, 2018), 2017 MA ENV LEXIS 77, adopted by Final Decision (January 17, 2019), 2019 MA ENV LEXIS 8, in support of its

[19] In Brockton Power, MassDEP's then-Commissioner noted that "MassDEP [was] in the process of developing a formal Title VI Complaint Policy for the Department" and until such time the Policy was adopted, Title VI discrimination claims could be asserted in an administrative appeal before OADR. 2017 MA ENV LEXIS 21, at *5-6. Specifically, MassDEP's then-Commissioner ruled that:

> anyone aggrieved by the Department's permit decisions or enforcement orders, based on purported Title VI violations [could] assert such claims in an administrative appeal with [OADR], as the Petitioners [had done] in [Brockton Power and] [a]s was also done in [that] case, the claims [would be] adjudicated by an OADR Presiding Officer based on the evidentiary record in the case, who [would] forward a Recommended Final Decision to the Department's Commissioner.

Id.

objections to the TRFD, it omitted two critical appeal adjudication rules discussed in Kane Built governing a Presiding Officer's adjudication of an appeal, including this one. These rules are as follows.

First, the appeal is a *de novo* proceeding, meaning that in adjudicating the appeal, the Presiding Officer's review of the Department's determinations underlying its grounds for the agency action being appealed is anew based on: (1) a preponderance of the testimonial and documentary evidence presented by the parties to the appeal at the evidentiary adjudicatory hearing ("Hearing") conducted by the Presiding Officer and (2) the governing legal requirements, irrespective of what the Department determined previously. Kane Built, 2017 MA ENV LEXIS 77, at *18.

Second, a Presiding Officer is not required to defer to the Department's view of how evidence introduced at the evidentiary adjudicatory hearing should be weighed because the Adjudicatory Proceeding Rules at 310 CMR 1.01(13)(h) governing adjudication of the appeal clearly state that the "[t]he weight to be attached to any evidence in the record [of an appeal] will rest within the sound discretion of the Presiding Officer . . . ." Kane Built, 2017 MA ENV LEXIS 77, at *17. This language is critical; G.L. c. 30A, § 10 "guarantees a party certain procedural rights in adjudicatory hearings at the administrative level, before the case reaches the judicial branch" for judicial review of a state agency's final decision in the matter. Space Bldg. Corp. v. Comm'r of Revenue, 413 Mass. 445, 450 (1992). Among those rights is the right to a "full and fair" adjudicatory proceeding. G.L. c. 30A, § 10. This is also required by art. 29 of the Massachusetts Declaration of Rights, which "extends beyond judges [serving in the judicial branch of government] 'to all persons authorized to decide the rights of litigants,'" including administrative hearing officers such as OADR Presiding Officers. Doe v. Sex Offender Registry

Board, 84 Mass. App. Ct. 537, 541 (2013), citing Police Comm'r of Boston v. Municipal Court of the West Roxbury District, 368 Mass. 501, 507 (1975). The Massachusetts Supreme Judicial Court has also ruled that:

> [Administrative] hearing officers, like judges, are held to "high standards [which] are reflective of the constitutional rights of litigants to a fair hearing, as established in art. 29 of the Declaration of Rights of the Constitution of this Commonwealth . . . . 'It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit.'" . . . Moreover, . . . "actual impartiality alone is not enough [because of] . . . the importance of maintaining not only fairness but also the appearance of fairness in every judicial proceeding. In order to preserve and protect the integrity of the judiciary and the judicial process, and the necessary public confidence in both, even the appearance of partiality must be avoided."

Doe v. Sex Offender Registry Board, supra, 84 Mass. App. Ct. at 541-42, citing Police Comm'r of Boston v. Municipal Court of the West Roxbury District, supra; see also 310 CMR 1.01(1)(a) ("[MassDEP's] Commissioner shall designate qualified, impartial attorneys to serve as Presiding Officers [in administrative appeals]").

In sum, in adjudicating an appeal, the Presiding Officer makes (1) findings of fact based on a preponderance of the evidence presented at the Hearing with no deference to any prior factual determinations of the Department and (2) legal determinations based on the governing statutory and regulatory requirements with deference to the Department's reasonable interpretations or construction of those requirements. Pioneer Valley Energy Center, 2011 MA ENV LEXIS 109, at *26.

What follows below is a response to each instance where the Department disagreed with how I weighed the evidence presented at the Hearing. To the extent that I have reconsidered the weight accorded to any testimony in this Recommended Final Decision, the findings of fact and

analysis here reflect those changes. In either case, the weight I accorded to these findings is within my discretion. Kane Built, 2017 MA ENV LEXIS 77, at *17.

B. Analysis of the Department's Objections to the TRFD

1. The Petitioner's Release Notification Form.

The Department argues that the Petitioner "self-declared" itself the party responsible for the release at the Property in the RNF. Ward Ex. A, p. 2. The Department contends that the TRFD "ignored [the] fact that the RNF was certified under the pains and penalties of perjury by Evan Bonney, the Petitioner's Safety Director who inspected the AST and the site the day after the release." Objections, p. 7. I find the Department's argument unpersuasive.

First, Mr. Ward, of MassDEP's CERO Office, ordered the Petitioner to file the RNF. Tr. 19:14-20:5. The Petitioner did not file the document of its own volition. Once the Department was involved, it would make sense for the Petitioner to comply however it had to in order to minimize any potential future liability.

Second, the Petitioner's RNF states that it was submitting the RNF due to a "Sudden Release," not a "Threat of Sudden Release." Ward Ex. A, p. 1. Tellingly, the Department did not seek to prove that there was a reportable release at the Property because it could not, it only alleged that there was a threat of release. It concedes that "[t]his appeal only pertains to the legal issue of a *threat of release* and not to a release of oil to the environment." Department Causation Memo., p. 1 (emphasis in original). For the Department to rely on the Petitioner's concession of a legal theory that the Department itself chose not to pursue is unconvincing.

Where the RNF is executed under oath, it is like any other testimony in the record, and the weight that I accord it is within my "sound discretion." 310 CMR 1.01(13)(h)1. For the reasons given above, I do not find the RNF compelling evidence of the Petitioner's culpability

and have accorded it very little weight as evidence of the Petitioner's culpability given these facts.

2. Evidence of bad faith conduct and failure to mitigate.

The Department argues that the TRFD should have considered "(1) testimony from the Petitioner's agent, Mr. Lanteigne, that he smelled the odor of oil; (2) the Petitioner receiving reports of odors from the homeowner; and (3) data from the Petitioner's LSP showing indoor air impacts and significant ground impacts (DEP Objection, pp. 7-8) . . . ." Reply, p. 2. These facts are relevant to showing that oil spilled from the AST and that the Petitioner had knowledge of the release and conditions at the property, but do not on their own demonstrate that the Petitioner "caused" the threat of release, as discussed below beginning on page 4840.

3. Evidence of oil impacting the environment.

The Department argues that the TRFD should have considered the "cracks in floor, gaps between floor and walls, and the Petitioner's admission in the RNF that more than 2 cubic yards of soil were impacted by the release (DEP Objection, pp. 8-9) . . . ." Reply, p. 2. The cracks in the floor are not relevant to the dispositive question of whether the Petitioner "caused" the TOR, especially where whether a release occurred is not at issue. These facts are, however, relevant to the Department's calculation of the penalty, which I discuss on page 57 below.

4. Evidence of familiarity with the AST.

The Department argues that I should have considered the "notation on the delivery receipt indicating that Petitioner was aware of special considerations when interacting with the AST[] (DEP Objection, pp. 9-10) . . . ." Reply, p. 2. I address this beginning on page 51-52 below.

5. Evidence supporting the Petitioner's motivation to avoid accountability for the threat of release.

At Objection, pp. 9-10, the Department argues the TRFD's discussion of Roth's incentive to avoid accountability was not correctly weighed against the Petitioner's own incentives to avoid accountability. This issue relates to the weight of the evidence, which is within my discretion. It is also permissible to draw an inference from the absence of a witness that is available, not hostile to the calling party, and who has relevant, percipient testimony, in the absence of any explanation for the failure to call that witness. Mass. Guide Evid. § 1111(b).

