COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS

DEPARTMENT OF ENVIRONMENTAL PROTECTION

100 CAMBRIDGE STREET, BOSTON, MA 02114 617-292-5500

THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

January 8, 2024

In the Matter of King's Grant Water Company, Inc.	**OADR Docket Number: 2020-023 Enf. Document No. 00009566 Attleboro, MA**
Consolidated with	
In the Matter of King's Grant Water Company, Inc.	**OADR Docket Number: 2020-026 Enf. Document No. 00009876 Enf. Document No. 00009877 Attleboro, MA**
Consolidated with	
In the Matter of King's Grant Water Company, Inc.	**OADR Docket Number: 2020-035 Enf. Document No. 00010061 Enf. Document No. 00010062 Attleboro, MA**
Consolidated with	
In the Matter of King's Grant Water Company, Inc.	**OADR Docket Number: 2020-038 Enf. Document No. 00010085 Enf. Document No. 00010086 Attleboro, MA**

RECOMMENDED FINAL DECISION

These four consolidated appeals arise out of the issuance by the Massachusetts Department of Environmental Protection ("the Department") of four Notices of Intent to Assess a Civil Administrative Penalty, ("Penalty Assessment Notices" or "PANs") in the total amount of $18,250

against King's Grant Water Company, Inc. ("Petitioner"), for alleged violations of the Massachusetts Drinking Water Regulations, 310 CMR 22.00. The Petitioner claims that it did not commit the alleged violations, that the penalties are unwarranted and excessive, and that it has a financial inability to pay the penalties.

I have reviewed the documents that the Petitioner and the Department submitted, including the Department's Basic Documents,[1] briefing of the parties on summary decision, affidavits, and post-summary decision filings. Based on my review, I recommended that the Department's Commissioner issue a Final Decision affirming the PANs in their entirety.

I. Procedural History.

A. OADR Docket Number 2020-023.

The Department issued the PAN in OADR Docket Number 2020-023 on June 19, 2020, in the amount of $5,750. Penalty Assessment Notice, p. 4 (produced with the Department's Basic Documents). On July 4, 2020, the Petitioner timely filed its appeal of the PAN. See Appeal Notice (2020-023), p. 1. A pre-hearing conference was held on February 16, 2021, and a pre-hearing report was issued on February 25, 2021. Following the pre-hearing conference, the Department was allowed to add a rebuttal witness on the issue of inability to pay.

The Department filed a motion for summary decision on all issues for adjudication in the appeal on April 9, 2021. The Petitioner filed an opposition on April 16, 2021. I issued a decision on the motion for summary decision on June 29, 2023, finding that there was no genuine issue of

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

material fact on the issue of the Petitioner's liability for the PAN but that there remained an issue of material fact on whether the Petitioner had an inability to pay the penalty.

Of note, one of the witnesses who submitted an affidavit in support of the summary decision motion was Karen Cadier. On March 12, 2021, the Department sent an E-mail to OADR informing of the following incident:

> Department counsel received a call from Ms. Karen Cadier today. Ms. Cadier is a customer of the Petitioner. Ms. Cadier provided the Department with an affidavit describing the water loss at her residence on June 18, 2020. Ms. Cadier informed Department counsel that she called the Petitioner today to inquire about her water meter placement. Mr. James Brady, Petitioner's representative answered her call. Ms. Cadier told Department counsel that when she inquired with Mr. Brady about repositioning her water meter, Mr. Brady raised his voice and said: "You are suing me and now you want a favor!" and then hung up. Ms. Cadier was upset by this incident. It occurred after Mr. Brady was given her name as a witness in this proceeding.
>
> Department counsel would like to discuss this incident with the Presiding Officer and the Petitioner at a time that is convenient….

In response to this E-mail, the former Presiding Officer scheduled a conference call for Monday, March 15, 2021, to discuss this incident. No further encounters with this witness were reported.

