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

December 18, 2017

In the Matter of
Kane Built, Inc.

Docket No. 2017-037
DEP Enforcement Document
No. 00002796

RECOMMENDED FINAL DECISION

INTRODUCTION

In this appeal, the Petitioner Kane Built, Inc. ("Kane") challenges a $67,250.00 Civil Administrative Penalty Assessment Notice ("PAN") that the Central Regional Office of the Massachusetts Department of Environmental Protection ("MassDEP" or "the Department") issued to Kane on August 28, 2017 for violations of the Department's Asbestos Regulations at 310 CMR 7.15. The Department issued the PAN to Kane in connection with the removal of asbestos containing materials at Kane's real property at 6 Deanne Street in Maynard, Massachusetts ("the Site"). Kane denies it violated the Asbestos Regulations and requests that the PAN be vacated. Petitioner's Appeal Notice, at pp. 1-2.

I conducted an evidentiary Adjudicatory Hearing ("Hearing") to resolve Kane's appeal of the Department's PAN. Per the standard practice of the Office of Appeals and Dispute Resolution ("OADR"), the Hearing was digitally recorded. Following the Hearing, OADR's

Case Administrator made the digital recording available to the parties for downloading from the internet, which the parties relied on in drafting and filing their respective Closing Briefs in the case.

The Issues for Resolution at the Hearing as established at the Pre-Hearing Conference that I conducted with the parties several months prior to the Hearing were the following:

(1) Whether Kane violated the Department's Asbestos Regulations at 310 CMR 7.15 as alleged by the Department in the PAN?

(2) If so, did the Department properly assess the $67,250.00 PAN Penalty amount against Kane pursuant to G.L. c. 21A, § 16 and 310 CMR 5.25?

At the Hearing, both Kane and the Department were represented by legal counsel and presented witnesses in support of their respective positions in the case. The witnesses were cross-examined by opposing counsel on the sworn Pre-filed Testimony ("PFT") that the witnesses had filed prior to the Hearing.

The Department, the party with the burden of proof,[1] presented testimonial, documentary, and photographic evidence from two witnesses in support of the PAN:

(1) Donald Heeley, an asbestos expert and a senior Environmental Analyst in the Asbestos Program of the Department's Central Regional Office ("Mr. Heeley"), with more than 30 years of experience in the Department, including nearly 20 years in the asbestos field;[2] and

(2) Gregory P. Levins, an asbestos expert and Chief of the Asbestos Program of the Department's Central Regional Office ("Mr. Levins"), with more

[1] See below, at pp. 9-10.

[2] Department's Pre-filed Direct Testimony of Donald Heeley ("Mr. Heeley's Direct PFT"), at pp. 1-5.

than 35 years of experience in the Department, including 30 years in the asbestos field.[3]

In rebuttal, Kane presented two witnesses:

(1) Michael Edwardsen, a painter and the principal of Edwardsen Painting, Inc. ("Mr. Edwardsen");[4] and

(2) Roger K. Kane, Jr., Kane's principal,[5] and a highly experienced home builder and real estate developer who has been in the real estate industry for 40 years.

As discussed in detail below, based on a strong preponderance of the evidence presented by the Department and Kane at the Hearing and the governing statutory and regulatory requirements, I find that: (1) Kane violated the Department's Asbestos Regulations at 310 CMR 7.15 as alleged by the Department in the PAN; (2) Kane's violations were willful and not the result of error within the meaning of G.L. c. 21A, § 16; and (3) the Department properly assessed the $67,250.00 PAN Penalty amount against Kane pursuant to G.L. c. 21A, § 16 and 310 CMR 5.25. Accordingly, I recommend that the Department's Commissioner issue a Final Decision affirming the Department's PAN.

STATUTORY AND REGULATORY FRAMEWORK

I. THE DEPARTMENT'S AUTHORITY TO REGULATE THE REMOVAL OF ASBESTOS CONTAINING MATERIALS

"Asbestos is a naturally occurring, mostly fibrous mineral that has been used in a variety

[3] Department's Pre-filed Direct Testimony of Gregory P. Levins ("Mr. Levins' Direct PFT), at pp. 1-4; Department's Rebuttal Pre-filed Testimony of Gregory P. Levins ("Mr. Levins' Rebuttal PFT").

[4] Petitioner's Pre-filed Direct Testimony of Michael Edwardsen ("Mr. Edwardsen's Direct PFT"), ¶ 1. Corporate records for Edwardsen Painting, Inc. on file at the Massachusetts Secretary State's Office note that Edwardsen Painting, Inc. is a painting company and that Mr. Edwardsen is the company's President, Treasurer, Secretary, and Director. http://corp.sec.state.ma.us/CorpWeb/CorpSearch/CorpSummary.asp for Edwardsen Painting, Inc.

[5] Petitioner's Pre-filed Testimony of Roger K. Kane, Jr. ("Mr. Kane's Direct PFT"), ¶ 1. Corporate records for Kane on file at the Massachusetts Secretary of State's Office note that Kane is a real estate builder and that Mr. Kane is Kane's President, Treasurer, Secretary, and Director.

of building products and industrial settings over the years because of its resistance to heat, fire, and many caustic chemicals."[6] "The physical properties that give asbestos its resistance to heat and decay are also linked with a number of adverse human health effects. Asbestos tends to break apart into a dust of microscopic fibers that remain suspended in the air for a long time."[7] If inhaled, "these fibers can cause [1] Asbestosis, a chronic lung condition that makes breathing progressively more difficult; [2] Cancer, most frequently lung cancer; or [3] Mesothelioma, an incurable Cancer of the chest and abdominal membranes."[8] (numerical references supplied). Adverse health symptoms caused by inhaling asbestos fibers "can take up 40 years to develop, all can lead to death, and each exposure increases [a person's] risk."[9] As result, the Department "regulates abatement, construction[,] and demolition projects that involve asbestos" through its Asbestos Regulations at 310 CMR 7.15.[10]

The Asbestos Regulations define "asbestos-containing material" or "ACM" as:

> any material containing 1% or more asbestos as determined by a laboratory using protocols set forth in the *Method for the Determination of Asbestos in Bulk Building Materials* found in [the U.S. Environmental Protection Agency's ("EPA")] report EPA/600/R-93/116, or another method as directed by the Department[,] [and] . . . includes, but is not limited to, sprayed-on and troweled-on materials applied to ceilings, walls, and other surfaces; insulation on pipes, boilers, tanks, ducts, and other equipment, structural and non-structural members; tiles; asphalt roofing or siding materials; or asbestos-containing paper.

310 CMR 7.15(1) (definitions). ACM is "friable" when "[in a] dry [condition], [it] can be crumbled, shattered, pulverized or reduced to powder by hand pressure . . . ." Id. Non-friable

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[6] https://www.mass.gov/guides/massdep-asbestos-construction-demolition-notifications.

[7] Id.

[8] Id.

[9] Id.

[10] Id.

ACM becomes friable ACM when it "has been subjected to sanding, grinding, cutting, or abrading or has been crumbled, shattered or pulverized by mechanical means such as, but not limited to, the use of excavators, bulldozers, heavy equipment, or power and/or hand tools." Id.

The Asbestos Regulations prohibit any "***person*** [from] . . . [c]aus[ing], suffer[ing], allow[ing], or permit[ing] any ***asbestos abatement activity*** which causes or contributes to a condition of air pollution." 310 CMR 7.15(3)(a)2 (emphasis supplied). A "person" is defined as:

> any individual, public or private partnership, association, firm, syndicate, company, trust, corporation, department or instrumentality of the federal or state government, political subdivision of the commonwealth, authority, bureau, agency, law enforcement agency, fire fighting agency, or any other entity recognized by law as the subject of rights and duties.

310 CMR 7.00 (definitions). An "asbestos abatement activity" is defined as:

> the removal, encapsulation, demolition, renovation, enclosure, repair, disturbance, handling, transportation, storage, or disposal of asbestos-containing material or asbestos-containing waste material or any other activity involving asbestos-containing material or asbestos-containing waste material that has the potential to result in a condition of air pollution[,] [but] . . . does not include survey, sampling, analysis, monitoring, or visual inspection activities.

310 CMR 7.15(1) (definitions). "Asbestos-containing waste material" or "ACWM" is defined as:

> any ACM removed during a demolition or renovation project and anything contaminated with asbestos in the course of a demolition or renovation project including, but not limited to, asbestos waste from control devices, bags or containers that previously contained asbestos, contaminated clothing, materials used to enclose the work area during the demolition or renovation operation, and demolition or renovation debris . . . .

310 CMR 7.15(1) (definitions). ACWM also includes:

> ACM on and/or in facility components[11] that are inoperable or have been taken

[11] A "facility" is defined as "any dumping ground, or any installation, structure, building establishment or ship, and associated equipment." 310 CMR 7.15(1) (definitions).

> out of service and any ACM that is damaged or deteriorated to the point where it is no longer attached as originally applied or is no longer serving the intended purpose for which it was originally installed.

310 CMR 7.15(1) (definitions).

Under the Asbestos Regulations, "the owner/operator of a facility or facility component[12] that contains suspect ACM[13] shall, prior to conducting any demolition or renovation,[14] employ or engage an asbestos inspector to thoroughly inspect the facility or facility component, or those parts thereof where the demolition or renovation will occur, to identify the presence, location and quantity of any ACM or suspect ACM and to prepare a written asbestos survey report." 310

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[12] The "owner/operator" of a facility or facility component is defined as:

> any person who:
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> (a) has legal title, alone or with others, of a facility or dumping ground;
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> (b) has the care, charge, or control of a facility or dumping ground, or
>
> (c) has control of an asbestos abatement activity, including but not limited to contractors and subcontractors.

310 CMR 7.15(1) (definitions).

[13] "Suspect ACM" is defined as:

> products that have a reasonable likelihood of containing asbestos based upon their appearance, composition and use. **SUSPECT ASBESTOS-CONTAINING MATERIAL** includes, but is not limited to, non-fiberglass insulation (*e.g.* pipe, boiler, duct work, *etc.*), cement/transite shingles, vinyl floor and wall tiles, vinyl sheet flooring, plaster, cement/transite pipes, cement sheets (corrugated and decorative), ceiling tiles, cloth vibration dampers or ductwork, spray-on fire proofing, mastic (flooring or cove base adhesive or damp proofing), and asphalt roofing or siding materials (shingles, roofing felts, tars, etc.).

310 CMR 7.15(1) (definitions).

[14] "Demolition" and "renovation" are defined respectively as follows:

> Demolition: the wrecking or taking out of any load-supporting structural member of a facility together with any related handling operations or the intentional burning of any facility.
>
> Renovation: [the] altering a facility or one or more facility components in any way, including the stripping or removal of ACM from a facility component. Operations in which load-supporting structural members are wrecked or taken out are "demolitions."

310 CMR 7.15(1) (definitions).

CMR 7.15(4).[15] The asbestos inspector must be "[a] person certified by the Commonwealth pursuant to 453 CMR 6.07: Certification of Consultants who identifies, assesses the condition of, or collects pre-abatement samples of ACM." 310 CMR 7.15(1) (definitions).

The Asbestos Regulations also require the owner/operator of a facility or facility component to perform certain actions with respect to the performance of asbestos abatement work, including the following:

(1) notifying the Department and obtaining the Department's authorization prior to conducting any asbestos abatement activity at least ten working days before the activity begins, 310 CMR 7.15(6)(a)-(6)(e), (6)(g);[16]

(2) "adequately wet, containerize[,] and seal the ACWM in leak-tight containers" that are clearly labeled, warn individuals of the containers'

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[15] "[T]he owner of an Owner-occupied, Single-family Residence who performs asbestos abatement activities at the owner's residence involving solely non-friable ACM" is exempt from the requirements of 310 CMR 7.15(4). An "Owner-occupied, Single-family Residence" is defined as:

> any single unit building containing space for uses such as living, sleeping, preparation of food, and eating that is used by a single family which owns the property both prior to and after renovation or demolition. . . .