6. Evidence that Lanteigne determined that the AST did not pose a threat of release contradicts the statements in the RNF.

As discussed, I assign little weight to the RNF in this context. That said, it is irrelevant whether Mr. Lanteigne subjectively believed that the structural integrity of the AST was not compromised. It in fact was, as I discuss below beginning on page 45.

7. Evidence that the Petitioner knew on January 16, 2019, that there was an oil spill and threat of further release.

Here, the Department itemizes four specific objections:

> i. The Petitioner's observations of the AST on the afternoon of January 16, 2019, revealed damage indicative of a threat of release (i.e., tank was bulging, fittings were loose). (DEP Objection, p. 15)
>
> ii. The Petitioner's knowledge that it delivered 155 gallons of oil into the tank just a few hours before the Petitioner observed the damaged tank. (DEP Objection, p. 15)
>
> iii. The Petitioner observed oil on the AST and on the basement floor. (DEP Objection, p. 15)
>
> iv. The tank and site conditions constituted a threat of further release; the Petitioner knew that it had just delivered oil to the tank, and that if a release occurred, it would likely be more than the reportable quantity of 10 gallons. (DEP Objection, p. 15).

Reply, p. 3. I agree with the Department that the damage to the AST combined with the fact that there was oil in the AST constituted a threat of release under 310 CMR 40.0006 (Threat of Release). I agree with the Department that these observations by the Petitioner, taken together, support a finding that the Petitioner had knowledge of a TOR, requiring notification to the Department within two hours of obtaining knowledge. This conclusion is further discussed below beginning on page 43.

8. Purported "mischaracterization" of testimony.

The Department argues that the TRFD "mischaracterized" "Mr. Horgan as an eyewitness in the Tentative Decision, p. 4." Objections, p. 12; Reply, p. 3. The Department's objection is without merit; at no point does the TRFD refer to Mr. Horgan as an eyewitness. While the Department stated that "Horgan admitted on cross that he was not present on January 16, 2019"; id.; Mr. Horgan testified in response to the next question that he visited the Property on January 17, 2019, the day after the delivery. Tr. 145:4-9.

The Department also objected to citing to Mr. Horgan's testimony for the fact that the AST's alarm was not triggered. Id. While Mr. Horgan was not present on the site, there is no genuine dispute that the internal tank alarm was not triggered; Mr. Lanteigne testified to this fact. Tr. 130:18-131:1.

B. Whether the AST posed a threat of release.

The Department argues that the TRFD "never determined one way or another if there was a threat of release of oil from the compromised tank." Objections, p. 16. Where the TRFD found that the Petitioner was not a person required to notify, whether there was a threat of release was irrelevant. Where, upon reconsideration, I conclude that the Petitioner was required to notify, I have addressed this issue on page 47 below.

C. The Petitioner "willfully" diminishing the threat of harm.

The Department argues that the Petitioner "downplayed damage to the AST, leaked oil on floor, cracks in basement floor, soil odors, and was not forthcoming as to the extent of the spill during subsequent clean-up efforts. (DEP objection, p. 16)." Reply, p. 3. This is a question of the credibility of the witnesses. The weight I assign to their testimony is left to my discretion. That said, whether the Petitioner "downplayed" the situation at the Property is irrelevant to the ultimate question of whether it caused the threat of release. I address this below beginning on page 48.

D. Whether the Petitioner was a person required to notify of the threat of release.

The Department argues that the TRFD incorrectly concluded that the Petitioner was not a person required to notify under these circumstances. Objections, pp. 15-16; Reply p. 3. Upon review, because I find that the Petitioner caused the threat of release, it was a person required to notify. I discuss this in detail beginning on page 47 below.

E. The evidence of causation necessary to prove that the Petitioner "caused" the threat of release.

The Department argues that the TRFD incorrectly applied the term "caused" in 310 CMR 40.0331(1)(e). Objections, pp. 17-21. The Department's Objections and Reply did not articulate any rule by which it would assess causation in a given case, relying instead simply on a recitation of the facts.[20] In response to the request for additional briefing on this issue, the Department

[20] The Department contends that:

> "[T]here was more than sufficient evidence presented in written testimony and at the Hearing to establish by a preponderance of the evidence that the Petitioner was a person required to notify the Department of the threat of release of oil from the AST at the Property on January 16, 2019, based upon: (1) the Petitioner's prior familiarity with the AST at the Property; (2) the Petitioner's actions on the morning of January 16, 2019; (3) Ms. Ruskin's observations on January 16, 2019; (4) the Petitioner's observations on the afternoon of January 16, 2019 and January 17, 2019; and (5) the Petitioner's own admissions in the

offered its view that the standard of causation derives from Restatement (Third) of Torts, § 26 (Am. L. Inst. 2010) ("Tortious conduct must be a factual cause of harm for liability to be imposed. Conduct is a factual cause of harm when the harm would not have occurred absent the conduct."); see Doull v. Foster, 487 Mass. 1, 6-7 (2021). I discuss this further on page 49 below.

F. The Department's burden of proof.

The Department argues that:

> [i]t is unreasonable for the Petitioner to conclude its activities in delivering oil did not have a causal connection to the observed release of oil and damage to the AST which posed a threat of further release. (DEP Objection, p. 19). The Petitioner did not provide evidence of any other person or entity providing services to the AST at or around that date and did not provide evidence that some other person caused the damage to the AST.

Reply, p. 4. This argument improperly places the burden on the Petitioner to prove that it did not cause the damage to the AST. The initial burden of proof is the Department's. Kane Built, 2017 MA ENV LEXIS 77, at *16.

G. The Petitioner's status as an "operator" of the Property.

"It is the Department's position that [the] Petitioner is a person required to notify under G.L. c. 21E, § 7 as an 'operator,' and therefore falls within" 310 CMR 40.0331(1)(i). Objections, p. 21.[21] The Department goes on to say:

> The Department alleged in the PAN that the Petitioner was an "operator," and provided sufficient evidence proving such. Petitioner falls within the definition of "any . . . operator" in G.L. c. 21E, § 7. G.L. c. 21E, § 2 defines operator as "any person . . . operating such site." The SJC has defined "operator" as a person

RNF and other records. Taken together, the evidence clearly establishes that the Petitioner should have concluded that it likely caused a release or threat of release of oil such that it was required to take the minimal step of notifying the Department to protect the public health, safety and welfare and the environment . . . ." Objections, p. 18.

[21] The Department embraces a very broad interpretation of 310 CMR 40.0331(1)(i), suggesting that G.L. c. 21E, § 7 includes more entities than those listed elsewhere in 310 CMR 40.0331(1). Objections, p. 22.

> who has "actual control of, and active involvement in, operations at the site." Martignetti v. Haigh-Farr, Inc., 425 Mass. 294, 304 (1997).

Objections, p. 22. This position breaks down upon reading the case that the Department cites.

The Supreme Judicial Court's definition of an "operator" does not reach as far as the Department claims. In Martignetti, the court states that whether an entity is an operator is determined by the "actual control" test. Martignetti, 425 Mass. at 303-304. The court describes the test as follows:

> The parent corporation may be held directly liable for its activities as an operator where there is active involvement in the activities of the subsidiary. To be an operator requires more than merely complete ownership and the concomitant general authority or ability to control that comes with ownership. Actual, substantial control over the activities of the other corporation is required, not merely the authority or capability to control. The fact finder must consider the extent of involvement in the other corporation's day-to-day operations and policymaking decisions. Factors to consider include control of the facility's finances, employees, and daily business operations; responsibility for maintenance of its environmental controls; and receipt of economic benefits from the facility. Representation of the parent's employees among the officers and directors of the subsidiary is also significant.

Id. at 302. While Martignetti dealt with the definition of "operator" in the context of corporate parents and subsidiaries, its reasoning can be applied here in determining whether the Petitioner was an "operator." After applying Martignetti, I find that the Petitioner was not an operator for the following reasons.