B. OADR Docket Number 2020-026.

The Department issued the PAN in OADR Docket Number 2020-026 on July 29, 2020,[2] in the amount of $3,310. Penalty Assessment Notice, p. 4 (produced with the Department's Basic Documents). On August 14, 2020, the Petitioner timely filed its appeal of the PAN. See Appeal Notice (2020-026), p. 3. A pre-hearing conference was held on February 16, 2021, and a pre-hearing

[2] That same day, the Department also issued a Unilateral Administrative Order ("UAO") requiring the Petitioner to submit a coliform sampling plan, collect coliform samples, submit chemical addition reports, and submit an annual statistical report. That UAO is not at issue in this Matter.

report was issued on February 25, 2021. Following the pre-hearing conference, the Department was allowed to add a rebuttal witness on the issue of inability to pay.

The Department filed a motion for summary decision on all issues for adjudication on April 9, 2021. The Petitioner filed an opposition on April 16, 2021. The Department filed a rebuttal on May 11, 2021. I issued a decision on the motion for summary decision on June 29, 2023, finding that there was no genuine issue of material fact on the issue of the Petitioner's liability for the PAN but that there remained an issue of material fact on whether the Petitioner had an inability to pay the penalty.

C. OADR Docket Number 2020-035.

The Department issued the PAN in OADR Docket Number 2020-035 on October 13, 2020, in the amount of $1,720. Penalty Assessment Notice, p. 5 (produced with the Department's Basic Documents). On November 3, 2020, the Petitioner timely filed its appeal of the PAN. See Appeal Notice (2020-035), p. 3. A pre-hearing conference was held on February 23, 2021, and a pre-hearing report was issued on March 2, 2021. Following the pre-hearing conference, the Department was allowed to add a rebuttal witness on the issue of inability to pay.

The Department filed a motion for summary decision on all issues for adjudication on May 13, 2021. The Petitioner filed an opposition on May 27, 2021. The Department filed a rebuttal on June 17, 2021. I issued a decision on the motion for summary decision on June 29, 2023, finding that there was no genuine issue of material fact on the issue of the Petitioner's liability for the PAN but that there remained an issue of material fact on whether the Petitioner had an inability to pay the penalty.

D. OADR Docket Number 2020-038.

The Department issued the PAN in OADR Docket Number 2020-038 on November 4, 2020, in the amount of $8,330. Penalty Assessment Notice, p. 5 (produced with the Department's Basic Documents). On November 25, 2020, the Petitioner timely filed its appeal notice. See Appeal Notice

(2020-038), p. 3. A pre-hearing conference was held on February 23, 2021, and a pre-hearing report was issued on March 2, 2021. Following the pre-hearing conference, the Department was allowed to add a rebuttal witness on the issue of inability to pay.

The Department filed a motion for summary decision on all issues for adjudication on May 27, 2021. The Petitioner filed an opposition on June 6, 2021. The Department filed a rebuttal on June 30, 2021. I issued a decision on the motion for summary decision on June 29, 2023, finding that there was no genuine issue of material fact on the issue of the Petitioner's liability for the PAN but that there remained an issue of material fact on whether the Petitioner had an inability to pay the penalty.

E. Consolidation of the Matters and Subsequent Motions.

On June 29, 2023, contemporaneously with the decisions on the summary decision motions as discussed above, I entered an order consolidating the four matters for an evidentiary adjudicatory hearing ("Hearing") on the Petitioner's claimed inability to pay and ordering the parties to submit a proposed schedule for the filing of sworn pre-filed testimony ("PFT") of the parties' respective witnesses who would testify at the Hearing in support of the Parties' respective positions on the Petitioner's claim. On July 24, 2023, in response to that order, the parties proposed a schedule where the Petitioner would file supplemental PFT on the issue of its ability to pay by October 30, 2023, and the Department would file any rebuttal PFT by November 17, 2023. I adopted that schedule in an order dated July 24, 2023, and ordered that the Hearing would be held on December 12, 2023.

On October 30, 2023, the Petitioner submitted to OADR Income Statements for 2019 and 2020, a statement that it contested the findings in the summary decision order for OADR Docket Number 2020-023 that the Petitioner did not contact the Attleboro Board of Health, a Massachusetts Form 355S (S Corporation Excise Tax Return) for 2019, and a Massachusetts Form 355 (Business/Manufacturing Corporation Excise Return) for 2020.