310 CMR 7.15(1) (definitions). The definition "includes houses, mobile homes, trailers, detached garages, houseboats, and houses with a 'mother-in-law apartment' or 'guest room'", but "does not include rental property, multiple-family buildings, mixed use commercial/residential buildings or structures used for fire training exercises." Id.

[16] Certain asbestos abatement activities are exempt from this prior notification and authorization requirement. 310 CMR 7.15(6)(f). These activities are:

(1) "[t]he removal or disturbance of 100 square feet or less of exterior asbestos-containing cementitious shingles, sidings and panels, provided that the applicable requirements of 310 CMR 7.15(12) are met";

(2) "[t]he removal or disturbance of asbestos-containing floor tile, and asbestos mastics or asbestos-containing gypsum wallboard/joint compound systems, provided that the applicable requirements of 310 CMR 7.15(13) are met"; and

(3) "[t]he owner of an Owner-occupied, Single-family Residence who performs asbestos abatement activities at the owner's residence involving solely non-friable ACM; provided that the abatement activity does not cause the non-friable ACM to become friable ACM and provided that the asbestos abatement activity is not required to be conducted by a Licensed Contractor pursuant to 453 CMR 6.00: *The Removal, Containment or Encapsulation of Asbestos*. This exemption does not apply to the removal or disturbance of greater than 100 square feet of exterior asbestos-containing cementitious shingles, siding and panels.

310 CMR 7.15(6)(f)1-3.

contents, and set forth the name of the waste generator, the location at which the waste was generated, and the date of generation, 310 CMR 7.15(15)(a)-(15)(d); and

(3) "properly dispos[e] of [ACWM] at a landfill approved to accept such material." 310 CMR 7.15(17)(a)-(17)(c).

II. THE DEPARTMENT'S AUTHORITY TO ASSESS 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). 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); In the Matter of Iron Horse Enterprises, Inc., OADR Docket No. 2014-022, Recommended Final Decision (May 2, 2016), 2016 MA ENV LEXIS 23, at 58-59, adopted as Final Decision (May 5, 2016), 2016 MA ENV LEXIS 22.

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 310 CMR 5.12; Franklin Office Park, 466

Mass. at 461. 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. "[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 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"). "[T]here is no requirement," however, "that a violator either was aware of the applicable environmental laws or intended to violate those laws." Id., at 466.

As for the proper penalty amount to be assessed by the Department 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 when calculating the penalty amount. These 12 factors are discussed below, at pp. 33-53, in connection with the resolution of the issue of whether the Department properly assessed the $67,250 penalty amount against Kane for the latter's violations of the Department's Asbestos Regulations as set forth in the Department's PAN.

III. THE DEPARTMENT'S BURDEN OF PROOF AT THE HEARING

At the Hearing, the Department had the burden of proving by a preponderance of the evidence that: (1) Kane committed all of the violations of the Asbestos Regulations as alleged in the PAN; and (2) the Department properly assessed the $67,250.00 penalty amount pursuant to

G.L. c. 21A, § 16 and 310 CMR 5.25. In the Matter of West Meadow Homes, Docket Nos. 2009-023 & 024, Recommended Final Decision (June 20, 2011), 2011 MA ENV LEXIS 85, at 11-14, 28-37, adopted as Final Decision (August 18, 2011), 2011 MA ENV LEXIS 84.

As for the relevancy, admissibility, and the weight of evidence that the Department and Kane presented at the Hearing, this was governed by G.L. c. 30A, § 11(2) and 310 CMR 1.01(13)(h)(1). Under G.L. c. 30A, § 11(2):

> [u]nless otherwise provided by any law, agencies need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. Agencies may exclude unduly repetitious evidence, whether offered on direct examination or cross-examination of witnesses.

Under 310 CMR 1.01(13)(h), "[t]he weight to be attached to any evidence in the record will rest within the sound discretion of the Presiding Officer. . . ." Speculative evidence was accorded no weight given its lack of probative value in resolving the issues in the case. In the Matter of Sawmill Development Corporation, OADR Docket No. 2014-016, Recommended Final Decision (June 26, 2015), 2015 MA ENV LEXIS 63, at 84, adopted as Final Decision (July 7, 2015), 2015 MA ENV LEXIS 62 (petitioners' expert testimony "that pharmaceuticals, toxins, and other potentially hazardous material would be discharged from effluent generated by . . . proposed [privately owned wastewater treatment facility] . . . was speculative in nature and not reliable").

IV. STANDARD OF REVIEW OF DEPARTMENT'S PENALTY DETERMINATIONS

My review of the Department's determinations underlying the PAN, specifically that Kane violated the Asbestos Regulations and that $67,250.00 is an appropriate penalty amount for the violations, is de novo, meaning that my review is anew based on a preponderance of the evidence presented at the Hearing and the governing statutory and regulatory requirements,

irrespective of what the Department determined previously. West Meadow Homes, 2011 MA ENV LEXIS 85, at 11-14, 28-37 (Department's $6,000.00 penalty assessment against appellant for violations of Massachusetts Wetlands Protection Act ("MWPA"), G.L. c. 131, § 40, vacated where Chief Presiding Officer determined Department proved appellant committed violations but failed to prove it considered all 12 required statutory factors under G.L. c. 21A, § 16 in assessing penalty); Iron Horse Enterprises, Inc., 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 Presiding Officer determined that penalty had a sufficient factual and legal basis). Put another way, "[I am] responsible . . . for independently adjudicating [Kane's] appea[l] [of the Department's PAN based on a preponderance of the evidence presented at the Hearing and the governing statutory and regulatory requirements] and making a recommendation to MassDEP's Commissioner that [is] consistent with [the evidentiary record and the governing statutory and regulatory requirements]." Cf. In the Matter of John Soursourian, OADR Docket No. WET-2013-028, Recommended Final Decision (2014), 2014 MA ENV LEXIS 49, at 34-36, adopted as Final Decision, 2014 MA ENV LEXIS 47 (2014) (explaining the Presiding Officer's de novo review authority in wetlands permit appeals).

My role, however, is not to "second guess" the Department's penalty determinations or substitute my opinion for that of the Department, but rather, to determine whether the Department's penalty determinations have a valid factual and legal foundation based on a preponderance of evidence presented at the Hearing and the governing statutory and regulatory requirements. West Meadow Homes, supra; Iron Horse Enterprises, Inc., supra. This standard

of review is similar to the "rational basis test" utilized by Massachusetts courts in conducting judicial review of discretionary decisions of state agencies.

As the Massachusetts appellate courts have explained, when a state agency exercises its administrative discretion in making a determination, the determination should be affirmed by a reviewing court unless, based on the evidentiary record before the agency and the governing statutory and regulatory requirements, "the decision was arbitrary and capricious such that it constituted an abuse of [the agency's] discretion." Frawley v. Police Commissioner of Cambridge, 473 Mass. 716, 728 (2016); Garrity v. Conservation Commission of Hingham, 462 Mass. 779, 792 (2012); Sierra Club v. Commissioner of Department of Environmental Management, 439 Mass. 738, 748-49 (2003); Forsyth Sch. for Dental Hygienists v. Board of Registration in Dentistry, 404 Mass. 211, 217 (1989). A state agency "decision is arbitrary or capricious such that it constitutes an abuse of discretion where it 'lacks any rational explanation that reasonable persons might support'" and "an abuse of discretion occurs when there has been a clear error of judgment in weighing relevant factors such that [the] decision falls outside [the] range of reasonable alternatives[.]" Frawley, 473 Mass. at 729-33 (Cambridge Police Chief's reasons for denying retired police officer's application for "retired [police] officer identification card" authorizing him to carry a concealed weapon lacked a rational basis); Garrity, 462 Mass. at 792-97 (Hingham Conservation Commission's reasons for bringing enforcement action against plaintiff for wetlands violations had rational basis); Sierra Club, 439 Mass. at 748-49 (state agency commissioner's MEPA findings in favor of proposed project had rational basis); Doe v. Superintendent of Schools of Stoughton, 437 Mass. 1, 6 (2002) (high school principal's reasons for suspending student pending resolution of criminal charges against student had rational basis); Forsyth, 404 Mass. at 217-19 (State Board of Registration in Dentistry's reasons for denying

dental hygienist school's request to include certain course in its curriculum for dental hygienists had rational basis); City of Brockton v. Energy Facilities Siting Board, 469 Mass. 196, 209-10 (2014) (Energy Facility Siting Board's reliance on Boston Logan Airport meteorological data in approving proposed Brockton energy facility had rational basis because: (1) data "[was] representative of [Brockton meteorological] conditions", (2) "no suitable meteorological data for the Brockton site were available", and (3) Board's governing statute did not require Board to use on-site meteorological data).

The Massachusetts appellate courts have also explained, that "[a state agency] decision is not arbitrary and capricious if 'reasonable minds could differ' on the proper outcome'" and "[i]t is not the place of a reviewing court to substitute its own opinion for that of the [agency]." Doe, 437 Mass. at 6; Frawley, 473 Mass. at 729. Thus, if an agency's decision has a rational basis, it should be affirmed by the reviewing court notwithstanding that the court might have made a different decision based on the circumstances of the case. Id. For these reasons, "[t]he deference . . . grant[ed] to an agency's determination of questions entrusted to its expertise places a 'heavy burden' on parties challenging the [determination]." NSTAR Electric Co. v. Department of Public Utilities, 462 Mass. 381, 386 (2012). 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 regulatory requirements]." NSTAR, 462 Mass. at 386-87; Warcewicz v. Department of Environmental Protection, 410 Mass. 548, 550 (1992); Moot v. Department of Environmental Protection, 448 Mass. 340, 346 (2007).

In sum, in an administrative appeal of a Department PAN, while the Presiding Officer's review of the Department's penalty determinations underlying the PAN is de novo, the Presiding

Officer should recommend the PAN's affirmance by the Department's Commissioner if the Presiding Officer determines based on a preponderance of the evidence presented at the evidentiary adjudicatory hearing and the governing statutory and regulatory requirements that the Department's penalty determinations have a rational basis, i.e. a sufficient factual and legal foundation, and recommend otherwise if they do not. West Meadow Homes, supra; Iron Horse Enterprises, Inc., supra. It is important to note, however, that notwithstanding the Presiding Officer's determination and recommendation on the propriety of a PAN issued by the Department, it is the Department's Commissioner, as the final agency decision-maker in the appeal, who 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);[17] In the Matter of Associated Building Wreckers, Inc., OADR Docket No. 2003-132, Final Decision (July 6, 2004), 11 DEPR 176 (2004) (Department's Commissioner rejected DALA[18] Administrative Magistrate's recommendation that Department's $2,500.00 penalty assessment against appellant for air pollution violations be reduced from by $625.00 to $1,875.00 after concluding Magistrate erred in determining $2,500.00 penalty amount was excessive); In the Matter of Roofblok Limited, OADR Docket Nos. 2006-047 & 048, Final Decision (May 7, 2010), 17 DEPR 377 (2010) (Department's Commissioner accepted DALA Administrative

[17] It is a well settled principle that "the [Department's] commissioner determines 'every issue of fact or law necessary to the [final] decision [in an appeal,] [and] . . . may adopt, modify, or reject a [Presiding Officer's] recommended decision, with a statement of reasons.'" Ten Local Citizen Group v. New England Wind, LLC, 457 Mass. 222, 231 (2010). "[T]he commissioner's interpretation of [the governing] regulations [and statutes]," and not that of the Presiding Officer, "is conclusive at the agency level, and is the only interpretation that is entitled to deference by a reviewing court" on judicial review pursuant to G.L. c. 30A, § 14. Id., at 457 Mass. at 228.