First, the Petitioner had no actual involvement in the day-to-day management of Ms. Ruskin's home. It had no control over the financing, maintenance, or decisions concerning the home. The Petitioner certainly has no right to enter Ms. Ruskin's home without her consent. The Petitioner only delivered oil based on its contractual arrangement with Ms. Ruskin. While the Petitioner arguably had some responsibility in this instance for the "environmental controls" at

the Property, it certainly is not responsible for all environmental compliance on the Property. In sum, the Department has done nothing to show that the Petitioner had any control over the Property in any way other than at the express permission or direction of the owner, Ms. Ruskin.

If the Department's position was adopted, the consequences would be profound: every fuel oil delivery company would be deemed an "operator" of every property it has serviced. They would be immediately swallowed by 310 CMR 40.0331(1)(a). There is no indication that the Legislature in enacting G.L. c. 21E intended this result. The Petitioner was thus not an "operator" of the Property.

H. A "full and definitive analysis of all potential causes of a threat of release within the two-hour reporting period" is not required.

The Department argues:

> The purpose of the notification regulations is to allow the Department to timely assess a potentially dangerous situation and to have the opportunity to take prompt steps to mitigate threats to the public and the environment. Requiring a full and definitive analysis of all potential causes of a release or threat of release within the two-hour reporting period is simply impracticable and contrary to the goals of the regulations.

Objections, p. 25. I agree on both counts. A person determining whether they are required to notify should be able to determine whether to report a TOR to the Department within two hours. Oral notification is all that is required at this point. If they subsequently file a RNF within the 60-day period specified in 310 CMR 40.0333 and it turns out they were not required to notify, the MCP provides a mechanism for withdrawing the Release Notification Form. See 310 CMR 40.0335.

That said, the overall tenor of the Department's interpretation of 310 CMR 40.0331(1) runs perilously close to allowing 310 CMR 40.0331(1)(a)-(d) and (f)-(i) to subsume those parties that fall solely under 310 CMR 40.0331(1)(e). Simply delivering oil to a customer's home is

insufficient to always make a delivery company a person required to notify after agreeing to its first delivery. As I discuss below beginning on page 47, a party must have engaged in some conduct that was the last step in creating a threat of release or that contributed to a pre-existing threat of release.

I. Request for argument to the Commissioner.

The Department is of the view that "pursuant to 310 CMR 1.01(14)(a) and (c), a Tentative Decision should be submitted to the Commissioner in this situation." Department Causation Memo., p. 1 n.1. To the extent this is a claim by the Department that 310 CMR 1.01(14)(a) and (c) does not allow a Presiding Officer to issue a Recommended Final Decision after considering any objections or supporting arguments made by the parties to an appeal to a Tentative Decision, I reject this claim for several reasons. First, 310 CMR 1.01(14) does not have any such prohibition. Moreover, long-standing OADR practice, as approved by previous Final Decisions in appeals, is that Tentative Recommended Final Decisions are submitted to the parties, objections are received and considered by the Presiding Officer, and then a Recommended Final Decision is issued to the Commissioner. See In the Matter of Stephen D. Peabody, OADR Docket No. WET-2008-063, Final Decision (April 12, 2011), 2011 MA ENV LEXIS 39, *6 n. 3 (Kimmell, Comm'r) ("[f]ollowing receipt of the parties' responses to the tentative decision, the Presiding Officer may issue a Recommended Final Decision ('RFD') for the Commissioner's review, or the Commissioner may issue a Final Decision"); see also In the Matter of Michael Carrigan, OADR Docket No. WET-2021-027, Final Decision (May 21, 2023), 2023 MA ENV LEXIS 22, *6 (Giorlandino, Chief Presiding Officer) ("[t]he Presiding Officer issued her Recommended Final Decision after thoroughly reviewing the Parties' respective responses to her Tentative Decision, including the Petitioners' objections to her findings in the

Tentative Decision"); In the Matter of Martin Burke and Melmar Properties, LLC, OADR Docket No. WET-2021-031, Recommended Final Decision (November 28, 2023), 2023 MA ENV LEXIS 60, *1-2, adopted by Final Decision (January 11, 2024), 2024 MA ENV LEXIS 3 (Presiding Officer issued Tentative Decision in appeal pursuant to 310 CMR 1.01(14)(a) affirming MassDEP's denial of Wetlands Permit for Petitioner's proposed Project and then issued a "Recommended Final Decision consistent with the [findings of the] Tentative Decision for review and approval by MassDEP's Commissioner pursuant to 310 CMR 1.01(14)(b)" after neither the Petitioner nor MassDEP filed any objections to the Tentative Decision).[22]

The Department "requests an opportunity for oral argument before the Commissioner." Objections, p. 2. It is within the sole discretion of the Commissioner "to allow or order the parties to argue orally before the Commissioner." 310 CMR 1.01(14). I take no position on whether the Commissioner should exercise her discretion in this instance. However, should the Commissioner decide to hold an oral argument, I request that the Chief Presiding Officer and I be present at the oral argument consistent with recent prior practice when the Department's Commissioner has heard oral argument from the parties' respective counsel in an appeal.[23]

[22] The Michael Carrigan and Martin Burke appeals are appeals that my colleague, Presiding Officer Stolfa, assumed adjudicatory responsibility for after the former Presiding Officer in the appeals (the same former Presiding Officer in this appeal) conducted evidentiary adjudicatory hearings in the appeals but did not issue a Recommended Final Decision in the appeals before departing OADR.

[23] During the Chief Presiding Officer's near 17-year tenure (since July 2007), the Department's Commissioner only once has heard oral argument of counsel in an appeal. This occurred in May 2019 when MassDEP's then-Commissioner heard oral argument of counsel in the Brockton Power appeal regarding whether he should adopt as his Final Decision the Chief Presiding Officer's Recommended Final Decision on Remand recommending that the Department's issuance of an air pollution control permit be affirmed. The Chief Presiding Officer was present at the oral argument and then met with MassDEP's then-Commissioner thereafter to discuss the arguments made by counsel at the oral argument.

VI. Discussion.

A. The regulatory framework.

G.L. c. 21E, the "Massachusetts Oil and Hazardous Material Release Prevention and Response Act" or the state Superfund law, was enacted in 1983 and created the Department's waste site cleanup program. The regulations adopted to implement G.L. c. 21E are called the Massachusetts Contingency Plan or the MCP. See 310 CMR 40.0000. "The purposes of the Massachusetts Contingency Plan are [to] provide for the protection of health, safety, public welfare and the environment by establishing requirements and procedures" for the release or threat of release of oil and/or hazardous materials and to "encourage persons responsible for releases and threats of release of oil and/or hazardous materials to undertake necessary and appropriate response actions in a timely way…." 310 CMR 40.0002(1).

Key to the success of the waste site cleanup program is the requirement that the Department be notified of releases and threats of releases of oil and hazardous material within certain specified time periods, depending on the nature of the release or TOR. Notification to the Department triggers the regulatory deadlines for submitting site information and conducting any necessary cleanup in accordance with the MCP. See 310 CMR 40.000, Subpart C.[24]

The MCP governs the conduct of actions to assess, contain, remove, and remediate releases of oil or hazardous material. See 310 CMR 40.0000. These actions are called "Response Actions" and must be conducted in compliance with the MCP. See Commonwealth v. Springfield Terminal Ry. Co., 80 Mass. App. Ct. 22 (2011); In the Matter of Blackinton Common LLC, Docket Nos. 2007-115 & 2007-147, Recommended Final Decision (September

[24] The MCP contains three categories of releases requiring notification: 2-hour releases, 72-hour releases and 120-day releases, as well as certain releases that require no notification. See 310 CMR 40.0310 through 40.0317.

25, 2009), 2009 MA ENV LEXIS 5, *7-*8, adopted by Final Decision (January 7, 2010). The MCP requires specified persons to complete response actions at sites on a schedule established in the MCP and under the supervision of an LSP. Id.; See 310 CMR 40.0169.