On November 17, 2023, the Department filed a Motion to Dismiss for Failure to Sustain a Case. The Department alleged that the Petitioner had not submitted any information in response to the July 24, 2023, scheduling order. On November 27, 2023, the Petitioner filed a response to that motion in which it stated that it had not served a copy of the October 30, 2023, filings on the Department. With that filing, the Petitioner submitted new, additional information, including a certification statement attesting under the pains and penalties of perjury to the accuracy of the financial information, a 2019 Internal Revenue Service Form 1120-S (U.S. Income Tax Return for an S Corporation), a 2020 IRS Form 1120-S, a 2021 IRS Form 1120-S, a 2022 IRS Form 1120-S, and Schedules K-1 for 2022. On November 29, 2023, I entered an order that the Petitioner's filings had raised an issue of fact on its ability to pay and ordered that the Hearing would go forward.

On December 4, 2023, the Department renewed its Motion to Dismiss for Failure to Sustain a Case, arguing that the Petitioner's late filings prejudiced the Department and that the Petitioner had, in any event, failed to provide an executed Internal Revenue Service Form 4506-T (Request for Transcript of Tax Return), which is necessary for the Department to independently verify the information provided in the Petitioner's filings. I entered an order on December 5, 2023, stating as follows:

> The Department's renewed motion to dismiss represents that the Department is "unable to adequately review the Petitioner's November 27 submittals, as required by the Comprehensive Policy for Assessing Financial Condition, and to then submit rebuttal pre-filed testimony." In light of this representation, precipitated by the Petitioner's failure to submit the required documentation to the Department timely, the adjudicatory hearing scheduled for December 12, 2023, is postponed until further notice. The Order of December 4, 2023, asking the Department to report on the location of the adjudicatory hearing, is therefore moot. The Petitioner is ordered to respond to the Department's renewed motion by December 12, 2023. The Petitioner must, as part of its opposition, explain why it did not submit an executed IRS Form 4506-T.

On December 12, 2023, the Petitioner filed with OADR and the Department an IRS Form 4506-T, although that form failed to check the box "attest[ing] that [the signatory] has read the attestation clause and upon so reading declares that he/she has the authority to sign the form 4506-T." Form 4506-T. In response to that filing, I issued the following order on December 14, 2023:

> The Petitioner has submitted additional information in response to the motion for directed decision. In light of all the information the Petitioner has produced, the Department has until **January 19, 2024**, to provide supplemental pre-filed testimony analyzing whether the Petitioner has demonstrated an inability to pay under Department policy based on the information presented. The Department may also file a memorandum in further support of its motion, not to exceed five pages. The Petitioner may file a rebuttal to the pre-filed testimony and memorandum (also not to exceed five pages) by **January 26, 2024**. After receiving and reviewing those filings, I will make a decision on the motion for directed decision.

(emphasis in original).

On December 15, 2023, the Department sent an E-mail to OADR stating as follows:

> In response to the Presiding Officer's email of December 14, the Department again renews its request for a ruling on *its Motion to Dismiss for Failure to Sustain a Case*. *The Presiding Officer's email referenced a motion for directed decision, but there is no such motion pending before OADR.* In June, the Presiding Officer issued decisions in the four consolidated matters allowing the Department's Motions for Summary Decision on all issues except the sole issue of the Petitioner's ability to pay the penalties. The Petitioner bears the burden of proving inability to pay. On November 17, the Department filed a *Motion to Dismiss for Failure to Sustain a Case* in this matter. That is the motion currently pending.
>
> The Petitioner, on December 12, finally submitted the IRS form 4506T the Department has been requesting for over two years, and well beyond timelines ordered by the Presiding Officer. Despite the Presiding Officer's most recent request, the Petitioner inexplicably has provided no explanation for his tardiness in submitting the form, has provided no opposition to the *Department's Motion to Dismiss For Failure to Sustain a Case* and still has not provided any pre-filed direct testimony on the issue of ability to pay. Accordingly, the Petitioner has still failed to sustain his burden in this matter or to oppose *the Department's Motion to Dismiss For Failure to Sustain a Case*.