[18] "DALA" is the acronym for the Massachusetts Division of Administrative Law Appeals, an agency within the Massachusetts Executive Office of Administration and Finance ("A&F"), that at one time adjudicated administrative appeals of Department permit decisions and enforcement orders.

Magistrate's recommendation that Department's $86,498.50 penalty assessment against appellant for solid waste, hazardous waste, and water pollution violations be vacated, "but for different reasons than those articulated by the DALA Magistrate"); West Meadow Homes, supra (Department's Commissioner accepted Chief Presiding Officer's recommendation that Department's $6,000.00 penalty assessment against appellant for violations of the MWPA be vacated because Department failed to prove it considered all 12 required statutory factors under G.L. c. 21A, § 16 in assessing penalty); Iron Horse Enterprises, Inc., supra (Department's Commissioner accepted Presiding Officer's recommendation that Department's $30,000.00 penalty assessment for appellant's violations of G.L. c. 21E be affirmed because penalty had a sufficient factual and legal basis). As discussed in detail below, the evidentiary record in this case and the governing statutory and regulatory requirements warrant the Commissioner's affirmance of the Department's $67,250.00 PAN against Kane for the latter's violations of the Asbestos Regulations because the Department's determinations underlying the PAN have more than a rational basis.

FINDINGS

I. KANE VIOLATED THE DEPARTMENT'S ASBESTOS REGULATIONS AT 310 CMR 7.15 AS ALLEGED BY THE DEPARTMENT IN THE PAN AND ITS VIOLATIONS WERE WILFULL AND NOT THE RESULT OF ERROR WITHIN THE MEANING OF G.L. c. 21A, § 16

The Department's PAN alleges that Kane, as the owner of the Site, violated the Asbestos Regulations at 310 CMR 7.15 in connection with the removal of asbestos containing materials at the Site and that the violations were willful and not the result of error within the meaning of G.L. c. 21A, § 16. PAN, ¶¶ 4-11. Specifically, the Department alleges in the PAN that Kane:

(1) "caused, suffered, allowed and/or permitted asbestos abatement

activities (including the handling and storage/disposal of asbestos-containing material or asbestos-containing waste material) at the Site in a manner that caused or contributed to a condition of air pollution, in violation of 310 CMR 7.15(3)(a)2";[19]

(2) "failed to employ or engage a Massachusetts Department of Labor Standards licensed asbestos inspector to thoroughly inspect the Site for the presence, location and quantity of asbestos-containing materials and suspect asbestos-containing materials prior to commencing renovation at the Site, in violation of 310 CMR 7.15(4)";[20]

(3) "failed to notify MassDEP of an asbestos abatement activity involving asbestos-containing materials (asbestos-containing insulation and asbestos-containing transite[21] exterior siding shingles) at the Site, in violation of 310 CMR 7.15(6)";[22]

(4) "failed to wet, containerize[,] and seal asbestos-containing waste materials (asbestos-containing insulation and asbestos-containing transite exterior siding shingles) in leak-tight containers at the Site, in violation of 310 CMR 7.15(15)(b)";[23]

(5) "failed to label asbestos-containing waste material (asbestos-containing insulation and asbestos-containing transite exterior siding shingles) at the Site, in violation of 310 CMR 7.15(15)(c) and 310 CMR 7.15(d)";[24] and

(6) "stored asbestos-containing waste materials (asbestos-containing insulation and asbestos-containing transite exterior siding shingles) at a location (the Site) that is not a refuse transfer station permitted to manage

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[19] PAN, ¶ 10A.

[20] PAN, ¶ 10B.

[21] Mr. Levins testified at the Hearing that transite "is an industry term for asbestos-cement products" and that "[a]ll transite material contains asbestos." Mr. Levins' Direct PFT, at p. 5, ¶ 8.

[22] PAN, ¶ 10C.

[23] PAN, ¶ 10D.

[24] PAN, ¶ 10E.

> asbestos waste in accordance with 310 CMR 19.061, in violation of 310 CMR 7.15(17)(b)."[25]

At the Hearing, the Department's witnesses, Mr. Heeley and Mr. Levins, presented highly persuasive testimonial, documentary, and photographic evidence demonstrating that Kane violated the Asbestos Regulations as alleged by the Department in the PAN, and that Kane's violations were willful and not the result of error within the meaning of G.L. c. 21A, § 16. Mr. Heeley's and Mr. Levins' testimonial, documentary, and photographic evidence, which Kane's witnesses, Mr. Kane and Mr. Edwardsen, failed to refute with credible evidence, demonstrated the following.

On July 11, 2016, Kane submitted to the Department for its review and approval, a Non-Traditional Asbestos Abatement Work Practice Approval Application (BWP AQ 36 form) ("NTWP") relating to asbestos cleanup and decontamination work at a single family home located on the Site. PAN, ¶ 4; Mr. Heeley's Direct PFT, at p. 5, ¶ 1; Mr. Levins' Direct PFT, at p. 4, ¶ 6; Exhibit 1 to Mr. Levins' Direct PFT. The NTWP listed: (1) Kane as the Site's owner and Demolition Contractor; (2) Edwin Morgan ("Mr. Morgan") of Asbestos Consultants, LLC of Belmont, Massachusetts as Kane's Asbestos Abatement Project Designer for the Site; and (3) New England Asbestos Abatement, LCC, also of Belmont as Kane's Asbestos Abatement Contractor for the Site. Exhibit 1 to Mr. Levins' Direct PFT (Sections A and B, pp. 1-2). The NTWP indicated that "Asbestos abatement activity [was] being conducted to clean up and decontaminate a facility or portion of a facility [at the Site]" and that "[p]revious asbestos abatement activities [at the Site] were not conducted in compliance with 310 CMR 7.15." Exhibit 1 to Mr. Levins' Direct PFT (Section B, at p. 2). The NTWP indicated that ACM was

[25] PAN, ¶ 10F.

located at the exterior, basement, and kitchen of the single family home at the Site. Id.

The NTWP was signed and certified by Kane's principal, Mr. Kane,[26] on June 29, 2016. Exhibit 1 to Mr. Levins' Direct PFT (Section C, at p. 3). In signing the NTWP, Mr. Kane certified that "[he] ha[d] personally examined the [contents of the NTWP] and [was] familiar with the information contained in [the] document and all attachments [to the document] . . . ." Exhibit 1 to Mr. Levins' Direct PFT (Section C, at p. 3). Mr. Kane also certified that "based on [his] inquiry of those individuals immediately responsible for obtaining the information [contained in the NTWP], [he] believe[d] that the information [was] true, accurate, and complete . . . ." Id. He also certified that "[he was] aware that there [were] significant penalties for submitting false information [in the NTWP], including possible fines and imprisonment." Id.

Kane submitted with the NTWP, a work plan for the NTWP entitled "Alternative Methods Asbestos Abatement Work Plan" dated June 27, 2016 that was prepared by Mr. Morgan, Kane's Asbestos Abatement Project Designer for the Site. PAN, ¶ 5; Mr. Heeley's Direct PFT, at p. 5, ¶ 1; Mr. Levins' Direct PFT, at p. 5, ¶ 7; Exhibit 2 to Mr. Levins' Direct PFT. The work plan stated that it "[had been] submitted on behalf of [Kane]" for the purpose of "remov[ing] in the safest and least burdensome manner possible" all ACM that had been identified at the Site. Exhibit 2 to Mr. Levins' Direct PFT, at p. 2. The work plan stated that "[t]he Site consist[ed] of a two story single family dwelling with [the following] affected areas of ACM disturbance":

1. Exterior Transite panels removed from all exterior sides of the house;
2. Basement area [with] ACM pipe insulation contamination throughout area; [and]

[26] See n. 5 above, at p. 3.

3. Kitchen floor linoleum identified in recent inspection report (intact).

Id.

Also included with the NTWP, was a copy of a June 26, 2016 letter that Mr. Morgan had written to Mr. Kane. Mr. Levins' Direct PFT, at p. 5, ¶ 8; Exhibit 3 to Mr. Levins' Direct PFT. In the letter, Mr. Morgan thanked Mr. Kane "for [having] provide[d] [Mr. Morgan's company,] Asbestos Consultants [with] the opportunity to serve [Kane's] environmental needs [at the Site]." Exhibit 3 to Mr. Mr. Levins' Direct PFT. Mr. Morgan also stated that his company had conducted an asbestos inspection of the Site on June 13, 2016 and noted the following:

(1) "[e]xterior transite siding ha[d] been removed" from the single family home at the Site and "placed in a pile covered with a tarp in the front yard" of the home;

(2) "[b]asement asbestos containing pipe and fitting insulation materials ha[d] been removed from the area but residual debris remain[ed]";

(3) "[b]uilding materials [had been] visually inspected inside and outside the . . . home [at the Site] for . . . ACM" and certain "building materials were deemed to be suspect for ACM and sampled" for asbestos, including the front door perimeter caulk, kitchen linoleum, wall and ceiling plaster materials, 1" x 1" ceiling tiles, bathroom ceramic glue, bathroom sheetrock and joint compound materials, bathroom linoleum beneath floor tiles, basement window glaze, exterior tar paper, roof-flue vent flashing, and roof shingle; and

(4) "laboratory [test] results [for] . . . the . . . sampled building materials" revealed that only the front door perimeter caulk and kitchen linoleum "[had] tested positive for asbestos."

Exhibits 3, 4, and 5 to Mr. Levins' Direct PFT.

After reviewing the NTWP (Exhibit 1 to Mr. Levins' Direct PFT), the work plan for the NTWP (Exhibit 2 to Mr. Levins' Direct PFT), Mr. Morgan's June 26, 2016 letter to Mr. Kane (Exhibit 3 to Mr. Levins' Direct PFT), and the laboratory results confirming that the front door perimeter caulk and kitchen linoleum contained asbestos (Exhibits 4 and 5 to Mr. Levins' PFT),

Mr. Levins "determined that ACM had been disturbed at the Site without prior notification to the Department of the asbestos abatement activity" in violation of 310 CMR 7.15 and "that violations of the [Asbestos] Regulations . . . were ongoing at the Site." Mr. Levins' Direct PFT, at p. 6, ¶ 9. As a result, Mr. Levins directed Mr. Heeley "to do an inspection at the Site to assess and verify conditions at the Site and the extent of any demolition/renovation activities." Id.; Mr. Heeley's Direct PFT, at p. 5, ¶ 2. Mr. Levins was more than qualified to render his determination and Mr. Heeley was more than qualified to conduct the inspection.

Mr. Levins has been employed by the Department for more than 35 years, and his tenure with the Department includes three decades of significant training, regulatory, and investigative experience in the asbestos abatement field. Mr. Levins' Direct PFT, ¶¶ 1-5. He has been trained and certified in the asbestos abatement field by the Commonwealth's Department of Labor and Standards ("DLS")[27] as an Asbestos Inspector and Asbestos Supervisor/Foreman. Id.

In the Department's Central Regional Office, which issued the PAN to Kane,[28] Mr. Levins is the Office's asbestos program lead responsible for implementing and overseeing the Office's enforcement of asbestos cases by: (1) recommending enforcement actions; (2) preparing enforcement documents such as notices of non-compliance, administrative consent orders, unilateral administrative orders, and penalty assessment notices; (3) serving as the Office's lead

[27] DLS's mission is to "promot[e] and protect[t] workers' safety/health, wages, and working conditions . . . ." https://www,mass.gov/orgs/department-of-labor-standards. "[DLS] serves employers, employees, apprentices, [and] students in areas such as public employee safety, lead, asbestos, employment agencies, minimum wage, and prevailing wage." Id. DLS has an Asbestos Safety Program that "regulat[es] . . . occupational asbestos exposure", promotes "healthier work conditions for workers", and is responsible for "protect[ing] the public from long-term damage from excessive asbestos exposure." https://www.mass.gov/asbestos-safety-program.