Further, and importantly here, to ensure that Responsible Parties, Potentially Responsible Parties, or Other Persons provide required notifications and otherwise comply with the MCP, the Legislature gave the Department broad regulatory authority, including enforcement and auditing authority, over response actions by private parties. Matter of Iron Horse Enterprises, Inc., OADR Docket No. 2014-022, Recommended Final Decision (May 2, 2016), 2016 MA ENV LEXIS 23, *10, adopted by Final Decision (May 5, 2016), 2016 MA ENV LEXIS 22.

1. The Department's authority to issue civil administrative penalties.

The Department is authorized by the Civil Administrative Penalties Act, G.L. c. 21A, § 16, and the Administrative Penalty Regulations at 310 CMR 5.00, to assess civil administrative penalties against parties who have "fail[ed] to comply with any provision of any regulation, order, license or approval issued or adopted by the department, or of any law which the department has the authority or responsibility to enforce" G.L. c. 21A, § 16; Franklin Office Park Realty Corp. v. Commissioner of the Department of Environmental Protection, 466 Mass. 454, 459-66 (2013); Kane Built, 2017 MA ENV LEXIS 77, at *13. The Civil Administrative Penalties Act and the Administrative Penalty Regulations are designed to "promote protection of public health, safety, and welfare, and the environment, by promoting compliance, and deterring and penalizing noncompliance . . . ." 310 CMR 5.02(1); Iron Horse, 2016 MA ENV LEXIS 23, at *32; Kane Built, 2017 MA ENV LEXIS 77, at *13.

Generally, the Department "may assess a civil administrative penalty on a person who fails to comply with any provision of any regulation . . . or of any law which the department has

the authority or responsibility to enforce [if] . . . such noncompliance occurred after the department had given such person written notice of such noncompliance, and after reasonable time, as determined by the department and stated in said notice, had elapsed for coming into compliance." G.L. c. 21A, § 16; 310 CMR 5.10 to 5.12; Franklin Office Park, 466 Mass. at 461; Kane Built, 2017 MA ENV LEXIS 77, at *14. However, the Department "may assess such penalty without providing such written notice if such failure to comply . . . was willful and not the result of error." G.L. c. 21A, § 16; 310 CMR 5.14; Franklin Office Park, 466 Mass. at 461; Kane Built, 2017 MA ENV LEXIS 77, at *14. "[T]he willfulness exception in G.L. c. 21A, § 16 requires that the violator have undertaken intentionally the act that caused the violation, and that the violator either knew or should have known at least the facts that made the act a violation of the law." Franklin Office Park, 466 Mass. at 465-66 (Department's $18,225.00 civil administrative penalty assessment against property owner for asbestos violations affirmed because property owner's "agents knew or should have known that [roofing] shingles [that were removed from its property] could contain asbestos"); Kane Built, 2017 MA ENV LEXIS 77, at *27-*56 (Department's $67,500.00 civil administrative penalty assessment against property owner for asbestos violations affirmed because the owner was a highly experienced home builder and real estate developer who had extensive knowledge and experience in the removal of asbestos containing materials and knowingly hired a contractor who was not qualified to remove those materials). "[T]here is no requirement," however, "that a violator either was aware of the applicable environmental laws or intended to violate those laws." Franklin Office Park, 466 Mass. at 466; Kane Built, 2017 MA ENV LEXIS 77, at *15.

2. MassDEP's burden of proof in a Civil Administrative Penalty Appeal.

The Department has the burden of proving by a preponderance of the evidence that: (1) the Petitioner committed the violations alleged in the PAN; and (2) the Department properly assessed the penalty amount pursuant to G.L. c. 21A, § 16 and 310 CMR 5.25. In the Matter of West Meadow Homes, Inc., Docket Nos. 2009-023 & 024, Recommended Final Decision (June 20, 2011), 2011 MA ENV LEXIS 85, *11-*14, *28-*37, adopted by Final Decision (August 18, 2011); Kane Built, 2017 MA ENV LEXIS 77, at *16.

3. Determining the amount of the penalty to be assessed.

When assessing the amount of a penalty against a party who "[has] fail[ed] to comply with any provision of any regulation . . . or of any law which the department has the authority or responsibility to enforce," the Civil Administrative Penalties Act, G.L. c. 21A, § 16, and the Administrative Penalty Regulations at 310 CMR 5.25 require the Department to consider 12 factors:

> (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;
>
> (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; 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.

Iron Horse, 2016 MA ENV LEXIS 23, at *59-*61; Kane Built, 2017 MA ENV LEXIS 77, at *57-*59. Although consideration of each of the 12 factors set forth above is mandatory, neither the Civil Administrative Penalties Act, G.L. c. 21A, § 16, nor the Department's Administrative Penalty Regulations at 310 CMR 5.25, "defines 'consider' or 'considerations,' and neither requires any particular quantum or degree of consideration [by the Department]; nor does either the statute or the regulation[s] specify what the Department must review in considering any of the penalty factors." In the Matter of Roofblok Ltd., OADR Docket Nos. 2006-047 & 048, Final Decision (May 7, 2010), 2010 MA ENV LEXIS 185, *12; Kane Built, 2017 MA ENV LEXIS 77, at *59. Accordingly, the statute and the regulations "leave[] the weight to be given each factor to [the Department's] discretion," and, accordingly, "[t]he penalty assessment amount . . . is not a factual finding but the exercise of a discretionary grant of power" on the Department's

part. Roofblok, 2010 MA ENV LEXIS 185, at *18; Iron Horse, 2016 MA ENV LEXIS 23, at *59-*60; Kane Built, 2017 MA ENV LEXIS 77, at *59-*60.

"While the Department retains the discretion as to the weight [to be] given to [each of] the [twelve] factors, the penalty amount must [nevertheless] reflect the facts of each case." Iron Horse, 2016 MA ENV LEXIS 23, at *59. In an administrative appeal challenging a Department's penalty assessment, the Department has the burden of "demonstrat[ing] by a preponderance of the evidence [at the evidentiary adjudicatory hearing] that it [appropriately exercised] its discretion in determining the [penalty] amount," meaning "that it sufficiently considered the required statutory and regulatory factors, and such consideration is reflected in the penalty amount." Id. at *59-*60. If there is a sufficient factual and legal basis to support the Department's exercise of discretion in determining the penalty amount, the penalty should be affirmed. Id. at *60.

4. OADR's review of the Department's penalty is de novo.

As discussed previously, the Department's PAN receives a *de novo* review on appeal based on the evidence in the record and the governing statutory and regulatory requirements, irrespective of what the Department determined previously. Iron Horse, 2016 MA ENV LEXIS 23, at *61-*65 (Department's $30,000.00 penalty assessment for appellant's violations of Massachusetts Oil and Hazardous Material Release Prevention and Response Act, G.L. c. 21E, affirmed where Department demonstrated that penalty had a sufficient factual and legal basis); Kane Built, 2017 MA ENV LEXIS 77, at *18-*93 (Department's $67,250.00 civil administrative penalty assessment against appellant's violations of Department's asbestos removal regulations affirmed where Department demonstrated that penalty had a sufficient factual and legal basis). As also discussed previously, under the *de novo* standard of review, the Presiding Officer makes

(1) findings of fact based on a preponderance of the evidence with no deference to any prior factual determinations of the Department and (2) legal determinations based on the governing statutory and regulatory requirements with deference to the Department's reasonable interpretations or construction of those requirements. Pioneer Valley Energy Center, 2011 MA ENV LEXIS 109, at *26.

However, notwithstanding the Presiding Officer's determination and recommendation on the propriety of a PAN issued by the Department, the Department's Commissioner, as the final agency decision-maker in the appeal, has the ultimate authority over the PAN's fate, and as a result, the Commissioner may affirm the PAN in whole or in part or vacate the PAN in its entirety based on the evidentiary record and the governing statutory and regulatory requirements. 310 CMR 1.01(14)(b); In the Matter of Associated Building Wreckers, Inc., OADR Docket No. 2003-132, Final Decision (July 6, 2004), 11 DEPR 176 (2004) (Commissioner rejected Magistrate's determination that $2,500.00 penalty amount was excessive and recommended a reduction from $2,500.00 to $1,875.00); Roofblok, 2010 MA ENV LEXIS 185 (Commissioner vacated $86,498.50 penalty assessment for solid waste, hazardous waste, and water pollution violations, "but for different reasons than those articulated by the DALA[25] Magistrate").