> Please note that once IRS form 4506T is submitted to the IRS, the IRS can often take months to produce the relevant documentation. The Presiding Officer stated in his email of December 14, "In light of all the information the Petitioner has produced, the Department has until January 19, 2024, to provide supplemental pre-filed testimony analyzing whether the Petitioner has demonstrated an inability to pay under Department policy based on the information presented." As noted, the Petitioner has not filed additional testimony and has not met his burden of proof. Because the Department bears no burden for the sole remaining issue in this matter, *respectfully the Department will not be filing supplemental pre-filed testimony at this time. The Department thus renews its Motion to Dismiss for Failure to Sustain a Case under 310 CMR 1.01(11)(e).*

(emphasis added).

In response to this filing, I entered an order on December 15, 2023, stating, in part:

> As to the first point in the Department's response to my December 14 Order, that "there is no [motion for directed decision] pending before OADR", a motion for failure to sustain a case is akin to a motion for directed verdict under Mass. R. Civ. P. 50(a). Such a motion for failure to sustain a case is "also known as [a motion for] directed decision" in an administrative appeal before OADR. Matter of Valis, OADR Docket No. 2021-015, Recommended Final Decision, 2022 MA ENV LEXIS 23, *4 (Jul. 7, 2022), Adopted as Final Decision (Jul. 25, 2022), 2022 MA ENV LEXIS 22 (quoting Matter of Thomas Vacirca, Jr., OADR Docket No. WET-2016-017, Recommended Final Decision (April 11, 2017), 2017 MA ENV LEXIS 22, at 14-15, adopted as Final Decision, (April 18, 2017), 2017 MA ENV LEXIS 28). The Department erred in asserting that "there is no [motion for directed decision] pending before OADR."
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> With respect to the substance of its response to my December 14 Order, the Department indicated that it "will not be filing supplemental pre-filed testimony at this time." While the Department raises grounds in its response that might constitute good cause for my vacating that part of my December 14th Order requiring additional testimony from the Department, the Department nevertheless cannot unilaterally excuse itself from complying with that part of my December 14 Order. The long-established custom and practice for any party in an appeal before OADR, including the Department, desiring to be excused from complying with part or all a Presiding Officer's Order is to file a Motion with the Presiding Officer requesting that part or all a Presiding Officer's Order should be vacated for good cause set forth in the Motion. This is what the Department should have done here, but did not do, regarding its desire not to file additional pre-filed testimony ordered by my December 14 Order. However, to expedite matters, I will treat the Department's e-mail response of this date as a motion to dispense with the filing of pre-

> filed testimony. The Petitioner has until December 22, 2023, to file any opposition to the Department's motion.

On December 22, 2023, the Department filed a Clarification and Memorandum stating that it "did not intend for its email of December 15 to be construed as a motion to waive the submission of pre-filed testimony on the issue of ability to pay for all parties." Clarification and Memorandum, p. 2. Instead, "[b]ecause of the Petitioner's late and insufficient submissions, and the absence of additional pre-filed sworn testimony from the Petitioner in any form, there is nothing of substance for the Department to rebut." Id. at pp. 2-3.

Also on December 22, 2023, the Petitioner filed a reply to my December 15, 2023, order, stating that it did not know that it had to submit IRS Form 4506-T until November 19, 2023. It also alleged that the Petitioner is "being unfairly singled out for such a large penalty." Response to DEP's December 15, 2023, Response to OADR, p. 5.

II. The Parties' Witnesses.

The Department offers the pre-filed testimony of James McLaughlin, Charles Porteleki, Karen Cadier, and Holly Lee. James McLaughlin has worked with the Department since 2006 and as a full-time employee since 2009. Aff. McLaughlin (2020-023),[3] ¶ 1 (Apr. 8, 2021); Aff. McLaughlin (2020-026), ¶ 1 (Apr. 2, 2021); Aff. McLaughlin (2020-035), ¶ 1 (May 12, 2021); Aff. McLaughlin (2020-038), ¶ 1 (May 27, 2021). He has worked in the Drinking Water Program since 2006. Id. His responsibilities include reviewing permit applications, ensuring compliance with the Drinking Water Regulations, conducting sanitary inspections, and responding to complaints. Id. I find him qualified "by knowledge, skill, experience, training, or education" to render expert testimony in this matter. See Matter of Jon L. Bryan, 2005 MA ENV LEXIS 50, *9 (July 25, 2005); Mass. Guide Evid. 702.