[28] The Department's Central Regional Office "serves [a] region that spans from the Connecticut border to the New Hampshire line and encompasses all of Worcester county." https://www.mass.gov/locations/massdep-central-regional-office. "It also includes some municipalities in western Middlesex and Norfolk counties." Id. "In all, [the Department's Central Regional Office has environmental regulatory jurisdiction over] . . . 77 towns and cities with a total population of nearly 900,000." Id. The municipalities include Maynard, where the Site is located.

negotiator in enforcement conferences; and (4) representing the Office in enforcement conferences arranged by the Massachusetts Attorney General's office in environmental law enforcement proceedings initiated by that office. Mr. Levins' Direct PFT, ¶ 2A. Mr. Levins has prepared or overseen the preparation of Civil Administrative Penalty Worksheets for enforcement cases in the Department's Central Regional Office for 30 years: since 1988. Id.

As the program lead for the Office's asbestos program, Mr. Levins is also responsible for developing and implementing inspection targeting strategies; reviewing complaints involving ACM or materials suspected of being ACM; assigning staff to investigate complaints and conduct inspections, and determining appropriate compliance and enforcement responses; reviewing and approving non-traditional asbestos abatement work practice applications and work plans; providing technical support and staff to other Department programs as needed; and coordinating with other asbestos program staff in the Department's main office in Boston and other Department Regional Offices as needed. Mr. Levins' Direct PFT, ¶ 2B. He also drafts, edits, and reviews draft and final enforcement-related documents to ensure accuracy, program consistency, and compliance with applicable state and federal statutes and regulations. Id., ¶ 2C. He also provides field support to Department asbestos program field staff by accompanying and assisting on field inspections and complaint investigations, as needed, to determine compliance with state and federal statutes and regulations. Id., ¶ 2D.

As for Mr. Heeley, he has been employed by the Department for more than 30 years, and his tenure with the Department includes nearly two decades of significant training, regulatory, and investigative experience in the asbestos abatement field. Mr. Heeley's Direct PFT, pp. 1-5. He has been trained and certified in the asbestos abatement field by DLS as an Asbestos

Inspector and Asbestos Supervisor/Foreman. Id., at p. 2.

In the Department's Central Regional Office, Mr. Heeley is responsible for conducting inspections of asbestos removal projects and demolition/renovation projects to determine compliance with applicable state and federal regulations. Mr. Heeley's Direct PFT, at p. 1. He also conducts follow-up inspections as necessary to ensure continued compliance and/or return to compliance. Id. His inspections include collecting and processing for delivery to the laboratory bulk samples of suspected asbestos containing materials. Id., at p. 2.

Mr. Heeley also assists Mr. Levins in administering the asbestos program by identifying violations of the Asbestos Regulations; recommending appropriate enforcement and remedial actions and compiling detailed and accurate information necessary to support those actions; and providing technical assistance to regional staff, contractors, local officials, the general public, and others as needed. Id. He also identifies cases that warrant consideration of enforcement action by the Massachusetts Attorney General's Office, and presents enforcement cases for review to the Regional Enforcement Review Committee of the Department's Central Regional Office ("RERC")[29] and the Department's Case Screening Committee ("CSC").[30] Id.

In this case, Mr. Heeley conducted two inspections at the Site: on July 12, 2016 and July 19, 2016. Mr. Levins' Direct PFT, at p. 6, ¶ 10; Mr. Heeley's Direct PFT, at p. 6, ¶ 3; pp. 6-7, ¶ 4; pp. 7-8, ¶ 5; pp. 8-9, ¶ 6; p. 9, ¶ 7; PAN, ¶¶ 5-6. His inspections were very thorough and

[29] The RERC is comprised of staff members and managerial personnel of the Department's Central Regional Office. Mr. Levins' Direct PFT, ¶ 14.

[30] The CSC is based in the Department's Boston (main) office and is comprised of senior Department environmental enforcement staff and representatives of the Massachusetts Attorney General's Office. Mr. Levins' Direct PFT, ¶ 14.

revealed the following.

During his July 12, 2016 inspection of the Site, Mr. Heeley observed that the single family home at the Site was located in a congested residential/commercial neighborhood. Mr. Heeley's Direct PFT, at p. 6, ¶ 3. He also observed that a large portion of the home had been stripped of asbestos-containing transite exterior siding shingles. Id.; PAN, ¶ 5. He also observed numerous fragments of dry, friable asbestos-containing transite exterior siding shingles lying uncontained on the ground around the home's foundation and in a large pile under a tarp on the home's porch. Mr. Heeley's Direct PFT, at p. 6, ¶ 3; PAN, ¶ 5. In the home, he also observed that several asbestos-insulated heating system pipes had been cut down and were lying uncontained on the home's basement floor. Id. He took samples and photographs of the ACM he observed at the Site. Id.

Mr. Heeley conducted his July 19, 2016 inspection of the Site with Kane's principal, Mr. Kane. Mr. Heeley's Direct PFT, at pp. 6-7, ¶ 4; PAN, ¶ 6. During the inspection, "[Mr. Heeley] asked Mr. Kane if he was aware that the exterior of the [home at the Site] had been sided with asbestos transite shingles" and in response, Mr. Kane stated "that one of his employees[,] [Mr.] Edwardsen[,] had removed the asbestos transite shingles." Mr. Heeley's Direct PFT, at pp. 6-7, ¶ 4. Mr. Heeley also asked Mr. Kane if the latter "had given Mr. Edwardsen instructions to remove the transite shingles." Id. In response, Mr. Kane neither admitted nor denied having instructed Mr. Edwardsen to remove the transite shingles, but admitted that Kane, as the Site's owner, was responsible for Mr. Edwardsen's actions. Id. Mr. Kane informed Mr. Heeley that "Mr. Edwardsen had worked for [Kane] for many years as a painter and [that] he [(Mr. Kane)] had let Mr. Edwardsen do work on the [home at the Site] primarily to keep Mr. Edwardsen busy." Id. It is undisputed that at all times relevant to this appeal, Mr. Edwardsen was not in the

business of building demolition and was not licensed by the Commonwealth to perform either asbestos inspections or asbestos abatement work. Digital Recording of Hearing, at 1:13 and 1:17 (Department's Cross-Examination of Mr. Kane); 1:50-1:53 (Department's Cross-Examination of Mr. Edwardsen).

During his July 19, 2016 inspection of the Site, Mr. Heeley "did not observe any protective material in place as polyethylene plastic on [the home's] windows [at the Site], negative air equipment, or any other equipment that a trained asbestos abatement contractor would use on such an abatement project as [Kane's project at the Site]." Mr. Heeley's Direct PFT, at p. 7, ¶ 5. Mr. Heeley did observe:

(1) a large portion of the home had been stripped of asbestos-containing transite exterior siding shingles;[31]

(2) numerous fragments of dry, friable asbestos-containing transite exterior siding shingles under a plastic tarp on the home's deck; [32]

(3) fragments of dry, friable asbestos-containing transite exterior siding shingles remaining on the home; [33]

(4) fragments of dry, friable asbestos-containing transite exterior siding shingles lying uncontained on the ground around the home's foundation exposed to the ambient air; [34] and

(5) dry, friable asbestos-containing insulation in two unmarked, household trash bags outside in the home's back yard that were torn, open at the top, and exposed to the ambient air. [35]

Mr. Heeley asked Mr. Kane if the latter knew the origin of the trash bags containing the

[31] Mr. Heeley's Direct PFT, at pp. 7-8, ¶ 5; PAN, ¶ 6.

[32] Id.

[33] Id.

[34] Id.

[35] Id.

dry, friable asbestos-containing insulation that Mr. Heeley had observed during his inspection of the Site on July 19, 2016. Mr. Heeley's Direct PFT, at p. 8, ¶ 5. In response, Mr. Kane confirmed that the trash bags contained asbestos insulation and had come from the home's heating system after Mr. Edwardsen had dismantled it. Id. Mr. Kane also stated that the trash bags at issue had been inside the home but he had asked Mr. Edwardsen to put them outside. Id. Mr. Heeley took eight photographs of the trash bags and these photographs were introduced in evidence at the Hearing. Mr. Heeley's Direct PFT, at pp. 8-9, ¶ 6; Exhibits 1.a-1.h attached to Mr. Heeley's Direct PFT. These photographs depict protruding objects being present inside the trash bags. Id. They also depict one of the trash bags (referred as "bag number 1" by Mr. Heeley) as having been hand tied into a knot, leaving a hole in the bag that exposed the asbestos-containing material inside the bag to the ambient air. Exhibits 1.d, 1.e attached to Mr. Heeley's Direct PFT. The other trash bag (referred as "bag number 2" by Mr. Heeley) is depicted in the photographs as being ripped with asbestos-containing material inside the bag protruding to outside of the bag to the ambient air. Exhibits 1.f, 1.g, and 1.h. Independent laboratory testing of several samples of material contained in the trash bags that Mr. Heeley suspected as being ACM confirmed that the material contained asbestos. Mr. Heeley's Direct PFT, at p. 9, ¶ 7; p. 10, ¶ 11; Exhibits 2 and 3 attached to Mr. Heeley's Direct PFT. These test results were introduced in evidence at the Hearing. Id.

At the Hearing, Kane, through its principal, Mr. Kane, did not dispute that asbestos-containing materials at been removed at the Site in violation of the Asbestos Regulations; its sole defense was that it was not responsible for the violations and placed the entire blame for the

violations on Mr. Edwardsen.

Mr. Kane testified at the Hearing that in April 2016, Kane purchased the Site for $135,000.00 for the purpose of demolishing the existing one-family home on the Site and replacing it with a two-family home to be built by Mr. Edwardsen, who Mr. Kane labeled as an "independent contractor." Mr. Kane's Direct PFT, ¶¶ 1-11. Mr. Kane testified that "[Mr.] Edwardsen is primarily a painter, [who] is also experienced with home renovations." Mr. Kane's Direct PFT, ¶ 6. Undisputedly, however, Mr. Edwardsen was not licensed by the Commonwealth to do asbestos abatement work.

Mr. Kane testified that "[Kane] entered into an arrangement whereby it would provide [Mr. Edwardsen with] the money for the demolition/renovation [project at the Site], but the work would be done by [Mr.] Edwardsen . . . ." Mr. Kane's Direct PFT, ¶ 4. In Mr. Kane's words: "[t]he arrangement was that [Kane] would provide all of the capital for the project, but [Mr.] Edwardsen would perform all of the work at the Site." Mr. Kane's Direct PFT, ¶ 7. "In exchange for the work, [Mr.] Edwardsen would receive a 70% equity position in the project, while [Kane] would have [a] 30% equity position in the project." Mr. Kane's Direct PFT, ¶ 8. Mr. Kane, however, did not present any documentary evidence at the Hearing evidencing this purported agreement between Kane and Mr. Edwardsen. Id.

Mr. Kane testified that "[Mr.] Edwardsen performed all of the demolition/renovation work at the site," and he (Mr. Kane) "was not aware of the presence of asbestos at the project until [he] was informed of that fact after [Mr.] Edwardsen committed the acts which form the basis of the [Asbestos Regulations] violations at the Site." Mr. Kane's Direct PFT, ¶¶ 9-10. He also testified that "[he] did not instruct [Mr.] Edwardsen to remove the unmarked, torn, unsealed bags of asbestos insulation from the house [at the Site] and place them in a yard outside at the

Site." Mr. Kane's Direct PFT, ¶ 11. Mr. Kane, however, backtracked on that testimony by later testifying at the Hearing that he may have told Mr. Edwardsen to remove those bags from the basement. Digital Recording of Hearing, at 1:28-1:50.