B. The Petitioner Violated 310 CMR 40.0312(1) by Failing to Notify of a Threat of Release Within Two Hours of Obtaining Knowledge of the Threat of Release

The Department alleges that the Petitioner "fail[ed] to provide notification to MassDEP of the threat of release of oil to the environment within two hours of knowledge of the threat of release . . . ." PAN, ¶ 15. The Petitioner denies that it obtained knowledge of a threat of release

[25] DALA is the acronym for the Massachusetts Division of Administrative Law Appeals.

"because no threat of release to the environment ever existed." Petitioner Post-Hearing Brief, p. 3 (April 21, 2022). Petitioner further denies that it was a person required to notify.

Under 310 CMR 40.0312,

> Except as provided in 310 CMR 40.0317 or 40.0332(1) or (7) [(exceptions not applicable here)], persons required to notify under 310 CMR 40.0331 shall notify the Department as soon as possible but not more than two hours after obtaining knowledge that a threat of release meets one or more of the following sets of criteria:
>
> (1) a threat of release to the environment of oil and/or hazardous material that is listed at 310 CMR 40.1600 or that exhibits one or more of the characteristics described in 310 CMR 40.0347, when:
>
> (a) it is likely that the release threatened is about to occur; and
>
> (b) it is likely that the quantity of the release, if it occurred, would be equal to or greater than the applicable Reportable Quantity specified at 310 CMR 40.0351, 40.0352 or 40.1600 . . . .

The Reportable Quantity of #2 fuel oil is 10 gallons. 310 CMR 40.1600. A "threat of release" is defined as:

> a substantial likelihood of a release of oil and/or hazardous material which requires action to prevent or mitigate damage to health, safety, public welfare or the environment which may result from the release. Circumstances which represent a threat of release include, but are not limited to, sites containing or conducting an amount of oil and/or hazardous material in excess of the Reportable Quantity for that oil and/or hazardous material, or of an unknown quantity, where no reportable release has occurred but where a person required by 310 CMR 40.0331 to report the threat of release has knowledge of any corrosion, damage, malfunction or other condition that is likely to result in a release.

310 CMR 40.0006 (Threat of Release).

310 CMR 40.0331(1) provides that the following persons shall notify the Department in accordance with 310 CMR 40.0300 of a TOR:

(a) the owner or operator of a vessel or a site from or at which there is or has been a release or threat of release of oil and/or hazardous material;

(b) any person who at the time of storage or disposal of any hazardous material owned or operated any site at or upon which such hazardous material was stored or disposed of and from which there is or has been a release or threat of release of hazardous material;

(c) any person who by contract, agreement, or otherwise, directly or indirectly, arranged for the transport, disposal, storage or treatment of hazardous material to or in a site or vessel from or at which there is or has been a release or threat of release of hazardous material;

(d) any person who, directly or indirectly, transported any hazardous material to transport, disposal, storage or treatment vessels or sites from or at which there is or has been a release

or threat of release of such material;

(e) any person who otherwise caused or is legally responsible for a release or threat of release of oil and/or hazardous material from a site or vessel;

(f) any fiduciary who holds title to or possession of a site or vessel from or at which there is or has been a release or threat of release of oil and/or hazardous material;

(g) any secured lender who holds title to or possession of a site or vessel from or at which there is or has been a release or threat of release of oil and/or hazardous material;

(h) any agency of the Commonwealth or any public utility company that owns a right of way that is a site from or at which there is or has been a release or threat of release of oil and/or

hazardous material; and

(i) any person otherwise required to notify the Department of a release or threat of release pursuant to M.G.L. c. 21E.

Subsection (c) applies in this case: a "person required to notify" of a release or threat of release is "any person who otherwise caused or is legally responsible for a release or threat of release of oil and/or hazardous material from a site or vessel." 310 CMR 40.0331(1)(e). For the Department to

meet its burden of proof in this case, it must prove that: (1) the Petitioner had knowledge of a threat of release; (2) the Petitioner was a person required to notify; and (3) the Petitioner failed to notify the Department of the threat of release within two hours. As discussed below, based on a preponderance of the credible evidence presented at the Hearing and the governing statutory and regulatory requirements, I find that there was a TOR, that the Petitioner had knowledge of it, and that the Petitioner was a person required to notify because it caused the TOR.

1. There was a Threat of Release on January 16, 2019.

The following evidence was presented in the pre-filed testimony of the parties, including the exhibits, and in testimony at the Hearing. On January 16, 2019, at approximately 9:25 a.m., the Petitioner delivered 155.3 gallons of home heating oil into the AST in the home's basement. At around 2:15 p.m. that day, Ms. Ruskin, the homeowner, contacted the Petitioner to report the odor of oil in the house. Mr. Lanteigne, the Petitioner's service manager, went to the Property shortly thereafter and observed a rupture in the upper part of the AST's outer steel tank, bulging of the tank and oil on top of the AST. Ward Ex. B (Statement of Lanteigne, dated 8/19/2019); Ward Ex. C (Immediate Response Action Plan ("IRAP") at p. 2); Horgan PFT ¶ 8; Lanteigne PFT ¶ 8. Photographs 1 and 3 in the Photograph Log included in Appendix E to the IRAP (Ward Ex. C) show the outer steel tank to be bulging. The Petitioner's LSP described the AST as "distended." Id. Further inspection revealed loose pipe fittings on the outer tank near the vent and fill pipe connections at the top of the AST. Horgan PFT ¶ 8; Lanteigne PFT ¶ 8; Ward Ex. C (Immediate Response Action Plan ("IRAP") at p. 2). Some amount of oil had been released to the basement floor. The AST remained in service until the oil was used up and then it was replaced with a new tank. Ward Ex. C (Immediate Response Action Plan ("IRAP") at p. 2).

Mr. Daoust testified that the oil tank's condition as depicted in the photographs is "categorically a damaged tank, is a threat of release." Tr. 122:2-5. He further testified that it is immaterial that the tank did not subsequently leak. Tr. 122:6-12. Mr. Ward testified that "a damaged tank, a bulging damaged tank with a tear, with rivets that are separating and a tank that is bulging is categorically, based on the definition Threat of Release, a threat of release. A damaged tank is a threat. . . . [A] tank that's overfilled, damaged and over capacity . . . is categorically a threat of release." Tr. 28:1-10.

Mr. Lanteigne testified that his inspection of the tank revealed loose fittings on the top of the tank, indicating that oil appeared to have sprayed from the fittings. In his opinion, since it was at the top of the tank, it could only escape the tank while under pressure. He believed that any such pressure would have stopped upon the termination of the oil delivery. Because there was no active leak when he arrived at the property, he and others at Energy North reasonably concluded that only a finite and *de minimis* amount of oil could escape from the loose fitting at the top of the tank. Lanteigne PFT ¶ 8. He testified that did not observe cracks in the basement cement floor during his visit to the site on January 16, 2019. Lanteigne PFT ¶ 11. He further testified that at no time did he obtain knowledge of a "threat of release" which means a "substantial likelihood" of a release of oil and at no time did he have knowledge of any corrosion, damage, malfunction or other condition that was likely to result in a release. Lanteigne PFT ¶¶ 16-17.

In response, Mr. Ward testified that during his inspection of the release area in the basement he observed spaces at the joint between the basement floor and basement wall as well as cracks in the basement floor, and these observations were consistent with the LSP's observations, documented in its April 2020 Phase I Initial Site Investigation at p. 18. These

spaces and cracks were places where oil would have seeped into the soil beneath the basement floor. In Mr. Ward's opinion, the Petitioner should have recognized the potential for these spaces and cracks to present an opportunity for oil to enter the environment on January 16, 2019. Ward RPFT ¶ 8.

As noted above, 310 CMR 40.0006 defines a "Threat of Release" as a substantial likelihood of a release of oil and/or hazardous material which requires action to prevent or mitigate damage to health, safety, public welfare or the environment which may result from the release. Circumstances which represent a TOR include those where no reportable release has occurred but where a person required by 310 CMR 40.0331 to report the threat of release has knowledge of any corrosion, damage, malfunction or other condition that is likely to result in a release.