[3] The summary decision motions were filed and resolved prior to the consolidation of the four matters. Accordingly, the documents filed with those motions are identified by the case number in which they were filed.

Holly Lee is a Senior Financial Analyst with the Department and offers testimony about what documentation is necessary to demonstrate an inability to pay a penalty. Aff. Lee (2020-023) (May 18, 2021); Aff. Lee (2020-026) (May 11, 2021); Aff. Lee (2020-035) (June 16, 2021); Aff. Lee (2020-038) (June 18, 2021). The Department has employed him since September 2019, and he offers guidance to Department personnel whether an alleged violator has an inability to pay a penalty. Id. While he testifies that the Petitioner did not submit information sufficient to allow him to render an opinion on the Petitioner's inability to pay the penalty, id., I nevertheless find him qualified to offer expert testimony based on his knowledge, skill, and experience. Matter of Jon L. Bryan, 2005 MA ENV LEXIS 50 at *9.

Charles Porteleki and Karen Cadier, customers of the Petitioner, filed affidavits in support of the Department's motion in OADR Docket Number 2020-023. They testify that they were customers of the Petitioner and experienced the June 2020 water shortage at issue.

The Petitioner offers the pre-filed testimony of its President, John Brady. He provides only percipient testimony.

III. Facts.

All issues except for inability to pay were previously resolved on summary decision. The Petitioner's claimed inability to pay is resolved on the Department's Motion to Dismiss for Failure to Sustain a Case. The facts are therefore presented in the light most favorable to the Petitioner.

A. Facts common to all matters.

The Petitioner is a for-profit corporation with principal offices at 839 Newport Avenue, South Attleboro, Massachusetts. Aff. McLaughlin (2020-023), ¶ 3. It is a Public Water System ("PWS") regulated under the Massachusetts Drinking Water Regulations, 310 CMR 22.00 ("Regulations"). It is

also a "Small Water System" as defined in 310 CMR 22.02.[4] Id. It has been in operation for several decades. "Rebuttal Aff. McLaughlin" (2020-026), ¶ 6 (May 11, 2021).

The Petitioner has two groundwater sources, ID # 4211001-01G (its backup well) ("Well 1") and ID # 4211001-02G (its primary well) ("Well 2"). Aff. McLaughlin (2020-035), ¶ 3. On June 18, 2020, Well 1 was not operational. Aff. McLaughlin (2020-023), ¶ 3.

B. OADR Docket Number 2020-023.

On June 18, 2020, at approximately 6 a.m., one of the Petitioner's customers informed it that there was a drop in that customer's water pressure. Petitioner's Opposition (2020-023), p. 1. Operators went to the site to assess the situation and called the North Attleboro Fire Department. Aff. Brady (2020-023), p. 3 (Apr. 15, 2021). The Petitioner discovered that there was a 12% decrease in amperage in one of its pumps. Id. at p. 1. As a result, the water pressure in the main tank had decreased to 25 psi. Id. at p. 10 (After Action Report). The backup pump was activated, but that proved to be insufficient to raise the water pressure. Id.

At 10:30 a.m. that same morning, the Department received a call from a customer of the Petitioner informing it that their water service was interrupted. Aff. McLaughlin (2020-023), ¶ 4. At 10:57 a.m., the Department received a second call about the interruption of service. Id. at ¶ 5. James McLaughlin, an Environmental Engineer with the Department, tried contacting John Brady, the Petitioner's president, at 11 a.m., on Mr. Brady's cell phone. Id. at ¶ 6. The call went to voicemail, although the voicemail box was full. Id. Mr. McLaughlin was able to speak to an operator for the Petitioner at approximately 1:15 p.m., who confirmed the outage and said that they did not know when the issue would be resolved. Id. at ¶ 8. The Department received additional calls from customers at 1:24 p.m. and 3:03 p.m. reporting low water pressure. Id. at ¶¶ 8, 11.

[4] A "Small Water System" is "a water system that serves no more than 3,300 persons." 310 CMR 22.02.