Mr. Edwardsen's testimony at the Hearing was virtually identical to Mr. Kane's testimony that Mr. Edwardsen, not Kane, was responsible for violating the Asbestos Regulations as alleged by the Department in the PAN. Mr. Edwardsen's Direct PFT, ¶¶ 1-7. While I agree that Mr. Edwardsen violated the Asbestos Regulations (he admitted to committing the violations in his Direct PFT and on Cross-Examination at Hearing), both his and Mr. Kane's testimony that Kane was not responsible for the violations was neither credible nor legally tenable for the following reasons.

First, Kane was responsible for the violations of the Asbestos Regulations as the "owner/operator" of the Site. As discussed above, under the Asbestos Regulations such a party is:

> any person who:
>
> (a) has legal title, alone or with others, of a facility or dumping ground;
>
> (b) has the care, charge, or control of a facility or dumping ground, or
>
> (c) has control of an asbestos abatement activity, including but not limited to contractors and subcontractors.

310 CMR 7.15(1) (definitions). Undisputedly, Kane owned the Site at the time the Asbestos Regulations were violated.

Kane's control of both the Site and the asbestos abatement activity at the Site is further reflected in the NTWP that Kane submitted to the Department on July 11, 2016 relating to the asbestos cleanup and decontamination work at the single family home located on the Site. PAN,

¶ 4; Mr. Heeley's Direct PFT, at p. 5, ¶ 1; Mr. Levins' Direct PFT, at p. 4, ¶ 6; Exhibit 1 to Mr. Levins' Direct PFT. As discussed above, the NTWP listed: (1) Kane as the Site's owner and Demolition Contractor; (2) Mr. Morgan as Kane's Asbestos Abatement Project Designer for the Site; and (3) New England Asbestos Abatement, LCC as Kane's Asbestos Abatement Contractor for the Site. Exhibit 1 to Mr. Levins' Direct PFT (Sections A and B, pp. 1-2). The NTWP was signed and certified by Mr. Kane, on behalf of Kane. In signing the NTWP, Mr. Kane certified all of the NTWP's contents, including the statements that "Asbestos abatement activity [was] being conducted [at the Site] to clean up and decontaminate a facility or portion of a facility [at the Site]" and that "[p]revious asbestos abatement activities [at the Site] were not conducted in compliance with 310 CMR 7.15." Exhibit 1 to Mr. Levins' Direct PFT (Section B, at p. 2). Mr. Kane also certified that "[he] ha[d] personally examined the [contents of the NTWP] and [was] familiar with the information contained in [the] document and all attachments [to the document]" and "[was] aware that there [were] significant penalties for submitting false information [in the NTWP], including possible fines and imprisonment." Exhibit 1 to Mr. Levins' Direct PFT (Section C, at p. 3).

The June 27, 2016 Work Plan that Mr. Morgan prepared for the NTWP also evidences Kane's liability for the violations of the Asbestos Regulations as alleged in the Department's PAN because the Plan stated that it "[had been] submitted on behalf of [Kane]." Exhibit 2 to Mr. Levins' Direct PFT, at p. 2. Neither the NTWP nor the NTWP Work Plan made any mention of Mr. Edwardsen being an independent contractor at the Site performing asbestos abatement activities.

Mr. Kane's admissions to Mr. Heeley during the latter's inspection of the Site on July 19,

2016 also evidence Kane's responsibility for the violations of the Asbestos Regulations as the "owner/operator" of the Site. As discussed above, in response to Mr. Heeley's inquiry regarding whether he (Mr. Kane) was aware that the exterior of the home at the Site had been sided with asbestos transite shingles, Mr. Kane stated "that one of his employees[,] [Mr.] Edwardsen[,] had removed the asbestos transite shingles." Mr. Heeley's Direct PFT, at pp. 6-7, ¶ 4. Also, while neither admitting nor denying that he had instructed Mr. Edwardsen to remove the transite shingles, Mr. Kane admitted that Kane, as the Site's owner, was responsible for Mr. Edwardsen's actions. Id.

Even if Mr. Edwardsen was an independent contractor as claimed by Kane, the latter would still be liable for violations of the Asbestos Regulations because the removal of asbestos-containing material is an inherently dangerous activity. Vertentes v. Barletta Co., 392 Mass. 165, 168-69 (1984) (employer of independent contractor retained to perform inherently dangerous work is liable for the contractor's failure to take precautions in performing the work); Whalen v. Shivek, 326 Mass. 142, 150 (1950) (same); Harkins v. Colonial Floors, Inc., 8 Mass. L. Rep. 127 (Mass. Super. 1998), 1998 Mass. Super. LEXIS 390, at 17-18 ("the removal of asbestos containing material . . . squarely falls within [the] exception" for inherently dangerous work); In the Matter of Wood Mill, LLC and MassInnovation, LLC, OADR Docket Nos. 2010-039 & 039, Recommended Final Decision (March 20, 2012), 2012 MA ENV LEXIS 89, at 58, n.21 (same citing Harkins), adopted as Final Decision (March 30, 2012), 2012 MA ENV LEXIS 88. As discussed above, microscopic asbestos fibers can remain suspended in the air for a long period of time, and if inhaled, can cause Cancer. Given this serious public health threat, the public policy of the Commonwealth is that only duly authorized individuals with specialized knowledge in asbestos abatement work are permitted to perform such work. This public policy

is reflected in the Department's Asbestos Regulations, which "regulat[e] abatement, construction[,] and demolition projects that involve asbestos." 310 CMR 7.15. As discussed previously, the Asbestos Regulations require "the owner/operator of a facility or facility component that contains suspect ACM" to perform certain actions "prior to conducting any demolition or renovation activities at the facility or facility component." These actions include "employ[ing] or engag[ing] an asbestos inspector to thoroughly inspect the facility or facility component, or those parts thereof where the demolition or renovation will occur, to identify the presence, location and quantity of any ACM or suspect ACM and to prepare a written asbestos survey report." 310 CMR 7.15(4). Additionally, the asbestos inspector must be "[a] person certified by the Commonwealth pursuant to 453 CMR 6.07: Certification of Consultants who identifies, assesses the condition of, or collects pre-abatement samples of ACM." 310 CMR 7.15(1) (definitions).

It is undisputed that Kane did not employ a duly qualified asbestos inspector to perform the required asbestos inspection and asbestos survey report of the Site prior to commencing asbestos abatement work at the Site. Instead, Kane hired Mr. Edwardsen, a painter, who was not qualified by the Commonwealth to perform any asbestos inspection or asbestos abatement work. Also, Kane did not notify the Department and obtain its authorization prior to Mr. Edwardsen's commencement of the asbestos abatement work at the Site at least ten working days before the work began, in violation of 310 CMR 7.15(6)(a)-(6)(e), (6)(g).

Another factor in my finding that Kane is responsible for the violations of the Asbestos Regulations as alleged by the Department in the PAN and that the violations were willful and not the result of error within the meaning of G.L. c. 21A, § 16 is that Kane's principal, Mr. Kane, is a highly experienced home builder and real estate developer. Mr. Kane has been in the home

building and real estate development field for 40 years and has built 1,500 homes in the Greater Boston area during this period. https://www.kanebuilthomes.com/about. He "has created . . . neighborhoods of starter homes to luxury, custom homes." Id. His real estate developments include a 60 luxury home subdivision in Sudbury, Massachusetts on the Babe Ruth Farm and "an 18 million dollar residential rehab in historic Beacon Hill, Boston, as well as a 120-unit conversion of Canal Place, a landmark, historic . . . mill" in Lowell, Massachusetts. Id.

At the Hearing, Mr. Kane admitted that he has extensive experience in handling ACM in renovation and demolition projects and has a standard operating procedure to have an expert check for environmental issues, including asbestos, prior to undertaking any demolition work at a real property. Digital Recording of Hearing, at 58:00. Mr. Kane, however, did not follow that procedure with respect to the demolition and renovation project at the Site. Undisputedly, Mr. Kane knowingly hired Mr. Edwardsen, a painter and an unlicensed and untrained worker in the asbestos abatement field, to demolish the single family home at the Site. Moreover, prior to Kane's purchase of the Site in April 2016[36] and Mr. Edwardsen's commencement of the asbestos abatement work shortly thereafter, Mr. Kane knew or should have known that the Site contained ACM or material suspected of containing ACM because the Town of Maynard's Assessors Office maintained an "Unofficial Property Report Card" for the Site containing information about the Site. Mr. Heeley's Direct PFT, at p. 11, ¶ 16; Exhibit 5 attached to Mr. Heeley's Direct PFT. This information included that the exterior siding of the single family home at the Site consisted of shingles containing asbestos. Id. This information appeared in the sections of the "Unofficial Property Report Card" entitled "Building Description" and "Narrative

[36] Records at the Middlesex South Registry of Deeds indicate that Kane purchased the Site from David P. Arsenault on April 15, 2016 for $135,000.00. See Deed recorded in Book 67099, page 584 of Middlesex South Registry of Deeds on April 15, 2016.

Description of Property." Id. The "Building Description" section noted that the home's "Siding" was "ASBESTOS-SHNG." Id. "SHNG" is an abbreviation for shingles. Id. The "Narrative Description of Property" section noted that the Site "contain[ed] . . . a(n) conventional style building built about 1880, having ASBESTOS-SHNG . . . ." Id.

Although no evidence was presented at the Hearing regarding whether Kane performed a home inspection of the single family home at the Site prior to purchasing the property, a proper home inspection of the home would have also likely revealed that the home contained ACM or material suspected of being ACM. It is generally accepted in the residential real estate industry that the purchase of residential real property is often subject to a satisfactory home inspection of the property performed at the prospective buyer's expense unless the buyer waives the inspection. American Society of Home Inspectors, https://www.homeinspector.org/FAQs-on-Inspection. "A home inspection is [intended to provide a prospective buyer with] an objective visual examination of the physical structure and systems of a house, from the roof to the foundation." Id. "The standard home inspector's report will cover the condition of the home's heating system; central air conditioning system (temperature permitting); interior plumbing and electrical systems; the roof, attic and visible insulation; walls, ceilings, floors, windows and doors; the foundation, basement and structural components." Id. In short, a home inspection is intended "[t]o minimize unpleasant surprises and unexpected difficulties" for the prospective buyer by assisting the buyer "to learn as much as [buyer] can about the [property] . . . before [purchasing] it." Id.

In sum, Kane committed the violations of the Asbestos Regulations as alleged in the Department's PAN and the violations were willful and not the result of error within the meaning of G.L. c. 21A, § 16. As discussed in the next section below, a strong preponderance of the

evidence presented at the Hearing also demonstrated that the Department properly assessed the $67,250.00 PAN Penalty amount against Kane pursuant to G.L. c. 21A, § 16 and 310 CMR 5.25.

II. THE DEPARTMENT PROPERLY ASSESSED PENALTIES TOTALING $67,250.00 AGAINST KANE FOR ITS VIOLATIONS OF THE ASBESTOS REGULATIONS AS ALLEGED BY THE DEPARTMENT IN THE PAN

A. The 12 Penalty Assessment Factors of G.L. c. 21A, § 16 and 310 CMR 5.25

The Civil Administrative Penalties Act, G.L. c. 21A, § 16, and the Department's Administrative Penalty Regulations at 310 CMR 5.25 require the Department to consider the following 12 factors when assessing a civil administrative penalty against a party for environmental violations:

(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 Enterprises, Inc., 2016 MA ENV LEXIS 23, at 60-61. Although consideration 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." Roofblok, 17 DEPR at 378. As a result, the Act 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, 17 DEPR at 380; Iron Horse Enterprises, Inc., 2016 MA ENV LEXIS 23, at 59-60.