The Petitioner makes two arguments to undermine the Department's case. First it asserts that neither Mr. Ward nor Mr. Daoust personally observed the damaged tank, implying that their observations of the tank from the several photographs in the record are unreliable. Second, the Petitioner asserts that the fact that the tank remained in use and never leaked subsequent to January 16, 2019, supports its position that there was not a substantial likelihood of a release to the environment. Neither argument is persuasive.

2. The damage to the AST gave rise to a substantial likelihood of a release of oil in excess of 10 gallons.

The photographs provided by Ms. Ruskin and those contained in the reports submitted by the Petitioner's LSP clearly show the damage to the AST and there is no evidence that the photographs inaccurately depict the condition of the AST. Additionally, there is credible evidence regarding the condition of the basement floor, with hairline cracks and seams between the floor and the wall, indicating that there was a substantial likelihood that any further release of

oil from the tank would impact the environment. The damage to the tank was not merely cosmetic, and I agree with the Department that the damaged condition of the tank constituted a TOR as defined in 310 CMR 40.0006 because it is reasonable to conclude that a tank in that condition, filled with oil, was likely to result in a release of oil. In these circumstances and in that moment, the Petitioner, recognizing that the integrity of the tank was compromised, should have notified the Department.[26] The Petitioner argues that it cannot be held liable for a threat of release because "no further oil escaped after the date of the oil delivery, and the inner high-density polyethylene tank never leaked at all." Petitioner Response to Objections, p. 5. This argument puts the cart before the horse. It cannot be that whether there exists a threat of release is dependent on whether there was, in fact a release. Reading the regulations this way would effectively write the "threat of release" language out of the statute. Like statutes, regulations must "be 'construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous.'" Wolfe v. Gormally, 440 Mass. 699, 704 (2004), quoting Bankers Life & Cas. Co. v. Commissioner of Ins., 427 Mass. 136, 140 (1998); Biogen IDEC MA, Inc. v. Treasurer & Receiver Gen., 454 Mass. 174, 190 (2009) ("[p]rinciples governing statutory construction and application also apply to regulations"). It is therefore not relevant that the Department did not show an actual release of oil to the environment.

The Petitioner argues that the damage to the AST does not, in and of itself, give rise to a substantial likelihood of a release of oil in excess of 10 gallons. Petitioner Post-Hearing Brief, p. 5. The Department's stance is that "a damaged tank is categorically a threat of release." Tr. 48:12-13. However, the Department's position downplays that the "damage, malfunction or other

[26] See Ward Ex. B, Petitioner's response to RFI question 4.

condition [must be] likely to result in a release" in order to constitute a threat of release. 310 CMR 40.006 (Threat of Release).

Nonetheless, the Petitioner is incorrect in its assertion that the damage to the AST was not "likely to result in a release." Its argument is that "no further oil escaped after the date of the oil delivery, and the inner high-density polyethylene tank never leaked at all. Tr. p. 142: 15-24." Petitioner Post-Hearing Brief, p. 5. This argument might have merit if the Department was alleging the Petitioner caused an actual release, but this case involves a "threat" of release.

When determining whether damage is "likely to result in a release," an entity must be mindful that the MCP "encourage[s] persons responsible for releases and threats of release of oil and/or hazardous material to undertake necessary and appropriate response actions in a timely way." 310 CMR 40.0002(1)(b); see Marco v. Green, 415 Mass. 732, 736 (1993) (statutes must be read harmoniously). Thus, the assessment of whether a release is likely will often be made in the moment and without the benefit of complete information. This necessarily requires that an entity err on the side of caution.

At the moment that the Petitioner observed the damaged AST, it had to determine whether the damage was "likely to result in a release." It was, for several reasons. First, the Petitioner left the AST in service and recommended that Ms. Ruskin contact the manufacturer. But it knew in that moment that if she did not, and if she left the AST in service, adding oil to the AST in the future had a substantial likelihood of causing a release. Second, the damage to the outer tank suggested that there might be other damage not visible to the naked eye that could

cause a release.[27] The prudent course of action was to take the AST out of service and notify the Department. For the foregoing reasons, I find that the Petitioner violated 310 CMR 40.0312(1).

3. The Petitioner was a Person Required to Notify.

Since I have found that there was a TOR, the question remains whether the Petitioner was a person required to notify. As discussed below, the evidence supports a finding that the Petitioner caused the TOR and therefore was required to notify the Department within two hours from when it obtained knowledge of the TOR. This is a reasonable inference that can be drawn from the facts that the previous delivery of oil to the Property was without incident; Ms. Ruskin reported no problem with the tank prior to January 16, 2019; the Petitioner delivered 155.3 gallons of oil into the tank on January 16, 2019; after the delivery the condition of the tank included loose fitting, ruptured rivets on the outer steel tank, and a bulging inner tank; and there was a release of some amount of oil from the tank or its fittings.

a) The Petitioner Had Knowledge of the Threat of Release

Although the Petitioner maintains that there was no TOR, I have found that there was based upon the facts. A preponderance of the evidence discussed above supports a finding that the Petitioner had knowledge that the conditions at the property on the afternoon of January 16, 2019, constituted a TOR, even if the Petitioner asserts that no TOR existed.

b) The Petitioner Caused the Threat of Release

The Department alleges that the Petitioner "overfilled and caused the rupture of the outer wall of a double-walled oil storage tank . . . ." PAN, ¶ 5. The Department contends that the Petitioner was a person required to notify because by overfilling the AST and causing it to rupture, the Petitioner caused the TOR. Department Causation Memo., pp. 3-4. The Petitioner

[27] Again, whether there was in fact additional damage is not relevant to the analysis of whether there was a TOR.

asserts that it was not a person required to notify because there never was a threat of release. It further contends that the Department's evidence fails to prove that the Petitioner caused any TOR.

To be a "person required to notify" under the circumstances of this case, the Department was required to prove by a preponderance of the evidence that the Petitioner caused the TOR. See 310 CMR 40.0331(1)(e). In proving that the Petitioner "caused" the threat of release, proof of some action by the Petitioner is needed, as opposed to proving status liability as is required for owners, operators, fiduciaries, secured lenders, state agencies and public utilities for releases of oil. See 310 CMR 40.0331(1). Thus, this matter turns on what level of proof is necessary to demonstrate that an entity has "caused" a threat of release.

For there to be a threat of release, there must be a "substantial likelihood of release of oil" on a "site[] containing [] an amount of oil [] in excess of [10 gallons] or an unknown quantity, where no reportable release has occurred but where a person required by 310 CMR 40.0331 to report the threat of release has knowledge of any . . . damage . . . that is likely to result in a release." 310 CMR 40.0006 (Threat of Release). The Petitioner must have engaged in some conduct without which there would not be a threat of release. Newly Weds Foods v. Westvaco Corp., 2002 Mass. Super. LEXIS 244, *8, 14 Mass. L. Rep. 728 (Mar. 27, 2001).[28] This is similar to the "but-for" causation discussed recently in Doull v. Foster, 478 Mass. 1, 6-7 (2021). The Petitioner is a "but-for" cause of the threat of release if the threat of release would not have occurred "but for" the Petitioner's conduct. Id. at 7; accord Restatement (Third) of Torts, § 26, cmt. b.

[28] It may be that a threat of release could result due to an omission or negligence by an entity and that this would be a sufficient "cause." The Department did not raise that as a basis for liability and I do not consider it here.

There is no dispute that the Petitioner caused there to be an amount of oil in excess of 10 gallons in the AST, because Mr. Borque dispensed 155.3 gallons into the AST on January 16, 2019. Ward Ex. B, p. 3. There is also no dispute that upon entering the basement, Mr. Lanteigne became aware of the damage. Tr. 134:5-6, 141:5; Lanteigne PFT ¶¶ 3, 6; Ward Ex. B, p. 5. The remaining question is whether the Petitioner caused the damage to the AST that resulted in a TOR.