The Petitioner was able to restore the water pressure manually at 5 p.m. Aff. Brady (2020-023), p. 10. The electrical issue was not resolved until 8 p.m. that evening. Id. As a result of the events of June 18, 2020, the Department issued a PAN against the Petitioner for $5,750.00.

C. OADR Docket Number 2020-026.

As a regulated PWS, the Petitioner must have a coliform[5] sampling plan in place. Aff. McLaughlin (2020-026), ¶ 9. It is undisputed that at the time of the PAN, the Petitioner had not had a coliform sampling plan in place since at least 2013. Rebuttal Aff. McLaughlin (2020-026), ¶ 2 (May 11, 2021); Aff. McLaughlin (2020-026), ¶ 9.

As part of monitoring the presence of microbial contaminants, the Petitioner is required at minimum to collect routine samples of water at sites representative of the water through the distribution system, including a sample of raw, untreated water from the source. Aff. McLaughlin (2020-026), ¶ 12. Prior to the PAN, the Petitioner had only been taking samples from the distribution system. Id. at ¶ 13. It was not collecting raw water from the source, nor was it collecting samples after treatment but prior to it entering the distribution system. Id.; Aff. Brady Aff. (2020-026) (Apr. 16, 2021), p. 2.

Additionally, the Petitioner's water is treated with potassium hydroxide. Aff. McLaughlin (2020-026), ¶ 13; Aff. Brady (2020-026), p. 3. As such, the Petitioner is required to provide monthly reports documenting what chemicals were used to treat the water and the concentration of those chemicals in the water. Aff. McLaughlin (2020-026), ¶ 10. The Petitioner failed to submit chemical addition reports in March 2020, April 2020, May 2020, and June 2020. Id.; Aff. Brady (2020-026), p. 3.

[5] Coliform bacteria are microscopic organisms found in the digestive tracts of warm-blooded animals, including humans. The presence of coliform bacteria is indicative of contamination.

The Petitioner is also required to submit electronically an Annual Statistical Report documenting the operations of its system. Aff. McLaughlin (2020-026), ¶ 14. The Petitioner failed to file a report in 2019, alleging that the Department had populated the report with information that was incorrect and could not be edited on the user's end. Id.; Aff. Brady (2020-026), p. 3.

As a result of the foregoing events, the Department issued a PAN against the Petitioner for four violations, with penalties totaling $3,310.00, as follows:

Violation of 310 CMR 22.05(1)(a)3.	$1,000.00
Violation of 310 CMR 22.05(1)(a)	$860.00
Violation of 310 CMR 22.15(4)	$1,160.00
Violation of 310 CMR 22.15(5)	$290.00
Total	$3,310.00

The Petitioner has had additional encounters with the Department in the recent past. On February 28, 2013, the Department issued a Sanitary Survey report that included several notices of noncompliance ("NONs") for failure to submit a coliform sampling plan, failure to timely file chemical addition reports, and failure to submit its Annual Statistics Report. Rebuttal Aff. McLaughlin (2020-026), ¶¶ 2a, 5a, 6. Sanitary Surveys on April 8, 2014, and June 2, 2016, noted deficiencies for failure to submit a coliform sampling plan and failure to timely file chemical addition reports. Id. at ¶¶ 2b, 2c, 5b, 5c. A Sanitary Survey dated May 17, 2018, noted continued failure to submit a coliform sampling plan and failure to timely file chemical addition reports, but did not include dates for compliance because the Petitioner was working with the Department to come into compliance. Id. at ¶¶ 2d, 5d.

D. OADR Docket Number 2020-035.

The Petitioner's water source is treated with potassium hydroxide to control corrosion throughout the system. Aff. McLaughlin (2020-035), ¶ 6; Aff. Brady, p. 1 (2020-035) (May 27, 2021). In accordance with corrosion controls, the Department requires the Petitioner to maintain its water at a pH greater than or equal to 7.0. The Petitioner measures the pH of its water daily. Aff.