"While the Department retains the discretion as to the weight [to be] given to [each of] the [12] factors, the penalty amount must [nevertheless] reflect the facts of each case." Id. 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. 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.

B. The Department's Penalty Guidelines for Calculating Civil Administrative Penalties and "PenCalc" Tool

To assist Department personnel in making civil administrative penalty determinations in accordance with the requirements of G.L. c. 21A, § 16 and 310 CMR 5.25, the Department has developed two tools: (1) a guidance document entitled "Enforcement Response Guidance" ("the Penalty Guidelines" or "ERG") and (2) a computer program entitled "PenCalc." Mr. Levins' Direct PFT, ¶¶ 17-20; Exhibits 7 and 8 attached to Mr. Levins' Direct PFT. The Penalty Guidelines describe in general how Department personnel should calculate a civil administrative penalty using the 12 factors set forth in G.L. c. 21A, § 16 and 310 CMR 5.25, and "[are] intended to enhance consistency, predictability, deterrence value[,] and efficiency of the [Department's] enforcement process." Mr. Levins' Direct PFT, ¶ 17; Exhibit 7 to Mr. Levins' PFT, at p. 1. The PenCalc computer program is designed to provide Department personnel with a standardized format for demonstrating and documenting their consideration of each of the required 12 factors in calculating the civil administrative penalty for each alleged environmental violation. Mr. Levins' PFT, ¶ 18. PenCalc produces a penalty calculation worksheet ("Worksheet") that memorializes the determinations that Department personnel have made in calculating the penalty for each alleged environmental violation. Id.; Exhibit 8 attached to Mr. Levins' Direct PFT. The Worksheet is provided to the alleged violator at the same time when the Department issues the PAN. Id. A copy of the Worksheet that the Department provided to

Kane when the Department issued the PAN to Kane ("the Kane Worksheet") is attached to Mr. Levins' Direct PFT as Exhibit 8.

C. Mr. Levins' Persuasive Testimony Supporting the Department's Assessment of the $67,250.00 PAN Penalty Amount Against Kane

As set forth in the PAN and Mr. Levins' testimony, the $67,250.00 penalty amount against Kane is the sum of six penalty amounts for Kane's violations of specific provisions of the Asbestos Regulations:

Penalty Amount 1:	$16,312.50 for violating 310 CMR 7.15(3)(a)2 by "caus[ing], suffer[ing], allow[ing] and/or permit[ing] asbestos abatement activities (including the handling and storage/disposal of asbestos-containing material or asbestos-containing waste material) at the Site in a manner that caused or contributed to a condition of air pollution";[37]
Penalty Amount 2:	$1,000.00 for violating 310 CMR 7.15(4) by "fail[ing] to employ or engage a Massachusetts Department of Labor Standards licensed asbestos inspector to thoroughly inspect the Site for the presence, location and quantity of asbestos-containing materials and suspect asbestos-containing materials prior to commencing renovation at the Site";[38]
Penalty Amount 3:	$16,312.50 for violating 310 CMR 7.15(6) by "fail[ing] to notify MassDEP of an asbestos abatement activity involving asbestos-containing materials (asbestos-containing insulation and asbestos-containing transite exterior siding shingles) at the Site";[39]
Penalty Amount 4:	$16,312.50 for violating 310 CMR 7.15(15)(b) by "fail[ing] to wet, containerize[,] and seal asbestos-containing waste materials (asbestos-containing insulation and asbestos-containing transite exterior siding shingles) in leak-tight containers at the Site";[40]

[37] PAN, ¶¶ 10A, 11A; Mr. Levins' Direct PFT, ¶¶ 21-46.

[38] PAN, ¶¶ 10B, 11B; Mr. Levins' Direct PFT, ¶¶ 75-88.

[39] PAN, ¶¶ 10C, 11C; Mr. Levins' Direct PFT, ¶¶ 47-60.

[40] PAN, ¶¶ 10D, 11D; Mr. Levins' Direct PFT, ¶¶ 61-74.

Penalty Amount 5:	$1,000.00 for violating 310 CMR 7.15(15)(c) and 310 CMR 7.15(d) by "fail[ing] to label asbestos-containing waste material (asbestos-containing insulation and asbestos-containing transite exterior siding shingles) at the Site";[41] and
Penalty Amount 6:	$16,312.50 for violating 310 CMR 7.15(17)(b) by "stor[ing] asbestos-containing waste materials (asbestos-containing insulation and asbestos-containing transite exterior siding shingles) at a location (the Site) that is not a refuse transfer station permitted to manage asbestos waste in accordance with 310 CMR 19.061."[42]

At the Hearing, Mr. Levins testified that he was responsible for developing and finalizing the Department's $67,250.00 PAN against Kane, and did so after obtaining the input of: (1) Mr. Heeley, who, as discussed above, conducted a very thorough investigation of Kane's violations of the Asbestos Regulations; (2) the RERC of the Department's Central Regional Office; (3) the Department's CSC; and (4) the Regional Director of the Department's Central Regional Office, who approved and signed the final PAN. Mr. Levins' Direct PFT, ¶¶ 12-14. Mr. Levins provided very detailed and persuasive testimony (30 pages of Direct PFT with more than 100 numbered paragraphs) explaining how he, on behalf of the Department, assessed ***each*** of the six penalty amounts set forth above comprising the total $67,250.00 penalty amount in accordance with the 12 factors of G.L. c. 21A, § 16 and 310 CMR 5.25 based on the facts of the case and utilizing the Department's Penalty Guidelines and PenCalc tool. Mr. Levins' Direct PFT, ¶¶ 12-119; Mr. Levins' Rebuttal PFT, ¶ 5. Based on my extensive review of Mr. Levins' testimony and Kane's failure to effectively refute Mr. Levins' testimony,[43] I find that the Department

[41] PAN, ¶¶ 10E, 11E; Mr. Levins' Direct PFT, ¶¶ 103-116.

[42] PAN, ¶¶ 10F, 11F; Mr. Levins' Direct PFT, ¶¶ 89-102.

[43] Kane's failure to effectively refute Mr. Levins' testimony is discussed in detail below, at pp. 49-53.

properly assessed all of the penalty amounts comprising the total $67,250.00 penalty amount pursuant to G.L. c. 21A, § 16 and 310 CMR 5.25. Mr. Levins' testimony on how he assessed Penalty Amount 1: $16,312.50 against Kane for having violated 310 CMR 7.15(3)(a)2 ("caus[ing], suffer[ing], allow[ing] and/or permit[ing] asbestos abatement activities (including the handling and storage/disposal of asbestos-containing material or asbestos-containing waste material) at the Site in a manner that caused or contributed to a condition of air pollution"),[44] provides a good example of how thorough and proper under G.L. c. 21A, § 16 and 310 CMR 5.25 his assessments were for each of the six penalty amount comprising the total $67,250.00 penalty amount.

1. Mr. Levins' Proper Consideration of the 12 Factors in Assessing Penalty Amount 1

a. The Starting Base Penalty Amount for Kane's Violation of 310 CMR 7.15(3)(a)2

Mr. Levins testified that PenCalc requires Department personnel to select one of the pre-conditions for a civil administrative penalty under G.L. c. 21A, §16 and 310 CMR 5.10 "that must exist in order for MassDEP to assess a civil administrative penalty for a regulatory violation . . . ." Mr. Levins' Direct PFT, ¶ 21. In assessing Penalty Amount 1 for Kane's violation of 310 CMR 7.15(3)(a)2, Mr. Levins "selected 'willful' as the precondition for [Kane's] . . . violation [of this regulation], because [he] determined that the demolition/renovation activities (the removal of asbestos-containing insulation from heating pipes) that Kane caused, suffered, allowed and/or permitted, and which resulted in the regulatory violations observed at the Site, were intentional and were not the result of an error or accident." Id., ¶ 22. Mr. Levins' selection of the willful precondition along with his determination

[44] PAN, ¶¶ 10A, 11A; Mr. Levins' Direct PFT, ¶¶ 21-46.

supporting the selection were more than supported by a strong preponderance of the evidence presented at the Hearing as discussed above, at pp. 15-33.

Mr. Levins testified that after selecting 310 CMR 7.15(3)(a)2 as the regulatory citation, PenCalc "automatically entered the 'Base Penalty Amount' assigned to that citation" Mr. Levins' Direct PFT, ¶ 26. He explained that "[t]he Base Penalty Amounts are contained in [the Department's] database known as Citation Maintenance, from which PenCalc draws the information." Id. "The Base Penalty Amount is the starting dollar amount to which any upward or downward adjustments are made [to a penalty amount assessment], as appropriate, to determine the total administrative penalty [amount] for each violation." Id., ¶ 27. "The Base Penalty Amounts have been established by MassDEP to ensure that all penalties for violations of the same statutory or regulatory requirement start out at the same dollar amount and increase or decrease from that dollar amount depending upon the circumstances of the particular instance of violation, based on the applicability of the factors in M.G.L. c. 21A, §16 and. 310 CMR 5.25." Id.

Mr. Levins testified that "[t]he base penalty [amount] for [a violation of] 310 CMR 7.15(3)(a)2 is $8,700.00, which is shown in the fifth column of Line 1 on the [Kane] Worksheet." Id., ¶ 28. Mr. Levins testified that the Citation Maintenance database also sets forth $25,000.00 as the statutory maximum daily civil administrative penalty for a violation of 310 CMR 7.15(3)(a)2, which makes a violation of the Regulation "a Class I violation [and one of] . . . the most serious types of violations" of Massachusetts environmental statutory and

regulatory requirements. Id.

b. Mr. Levins' Proper Consideration of Penalty Factors 1 and 2 in Assessing Penalty Amount 1

Penalty Factors 1 and 2 as set forth in 310 CMR 5.25(1) and 5.25(2) and G.L. c. 21A, § 16 require the Department to consider the following in making a penalty assessment:

> (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; and
>
> (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.

Mr. Levins testified that Penalty Factors 1 and 2 are "gravity" based factors intended "to indicate the seriousness of the particular violation relative to other violations of the same statutory or regulatory requirement." Mr. Levins' Direct PFT, ¶ 29. He also explained that "[t]he [Penalty] Guidelines expressly prohibit MassDEP from using gravity-based adjustments to decrease the Base Penalty Amount." Id.

Mr. Levins testified that "[i]n determining the gravity of [Kane's] violation [of 310 CMR 7.15(3)(a)2], [he] considered [Penalty Factors 1 and 2]. Id. Specifically, he testified that "[he] considered the fact that Kane permitted dry, friable asbestos-containing materials to be removed from the basement of the residential building located at the Site, and then deposited and left in unmarked household trash bags that were torn and not sealed leak-tight on the ground outside the building at the Site." Id., ¶ 30. "[He] considered the fact that in doing so, Kane allowed these asbestos-containing materials to be directly exposed to the ambient air and that these actions caused or contributed to a condition of air pollution (release of asbestos fibers to the ambient air) and potentially exposed workers and persons in the residential neighborhood to a known carcinogen (asbestos fibers). As a result[,] [Mr. Levins] made a 50% upward gravity- based

adjustment [to the $8,700.00 base penalty amount,] which is reflected in the [Kane] Worksheet as '50%' in the sixth column of Line 1, under 'Gravity.'" Id. This 50% upward adjustment increased the $8,700.00 base penalty amount for Kane's violation of 310 CMR 7.15(3)(a)2 by $4,350.00 to a new base penalty amount of $13,050.00. Id., ¶ 39. As discussed below, at pp. 41-44, this new $13,050.00 base penalty amount increased to $16,312.50, the ultimate amount of Penalty Amount 1 for Kane's violation of 310 CMR 7.15(3)(a)2, as a result of a net 25% ($3,262.50) upward adjustment after Mr. Levins' consideration of the "Good Faith/Bad Faith" Penalty Factors 3, 4, and 5. Id.

c. Mr. Levins' Proper Consideration of Penalty Factors 3, 4, and 5 in Assessing Penalty Amount 1

Penalty Factors 3, 4, and 5 as set forth in 310 CMR 5.25(3), 5.25(4), and 5.25(5) and G.L. c. 21A, § 16 require the Department to consider the following in making a penalty assessment:

Penalty Factor 3:	Whether the person who would be assessed the Penalty took steps to prevent the failure(s) to comply that would be penalized (310 CMR 5.25(3));
Penalty Factor 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 (310 CMR 5.25(4)); and
Penalty Factor 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 (310 CMR 5.25(5)).