The parties dispute that the AST was damaged by an overfill during the delivery of oil to the Property. The Petitioner contends that the delivery was ordinary, and that the driver of the oil truck stopped pumping oil when the whistle on the vent pipe stopped whistling.

The evidence that there was an overfill comes primarily from Roth, the tank manufacturer, whose personnel reviewed photographs of the tank, but did not inspect it in person, and Mr. Ward, who testified that he "was not there" and could "only rely on the photographic evidence [and] the letter from the Roth folk." Tr. 62:24-63:9. However, it is my judgment that the photographs provide an adequate basis from which Roth and Mr. Ward could conclude that there was an overfill, given their experience with this particular tank (Roth) and overfills in general (Ward). The Petitioner's arguments to the contrary are not persuasive. I give more weight to the expertise of Roth and Mr. Ward regarding the tank than I do to a hearsay statement from the driver, who did not testify.

Ms. Ruskin took photos of the tank, and forwarded the pictures to the manufacturer, who then documented its observations about the tank in a letter dated April 3, 2019. Ward Ex. H (Ruskin RFI Response, pdf. p. 15, Attachment C to RFI Response). The letter from Roth Industries was prepared by Jim Kenney, Technical Support at Roth Industries Inc., who opined,

> Based on the above [photographs submitted by Ms. Ruskin], it is clear that the oil delivery driver failed to stop the flow of oil into the

> Ruskin tank when the whistle stopped. This resulted in the tank being over-pressurized with the subsequent rivet failure and oil being forced past the seals at the connections in enough quantity to overtop the upraised lip of the secondary tank top and then pool on the concrete floor where the tank is located. Due to the damage the tank has sustained, it needs to be removed from service and replaced.

Ruskin RFI Response, pdf. p. 16, Ex. C to RFI Response [Ward Ex. H]. Mr. Ward testified that he agreed with Mr. Kenney's conclusion that the tank was overfilled and over pressurized. He opined that the bulging and splitting of the seam are exactly how these double walled tanks act when they are overfilled. Based on the photographic evidence and his experience responding to tank overfills, in his opinion the overfill caused the tank to be over pressurized, and the over pressurization caused the damage to the tank and the release of oil into the basement. Ward PFT ¶ 12.

Mr. Lanteigne testified that based on his inspection of the tank and his conversations with the delivery driver, Mr. Bourque, the tank was not overfilled. Lanteigne PFT ¶ 13. As noted earlier, the delivery driver told Mr. Lanteigne that he stopped filling the tank when the vent whistle stopped whistling. Mr. Borque reported to Mr. Horgan that the delivery was routine; Horgan PFT ¶ 9; although Mr. Bourque did not testify either and was not subject to cross-examination. Mr. Lanteigne testified that the AST's alarm did not trigger, suggesting that the inner tank had not ruptured. Tr. 130:18-131:1. Mr. Bonney, who inspected the AST in person, concluded that the fault was with the AST itself. Ward Ex. B, p. 5.

In his rebuttal testimony, Mr. Ward testified that only two months prior to the overfill on January 16, 2019, Energy North delivered 160.1 gallons of oil to the tank on November 15, 2018, without incident. Ward Ex. B (Petitioner's RFI Response, pdf. p. 18, Ex. A to RFI Response, titled "Delivery History"). According to the Energy North RFI Response, the tank was installed on December 19, 2012. Ward Ex. B (Petitioner's RFI Response, pdf. p. 7 (response to

question 7.c.) Between December 19, 2012, and January 16, 2019, a total of 17 oil deliveries were made. Ward Ex. B (Petitioner's RFI Response, pdf. p. 18, Ex. A to RFI Response, titled "Delivery History"). A total of 16 deliveries were made without any incident involving a release from the tank fittings. During these 16 deliveries that were conducted without incident, a total of 2061.4 gallons of #2 fuel oil was delivered. Mr. Ward opined that there is no explanation for the damage to the tank on January 16, 2019, other than over pressurization caused by an overfill. Ward RPFT ¶ 5. At the hearing, Mr. Ward testified that based on the timing of the delivery, the photographic evidence of the tank's condition, the tank manufacturer's letter opining on the condition of the tank, and his own education and experience, he disputes any assertion by the Petitioner that the tank had not been overfilled. Tr. 15:13-18. He also reiterated that sixteen prior deliveries to Ms. Ruskin's oil tank were made without incident involving a release from the tank fittings, with a total of 2061.4 gallons of oil delivered, and in his opinion, there is no other explanation for the damage to the tank on January 16, 2019, other than over pressurization of the tank caused by an overfill. Tr. 78:15-79:5.

There was seemingly no issue with the AST when it was filled in November 2018 because a delivery occurred without incident. Ward Ex. A, Ex. B (Delivery History). Ms. Ruskin did not report any issues with the AST prior to it being filled on January 16, 2019. It was not until 2:15 p.m. when Ms. Ruskin called the Petitioner to let them know of a strong smell of oil in her basement that they learned something was amiss. Ward Ex. B, p. 4. She had not been in the house prior to 1:30 p.m. Ward Ex. H, p. 2.

The only reasonable inference to draw from the evidence is that the tank was damaged during the delivery, causing the oil to escape through the damaged fittings. At that moment, when the oil was dispensed into the damaged AST, the elements of a threat of release were met.

Accordingly, the Petitioner in that moment caused a threat of release and was obligated to report it to the Department within two hours.

C. Violation of 310 CMR 40.0414(1): Failure to Conduct an Adequate Assessment of the Threat of Release.

The Department alleges that the Petitioner violated 310 CMR 40.0414(1) by failing to take Immediate Response Actions in three ways: (1) it did not hire an LSP to inspect the Property for a release or threat of release of oil, (2) it did not conduct an indoor air quality assessment at the occupied residential dwelling to evaluate for the presence of a Critical Exposure Pathway, and (3) it did not assess the potential for released oil to have been released to the environment through cracks in the concrete floor. NOI, ¶ 10. The Petitioner argues that "[s]ince MassDEP has failed in its burden to show a violation of 40.0312(1), there can be no violation of 40.0414(1)." Petitioner's Post-Hearing Brief, p. 6.

"Immediate Response Actions" ("IRAs") are actions taken under 310 CMR 40.0410 through 40.0429. They are required at sites "where a release or threat of release of oil and/or hazardous material has occurred which requires notification to the Department under the 'Two Hour' notification provisions of 310 CMR 40.0311 or 40.0312 . . . ." 310 CMR 40.0412(1). Under 310 CMR 40.0414(1):

> At a minimum, Immediate Response Actions shall involve the assessment of the release or threat of release and/or site conditions described in 310 CMR 40.0412. The nature and extent of assessment actions taken as an Immediate Response Action shall be commensurate with the type and amount of oil and/or hazardous material released or threatening to be released, site complexity, and the sensitivity of site and surrounding human and environmental receptors, and shall be adequate and sufficient for determining:
>
> (a) the degree of hazard posed by the release, threat of release and/or site conditions . . . [and]

> (c) where appropriate, the nature, extent, and timing of any required removal or containment actions.

IRAs are required when certain time-critical conditions are present, such as a sudden spill or an imminent hazard.[29] Iron Horse, 2016 MA ENV LEXIS 23, at *12.

Because the threat of release required notification within two hours, the Petitioner was also required to comply with this section and take appropriate IRAs. The question is therefore whether, regardless of whether the Petitioner timely notified the Department, the Petitioner took "adequate and sufficient [steps] for determining[] the degree of hazard posed by the . . . threat of release and/or site conditions." 310 CMR 40.0414(1). Unfortunately, for the same reasons as above, the Petitioner's actions fell short.

There is no dispute that the Petitioner did not hire an LSP to inspect the Property for a release or threat of release of oil. Tr. 51:20-52:4. There is also no evidence in the record that it conducted an indoor air quality assessment prior to retaining an LSP in April 2019.

The Petitioner also did not assess the potential for released oil to have been released to the environment through cracks in the concrete floor. Because of the presence of oil on the AST and the floor and the visible damage on the AST's exterior; Horgan PFT ¶ 6; Lanteigne PFT ¶ 6; the Petitioner should have taken the AST immediately out of service to determine whether there was damage that was not visible. Ward PFT ¶ 13. Given that the Property abutted a lake, the site was especially sensitive. Ward Ex. C, p. 5. The Petitioner instead allowed the AST to remain in service and made no further inquiry beyond their visual assessments.