Mr. Levins testified that Penalty Factor 3, 4, and 5 are "Good Faith/Lack of Good Faith Adjustment" factors, which authorize the Department to make upward or downward adjustments to a base penalty amount based on the facts of the case. Mr. Levins' Direct PFT, ¶¶ 32-33. He testified that "[t]he [Penalty] Guidelines state that application of [the Good Faith/Bad Faith]

adjustments may result in a 0% to 50% downward or upward adjustment" and that "[t]hese adjustments are intended to evaluate a violator's actions, omissions, and conduct related to environmental compliance, but not the violator's 'good' or 'bad' personality." Mr. Levins' Direct PFT, ¶ 32. "In applying these adjustments, the [Penalty] Guidelines instruct MassDEP personnel to consider the following: [1] the degree of control the violator had over the events, and whether the violator took reasonable precautions against the events; [2] the foreseeability of the events, and whether the violator knew or should have known of the hazards associated with the events; [3] whether the violator knew of the legal requirement(s) violated (the [Penalty] Guidelines state that MassDEP personnel can adjust upward only for this consideration); [4] the amount of control the violator had over how quickly the violation was, or could have been, remedied; and [5] what the violator did, and how quickly, to remedy the violation." Id.

Mr. Levins testified that "[f]or the Good Faith/Lack of Good Faith Adjustments [as reflected in the] Penalty Factors [3, 4, and 5], . . . [he] considered that Kane failed to take reasonable precautions to prevent the violation [of 310 CMR 7.15(3)(a)2]." Mr. Levins' Direct PFT, ¶ 33. Specifically, he considered the following facts:

(1) "Kane is an experienced construction company and real estate developer[,] [and, as a result], Kane should have known about the presence of asbestos in a house of [the] age [of the house at the Site]";

(2) "the fact that the [house] at the Site ha[d] asbestos siding [was] indicated on the publicly available Town of Maynard general property data Record for the Site" (Exhibit 5 attached to Mr. Heeley's PFT);

(3) "Kane used an untrained painter[,] [Mr. Edwardsen] to conduct renovation operations involving asbestos-containing materials (heating system insulation)";

(4) Kane admitted to the Department that Mr. Edwardsen is a painter;

(5) "neither Mr. Edwardsen nor [his painting company,] Edwardsen Painting

Inc., are on th[e] list of approved [asbestos removal] contractors" maintained by the Commonwealth's DLS;

(6) "there was no evidence of any containment or wetting of [ACM] . . . or asbestos waste material at the Site found during Mr. Heeley's inspections" and that "Kane [had] failed to ensure that [Mr.] Edwardsen used any methods of wetting, dust suppression[,] or containment when removing asbestos containing materials from the Site"; and

(7) "Kane [admitted to Mr. Heeley] that [Kane] had instructed [Mr.] Edwardsen to remove the unmarked, torn, unsealed bags of asbestos insulation from the house [on the Site] and place them in the yard outside at the Site," and "that in doing so, Kane significantly increased the potential for exposure to asbestos fibers to an unprotected general public and posed a significant potential impact on public health, safety, welfare, and the environment."

Mr. Levins' Direct PFT, ¶ 33.

Mr. Levins testified that the facts set forth above led him to "conclude[e] that there was a lack of good faith by [Kane] that warranted a 50% upward adjustment to the base penalty" for a violation of 310 CMR 7.15(3)(a)2. Id. Mr. Levins, however, "considered that after the violation was called to its attention, Kane ceased conducting further demolition/renovation work [at the Site] involving asbestos containing materials, revised its previously submitted Non-Traditional Asbestos Abatement Work Practice Approval application (BWP AQ 36 form) and work plan, and agreed to retain the services of a licensed asbestos contractor to conduct the necessary asbestos cleanup and decontamination work at the Site." Id. "As a resul[t][,] [Mr. Levins] determined that a 25% downward adjustment was also appropriate for the violation of [310 CMR] 7.15(3)(a)2," and, accordingly, "the 8th column of Line 1 of the [Kane] Worksheet, '25%' reflects the net Good Faith/Lack of Good Faith adjustment made and appears under 'Good Faith' and 'Potential Public Health Impact' appears in the comment field for Line 1 on page 3." Id. As a result of the net 25% upward adjustment, the base penalty of $13,050.00 increased by

$3,262.50 to $16,312.50, the ultimate amount of Penalty Amount 1 for Kane's violation of 310 CMR 7.15(3)(a)2. Id., ¶ 39.

d. Mr. Levins' Proper Consideration of Penalty Factor 6 in Assessing Penalty Amount 1

Penalty Factor 6 as set forth in 310 CMR 5.25(6) and G.L. c. 21A, § 16 requires the Department to consider the following in making a penalty assessment:

> 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.

Mr. Levins testified that Penalty Factor 6 is a "'previous noncompliance' adjustment [factor, which] refers to previous violations over time by a given violator, including documented failures by the violator to comply with either the same or any other environmental regulations, laws or requirements." Mr. Levins' Direct PFT, ¶ 31. "The [Penalty] Guidelines state that the adjustment under [Penalty Factor 6] may result in a 0 to 50% upward adjustment [to the base penalty amount] only" because "no downward adjustments are allowed for this factor." Id. Mr. Levins testified that "[a]fter considering that Kane had no prior history of non-compliance with the Department, [he] determined that no upward adjustment was necessary [for the base penalty amount]" and that "[t]he seventh column of Line 1 of the Worksheet reflects a '0%' adjustment under 'Previous Noncompliance' and no comments appear in the comment field for Line 1 on page 3" of the Worksheet. Id.

e. Mr. Levins' Proper Consideration of Penalty Factor 7 in Assessing Penalty Amount 1

Penalty Factor 7 as set forth in 310 CMR 5.25(7) and G.L. c. 21A, § 16 requires the

Department to consider "[m]aking compliance less costly than the failure(s) to comply that would be penalized." Mr. Levins described Penalty Factor 7 as the "economic benefit" factor. Mr. Levins' Direct PFT, ¶ 43. "The [Penalty] Guidelines state that MassDEP should calculate an economic benefit number and add it to the gravity-based penalty whenever there is an indication that a violation resulted in an economic benefit to the violator in the form of delayed compliance costs, avoided compliance costs, or profits from unlawful activity." Id. "Use of the economic benefit adjustment factor ensures that compliance by the violator is less costly than its penalized cost for failures to comply, so that noncompliance is more costly than compliance." Id. "[This factor] is meant at a minimum to remove any economic benefits resulting from noncompliance." Id.

Mr. Levins testified that he did not make an upward adjustment for economic benefit under Penalty Factor 7 to the $16,312.50 penalty amount for Kane's violation of 310 CMR 7.15(3)(a)2 because he "determined that no economic benefit accrued to Kane as a result of [Kane's] violation of [the Regulation]." Mr. Levins' Direct PFT, ¶ 44. This is reflected "in column 16 of Line 1 of the [Kane] Worksheet, where '0%' appears under 'Economic Benefit,' and on page 3 of the Worksheet . . . under 'Economic Benefit 5.25(7)', [with] the comment . . . 'NONE.'" Id.

Mr. Levins' determination not to make an upward adjustment for economic benefit under Penalty Factor 7 to the $16,312.50 penalty amount for Kane's violation of 310 CMR 7.15(3)(a)2 was proper even though at the Hearing Kane contended that it made an $80,000.00 profit from its re-development of the Site after selling the two residential units it constructed at the Site for

"$400,000.00 a piece" or a total of $800,000.00 for both units. Mr. Kane's Direct PFT, ¶¶ 15-17; Digital Recording of Hearing at 1:10; Kane's Closing Brief, at pp. 7-8; See below, at pp. 49-53. It is well settled that "[a] [civil administrative] penalty that . . . is in the lower portion of the statutory range [permitted for the penalty] easily satisfies [the reasonableness] . . . test." Associated Building Wreckers, Inc., supra, 11 DEPR at 177. Here, a zero dollar penalty amount assessment for any economic benefit Kane obtained from its violation of 310 CMR 7.15(3)(a)2 was well within the lower portion of the statutory range for economic benefit under Penalty Factor 7, and, as such, Mr. Levins' determination not make any upward adjustment for economic benefit under Penalty Factor 7 was reasonable. Moreover, as discussed below, at pp. 49-53, Kane contended at the Hearing that it made an $80,000.00 profit from its re-development of Site only in connection with its meritless claim that the total $67,250.00 penalty amount for its violations of the Asbestos Regulations was unreasonable when compared to Kane's alleged $80,000.00 profit margin. Kane's claim that it only made $80,000.00 in profit from its re-development of the Site was also dubious at best given Kane's failure to substantiate the claim.

f. Mr. Levins' Proper Consideration of Penalty Factors 8, 9, and 10 in Assessing Penalty Amount 1

Penalty Factors 8, 9, and 10 as set forth in 310 CMR 5.25(8), 5.25(9), and 5.25 (10), and G.L. c. 21A, § 16 require the Department to consider the following in making a penalty assessment:

Penalty Factor 8:	Deterring future noncompliance by the person who would be assessed the Penalty (310 CMR. 5.25(8));
Penalty Factor 9:	Deterring future noncompliance by persons other than the person who would be assessed the Penalty (310 CMR 5.25(9)); and
Penalty Factor 10:	The financial condition of the person who would be

assessed the Penalty (310 CMR 5.25(10)).

Mr. Levins testified that Penalty Factors 8, 9, and 10 are financial consideration factors which he considered in assessing Penalty Amount 1 against Kane for violating 310 CMR 7.15(3)(a)2. Mr. Levins' Direct PFT, ¶ 34. He testified that "t]he [Penalty] Guidelines state that the financial considerations may result in a 0% to 50% downward or upward adjustment" of the base penalty amount, and that "[t]hese adjustments consider the financial condition of the violator being assessed the civil administrative penalty." Id. "The [Penalty] Guidelines instruct MassDEP personnel to make downward adjustments to the penalty based on the inability of the violator to pay [the penalty], and upward adjustments to the penalty based on its potential to deter noncompliance by the violator in question and other potential violators." Id. "The [Penalty] Guidelines make clear that the burden to demonstrate inability to pay rests on the violator and that MassDEP personnel should not consider inability to pay as a factor in the penalty assessment determination process if the violator fails to provide sufficient written documentation." Id. Also, "MassDEP personnel may not use the inability to pay factor to justify a downward adjustment if the violator refuses to correct a serious violation, and "[t]he [Penalty] Guidelines further indicate that downward adjustments may be warranted if the deterrence effect of the penalty is less important than getting the violator into compliance or to carry out a remedial measure, and assessment of the full penalty will significantly impede the ability of the violator to comply or carry out a remedial measure." Id.

Mr. Levins testified that in Kane's case, "Kane did not claim an inability to pay a penalty, and did not submit any financial information to the Department for consideration," and as a result, [Mr. Levins] did not make a downward adjustment [to the base penalty amount] for inability to pay." Mr. Levins' Direct PFT, ¶ 35. This is reflected "[i]n the 9th column of Line 1

of the [Kane] Worksheet, [where] '0%' appears under 'Financial' and no comments appear in the comment field for Line 1 on page 3." Id. Mr. Levins "also considered what penalty amount would deter future non-compliance by Kane, and what penalty amount would deter future non-compliance by other persons, and the financial condition of Kane and determined no upward or downward adjustment was necessary to deter future non-compliance." Id.

g. Mr. Levins' Proper Consideration of Penalty Factor 11 in Assessing Penalty Amount 1

Penalty Factor 11 as set forth in 310 CMR 5.25(11) and G.L. c. 21A, § 16 requires the Department to consider "the public interest" in making a penalty assessment. Mr. Levins testified that under the [Penalty] Guidelines, the Public Interest factor "may result in a 0 - 50% downward or upward adjustment" and "that this factor will generally be a downward adjustment, that any upward adjustment must be carefully evaluated to avoid duplication of the other adjustment factors, and that, in some instances, there are compelling public concerns that would not be served by unduly penalizing a violator." Mr. Levins' Direct PFT, ¶ 36. The Penalty Guidelines set forth the following considerations for such "Public Interest" adjustments:

(1) Would removal of the economic benefit result in plant closings, bankruptcy, or other extreme financial burden, and is there an important public interest in allowing the firm to continue in business?

(2) Will limited violator funds be used to pay the penalty instead of cleaning up the site or correcting the violation effectively, thereby further jeopardizing the public?

(3) Would an enforcement action against a nonprofit public entity such as a municipality or a publicly-owned utility threaten to disrupt continued provision of essential services?

(4) Are alternative penalties an option?

(5) Is there a substantial risk of creating precedent that will have a significant

adverse effect upon the Department's ability to enforce the law or [c]lean up pollution if the case is taken to trial?

Id. Mr. Levins testified that he "determined not to make any public interest adjustment [to the penalty] for [Kane's] violation of 310 CMR 7.15 (3)(a)2 [because he] did not identify anything that would justify an increase or decrease [of the penalty] based on impact to the public." Id. This determination is reflected "in the 10th column of Line 1 of the [Kane] Worksheet, [where] '0%' appears under 'Public Interest' and no comments appear in the comment field for Line 1 on page 3." Id.

h. Mr. Levins' Proper Consideration of Penalty Factor 12 in Assessing Penalty Amount 1

The last penalty factor: Penalty Factor 12 as set forth in 310 CMR 5.25(11) and G.L. c. 21A, § 16 requires the Department to consider "[a]ny other factor(s) that reasonably may be considered in determining the amount of a Penalty, provided that [the] factor(s) shall be set forth in the Penalty Assessment Notice." The Penalty Guidelines state that "other factor(s)" falling within the purview of Penalty Factor 12 may result in a 0 - 50% downward or upward adjustment of the base penalty amount. Mr. Levins' Direct PFT, ¶ 38. Mr. Levins testified that in considering Penalty Factor 12, he did not make adjustments to the base penalty for Kane's violation of violation of 310 CMR 7.15(3)(a)2 "[b]ecause [he] was not aware of any other relevant factors warranting [such an] adjustment." Id. This is reflected in the 11th column of Line 1 of the Kane Worksheet, where "0%" appears under "Other." Id.

2. Kane's Lack of Credible Evidence Refuting the Penalty Amount

Kane's failure to proffer any credible testimony at the Hearing to refute any of Mr. Levins' very detailed and persuasive testimony on the Department's assessment of the

$67,250.00 penalty amount also plays a major factor in my finding that the Department properly assessed the penalty amount pursuant to G.L. c. 21A, § 16 and 310 CMR 5.25.

At the Hearing, Kane did not provide any testimony specifically refuting Mr. Levins' testimony on each of the penalty amounts set forth above comprising the total $67,250.00 penalty amount. See Mr. Kane's Direct PFT, ¶¶ 15-17. Instead, Kane's sole contention was that the total $67,250.00 penalty amount was unreasonable because it constituted most of the $80,000.00 net profit that Kane purportedly earned from its re-development of the Site. Id; Kane's Closing Brief, at pp. 7-8. Specifically, Mr. Kane testified that "Kane . . . purchased [the Site, including the] single family home on [the Site] . . . for $135,000.00" and re-developed the property into two homes and "once the project was completed and [the two] homes were sold, [Kane] realized a net profit of just over $80.000.00 [from the project]." Mr. Kane's Direct PFT, ¶ 15; Kane's Closing Brief, at p. 7. He asserted that the $67,250.00 penalty amount "is most of the [$80,000.00] profit [that Kane purportedly] realized on the project," and, as such, "[does not] bear [a] reasonable relation to the value of the [Site]," which in Mr. Kane's view, "[t]he [Department] should have taken this into account as a mitigating favor in [Kane's] favor and reduced the [$67,250.00 PAN] penalty [accordingly]." Mr. Kane's Direct PFT, ¶¶ 16-18; Kane's Closing Brief, at pp. 7-8. In making these claims, Mr. Kane contended that a reasonable penalty amount would have been $16,000.00 or 20% of the $80,000.00 profit that Kane purportedly earned from re-developing the Site because "$16,000.00 [] is significant but reasonable in light of the size and scope of this project." Kane's Closing Brief, at p. 8. He asserted that the $16,000.00 figure "is [also] consistent with . . . the public interest [of] encouraging the creation of reasonably new, affordable housing out of older, asbestos containing dwellings." Id. In doing so, he lauded Kane's efforts in redeveloping the Site, contending that Kane "took an old

abandoned home (containing asbestos) and added to the value of the Town [of Maynard] by erecting two affordable homes at the Site." Id.

Mr. Kane's testimony on the penalty assessment issue is not persuasive for a number of reasons.

First, Mr. Kane exhibited "a bit of chutzpah" by more than intimating that Kane did the residents of Maynard a favor by demolishing the existing home at the Site containing asbestos material and replacing it with two new homes, which Mr. Kane claims constituted affordable housing for Maynard residents. Compare, Evans v. Lorillard Tobacco Co., 465 Mass. 411, 442 (2013) (defendant cigarette manufacturer exhibited "a bit of chutzpah" by claiming "that it was obvious to the general public by 1960 [when plaintiff's decedent began smoking cigarettes] that cigarettes were addictive and caused cancer when, in 1994, during sworn testimony before a congressional subcommittee, [defendant's] chairman and chief executive officer, declared that he did not believe that cigarette smoking was addictive or caused cancer"). The facts of this case, however, demonstrate that Kane did not act with the best interests of Maynard residents in mind when Kane, a highly experienced home builder and real estate developer, initially attempted to re-develop the Site on the cheap by employing Mr. Edwardsen, a person Kane knew was not authorized to perform any asbestos abatement work, to demolish the existing home that Kane knew or should have known contained asbestos. Moreover, the consequences of Kane's serious violations of the Asbestos Regulations as set forth in the PAN in attempting to re-develop the Site on the cheap will likely carry on for decades as a result of asbestos fibers having been exposed to the ambient air at the Site by Kane's re-development activities. Simply stated, a downward adjustment of the Department's $67,250.00 penalty assessment Kane pursuant to the Public Interest Factor (Penalty Factor 11) as set forth in 310 CMR 5.25(11) and G.L. c. 21A,

§ 16 is not warranted by the facts of this case.

A downward adjustment of the penalty is also not warranted pursuant to Penalty Factor 10 as set forth in 310 CMR 5.25(10) and G.L. c. 21A, § 16, which requires the Department to consider "[t]he financial condition of the person who would be assessed [a] Penalty" because Penalty Factor 10 is not intended to mitigate a penalty amount based on the amount of profit the environmental violator earned or did not earn from pursuing the activity that caused the environmental violation. Mr. Levins' Rebuttal PFT, ¶ 5. Instead, Penalty Factor 10 requires the Department to consider the party's overall ability to pay the penalty. As Mr. Levins' testimony made clear at the Hearing, the Department properly considered Kane's financial condition in assessing the $67,250.00 penalty amount against Kane. Id. Mr. Levins testified that prior to the Department's issuance of the PAN, Mr. Levins conducted an enforcement conference with Mr. Kane at which "[Mr. Levins] offered [Mr. Kane] financial forms [for Kane to complete that] the Department uses to evaluate [financial] inability to pay a penalty claims" by environmental violators, and, that in response, "[Mr. Kane] declined those forms and [did] not [thereafter] provid[e] the Department with any documentation to show [Kane's financial inability] to pay the [$67,250.00] penalty or show its financial condition." Id. Mr. Levins testified that "[t]ypical documentation submitted to the Department for consideration relative to a [party's] financial condition are financial statements, [income] tax returns, and supporting documentation," which Kane did not supply to the Department. Id.

Lastly, it was also appropriate for the Department not to consider under Penalty Factor 12 Kane's claim that it only made an $80,000.00 profit from its re-development of the Site. As discussed above, Penalty Factor 12 as set forth in 310 CMR 5.25(12) and G.L. c. 21A, § 16 requires the Department to consider "[a]ny other factor(s) ***that reasonably may be considered*** in

determining the amount of a Penalty . . . ." (emphasis supplied). Here, it would have been unreasonable for the Department to have considered Kane's claim that it only made an $80,000.00 profit from its re-development of the Site because the claim is suspect for several reasons. First, Kane failed to provide the Department with any documentation supporting the claim, including a profit and loss statement certified by Kane and/or a duly qualified financial expert under oath setting forth the revenues, costs, and expenses that Kane incurred in re-developing the Site. Kane could have provided that documentation to the Department following Mr. Levins' Enforcement Conference with Mr. Kane, but chose not to. Kane's claim is also suspect because at the Hearing, Mr. Kane testified on cross-examination that Kane sold the two residential units it constructed at the Site for "$400,000.00 a piece" or a total of $800,000.00 for both units. Digital Recording of Hearing at 1:10. The total $800,000.00 amount is not meager, but considerable. Indeed, the amount is almost 12 times more than the amount of the $67,250.00 penalty that the Department assessed against Kane for his violations of the Asbestos Regulations, and, as such, is further evidence of the reasonableness of the $67,250.00 penalty amount.

CONCLUSION

Based on the foregoing, I recommend that the Department's Commissioner issue a Final Decision affirming the Department's $67,250.00 PAN against Kane because a strong preponderance of evidence presented at the Hearing demonstrated that: (1) Kane violated the Department's Asbestos Regulations at 310 CMR 7.15 as alleged by the Department in the PAN; (2) Kane's violations were willful and not the result of error within the meaning of G.L. c. 21A, § 16; and (3) the Department properly assessed the $67,250.00 PAN Penalty amount against

Kane pursuant to G.L. c. 21A, § 16 and 310 CMR 5.25.

Date: 12/18/18

Salvatore M. Giorlandino
Chief Presiding Officer

NOTICE-RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Chief Presiding Officer. It has been transmitted to the Commissioner for his 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 G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain notice to that effect. Once the Final Decision is issued "a party may file a motion for reconsideration setting forth specifically the grounds relied on to sustain the motion" if "a finding of fact or ruling of law on which a final decision is based is clearly erroneous." 310 CMR 1.01(14)(d). "Where the motion repeats matters adequately considered in the final decision, renews claims or arguments that were previously raised, considered and denied, or where it attempts to raise new claims or arguments, it may be summarily denied. . . . The filing of a motion for reconsideration is not required to exhaust administrative remedies." Id.

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

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