[29] The Department does not allege that this situation involved an Imminent Hazard, which would have triggered additional obligations under 310 CMR 40.0426. Tr. 73:23-74:2.

The Response Actions that the Petitioner did in the moment were insufficient. While the Petitioner took steps to remove the oil from the floor, including by placing absorbent; Ward Ex. B, p. 4; there was nevertheless oil that leeched into the soil. Ward Ex. C, pp. 7-8. The oil infiltrated through the cracks in the floor. While Mr. Lanteigne testified that he did not observe cracks in the basement floor on January 16, 2019; Lanteigne PFT ¶ 11; Mr. Ward observed cracks in the basement floor during his inspection on April 12, 2019. Ward PFT ¶ 19. Mr. Ward "also observed seams where the concrete floor met the cinderblock basement walls." Id. Later, the Petitioner's own LSP reported that oil released into the environment through the cracks in the floor. Ward RPFT ¶ 9; Ward Ex. E ("a portion of the released fuel oil apparently penetrated the above-noted gaps, seam and hairline crack and impacted the sub-slab soil"). I therefore do not credit Mr. Lanteigne's testimony about the cracks, and I credit Mr. Ward's testimony and the LSP's report. The Petitioner should have seen at least the seam in the wall and considered the possibility that the oil could seep into the surrounding environment.

There is also no dispute that oil in fact had infiltrated into the surrounding environment. The Petitioner's LSP took 11 initial soil borings from the basement which contained reportable concentrations of hydrocarbons. Ward Ex. C, pp. 7-8; Ward Ex. K, p. 2. Later analysis of the Property's well water detected naphthalene. Ward Ex. C, p. 8. As a result of soil excavation activities, approximately 4,500 pounds of soil impacted by oil were excavated and removed from the Property for proper disposal. Ward PFT ¶ 17. I find that the release of oil from the AST triggered the requirement to conduct an IRA and the Petitioner failed to conduct an IRA. Had the Petitioner complied with the MCP, it may have limited the release's effect on the surrounding environment.

The Petitioner argues that there is no evidence that additional oil released into the environment *after* the January 16 release such that any response actions were needed. Horgan PFT ¶¶ 11, 14. The Department concedes that no further oil was released into the environment after the January 16 release. However, this fact is not relevant because the MCP is explicitly intended to "encourage persons responsible for releases and threats of release of oil and/or hazardous material to undertake necessary and appropriate response actions *in a timely way*." 310 CMR 40.0002(1)(b) (emphasis added). Because it failed to do so, the Petitioner violated 310 CMR 40.0414(1).

D. Willfulness of the violations.

The Petitioner contends that its violations were not willful because it was not required to report the threat of release in the first instance; Tr. 77:9-78:2; Energy North Post-Hearing Brief, p. 6; and that there was no subsequent release of oil after January 16. Tr. 103:7-23; Energy North Post-Hearing Brief, p. 7. No doubt, if there was no requirement to report the threat of release, then there was necessarily no violation, willful or not. But that is not this case; the Petitioner was a person required to notify. And while there appears to have been no release after January 16, 2019, as discussed above, the assessment of willfulness is not based on a retrospective analysis, but on the Petitioner's knowledge at the time of the alleged violation.

This is not an instance where the Petitioner lacked knowledge of the facts giving rise to the violation at the time of the release. The operative facts in this matter are that the AST had released oil, that the AST showed visible damage, and that there was a seam in the basement floor (and possibly cracks). As discussed above, the Petitioner had knowledge of these facts at the time of the release. Cf. Franklin Office Park, 466 Mass. at 463 ("the operative fact was that

the shingles at the site likely contained asbestos"). The Petitioner therefore willfully violated 310 CMR 40.0312(1) and 310 CMR 40.0414(1).

E. Penalty assessment.

The Department assessed penalties of $11,000 each for the two violations, for a total of $22,000. The Department calculates penalties referring first to its "Guidelines for Calculating Civil Administrative Penalties." Daoust PFT ¶ 19. The guidelines describe in general how to calculate a civil administrative penalty and how Department personnel are to consider the factors listed in G.L. c. 21A, § 16 and 310 CMR 5.25 in its penalty calculations. Id. The second tool that the Department uses is a computer program called PenCalc. Id. at ¶ 20. PenCalc provides Department personnel with a standardized mechanism for demonstrating and documenting their consideration of each of the required factors in calculating the civil administrative penalty for each regulatory violation alleged. Id. PenCalc performs the arithmetical calculations associated with calculating penalties to eliminate mathematical errors. Id.

Mr. Daoust supervised and consulted with Mr. Ward in the calculation of the penalty. Id. at ¶¶ 14-15. Mr. Daoust reviewed the PAN and finalized the penalty worksheet before the PAN was issued. Id. at ¶ 14. They calculated the total penalty first by assessing the base penalty amounts for the respective violations in accordance with the guidelines. Aff. Daoust ¶¶ 27-28, 51. The base penalty amount for both violations is $10,000.00. Id. Mr. Daoust and Mr. Ward (correctly) describe the violations as "willful." Id. at ¶¶ 24, 49. They assessed a 10% upward adjustment to the penalty based on the gravity of the violation, "considering the fact that by leaving the compromised overfilled [AST] in service rather than pumping it out, Energy North allowed the threat of release of the remaining contents of the [AST] to continue, which resulted in further potential impact to the environment." Id. at ¶ 31. In assessing the "good faith/lack of

good faith" factors, they approved a 10% upward adjustment because the Petitioner failed to conduct an initial assessment, but also approved a 10% downward adjustment because it "engaged an environmental contractor and LSP," filed a Release Notification Form, and filed an Immediate Response Action Plan upon being ordered to do so. Id. at ¶¶ 34, 56. Mr. Daoust and Mr. Ward made no adjustments to the penalties based on the remaining statutory factors, reasoning that the Petitioner had no history of noncompliance; id. at ¶¶ 32, 54; that there was no basis for adjustments based on inability to pay or future deterrence; id. at ¶¶ 35-36, 57; that the public's interest in the violations did not warrant an upward adjustment; id. at ¶¶ 37-38, 58; and that the Petitioner did not benefit from the violation. Id. at ¶¶ 44-45, 63. I find that the Department adequately considered each of the twelve factors, and that its calculation of the penalty is reasonable and within its discretion.

VII. Conclusion.

As I stated in the TRFD, this case is a close call.[30] But by adding oil to the AST, the Petitioner took an action that either directly caused the threat of release or contributed to an existing threat of release. The Petitioner was therefore a but-for cause of the threat of release and was required to report to the Department within two hours. I find that the Petitioner violated 310 CMR 40.0312(1) and 40.0414(1) and that the Department properly exercised its discretion in calculating the $22,000 penalty. I recommend that the Department's Commissioner issue a Final Decision affirming the PAN and the amount of the penalty in their entirety.

[30] The Petitioner has strongly suggested that the Department has somehow influenced my decision in this matter. Petitioner Memo. Pursuant to Amended Scheduling Order, p. 7 (Nov. 8, 2023). To be clear: this decision is being issued based on the facts as I have weighed them and the governing law alone. No person or entity—including other members of the Panel—has directed me to make my decision here.

As I noted previously above, the Department has "request[ed] an opportunity for oral argument before the Commissioner"; this request is within the Commissioner's sole discretion to grant under 310 CMR 1.01(14). I take no position on whether the Commissioner should grant the Department's request for oral argument. If the Commissioner grants the Department's request for oral argument, I request that the Chief Presiding Officer and I be present at the oral argument consistent with recent prior practice when the Department's Commissioner has heard oral argument from the parties' respective counsel in an appeal.[31]

Date: June 7, 2024

Patrick M. Groulx
Presiding Officer

[31] See n. 23, at p. 33 above.

NOTICE OF RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to MassDEP's Commissioner for her Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d) and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party may file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party may communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.

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