McLaughlin (2020-035), ¶ 5. At no time has the Department determined that meeting a pH level of 7.0 is not technically feasible for the Petitioner or is not necessary for the Petitioner's system to optimize corrosion control. Id. at ¶ 4; Rebuttal Aff. McLaughlin (2020-035), ¶ 2a (June 16, 2021). On two occasions (one in April 2020 and another in June 2020), the Petitioner reported a pH of 6.8. Id. at ¶ 5; Aff. Brady (2020-035), p. 4. On another 63 occasions from January 2020 through August 2020, the Petitioner reported a pH of 6.9. Aff. McLaughlin (2020-035), ¶ 5; Aff. Brady (2020-035), p. 4.

As part of its monitoring function, the Department also requires the Petitioner to test its water for the presence of lead and copper. Aff. McLaughlin (2020-035), ¶¶ 12-13. The Petitioner was required to submit results for testing in the first quarter of 2020. Id. The Petitioner did not do so. Id.; Aff. Brady (2020-035), p. 2.

When testing for lead and copper, the Department requires the Petitioner to collect water from 10 previously approved sources. Aff. McLaughlin (2020-035), ¶ 16. In the first quarter of 2020, the Petitioner only provided a sample from one approved source and from nine unapproved sources. Id.; Aff. Brady (2020-035), p. 3.

As a result of the foregoing events, the Department issued a PAN against the Petitioner assessing four penalties totaling $1,720.00, as follows:

Violation of 310 CMR 22.06B(3)(f)2.	$860.00
Violation of 310 CMR 22.06B(1)(h)	$860.00
Violation of 310 CMR 22.06B(7)(a)	$0.00
Violation of 310 CMR 22.06B(11)(a)1.	$0.00
Total	$1,720.00

E. OADR Docket Number 2020-038.

On February 11, 2020, James McLaughlin, on behalf of the Department, inspected the Petitioner's facility. Aff. McLaughlin (2020-038), ¶ 5. During that inspection, Mr. McLaughlin noticed that the water meter in the pump station (which is used to measure water flow from both wells) was not functioning. Id. Well 1's pump screen had previously broken, causing rocks to clog the

water meter's propellers. Aff. Brady (2020-038), p. 1 (June 9, 2021). The Petitioner had previously informed the Department of the malfunction.[6] Aff. McLaughlin (2020-038), ¶ 5. The water meter had been broken since at least May 2019. Id. at ¶ 5; Aff. Brady (2020-038), p. 1.

Prior to the inspection, the Petitioner informed the Department that Well 1 was not operational. Aff. McLaughlin (2020-038), ¶ 6. During the inspection, Mr. McLaughlin learned that the Petitioner had not yet brought it back into operation. Id. While Well 1 has a pump, that pump is too small to supply enough water to compensate in the event of Well 2 failing. Id.; Aff. Brady (2020-038), p. 2.

Lastly, the Petitioner treats its water with potassium hydroxide as a method of corrosion control. Aff. McLaughlin (2020-038), ¶ 8C; Aff. Brady (2020-038), p. 3. During the inspection, Mr. McLaughlin observed that the potassium hydroxide feed system lacked a call-out alarm that immediately would send an alarm to a Certified Operator. Aff. McLaughlin (2020-038), ¶ 7.

As a result of the foregoing events, the Department issued a PAN against the Petitioner assessing four penalties totaling $7,470.00, as follows:

Violation of 310 CMR 22.04(6)	$860.00
Violation of 310 CMR 22.21(3)(a)	$860.00
Violation of 310 CMR 22.04(14)	$5,750.00
Total	$7,470.00

For each of the four penalties, the Petitioner timely appealed the PANs to OADR.

F. Inability to pay.

In each of the four consolidated matters, the Petitioner alleges that it is unable to pay the penalties. However, the Department in each instance was unable to determine that the Petitioner had an inability to pay due to the Petitioner's failure to submit proper financial documentation supporting

[6] Mr. McLaughlin testifies that the Petitioner informed the Department of the malfunction first during the February 2020 inspection. The Petitioner testifies that it notified the Department that the well was not functional earlier than the inspection. Aff. Brady (2020-038), p. 1. For purposes of a summary decision motion, I take the facts in the light most favorable to the Petitioner, the non-movant. Matter of Town of Hopkinton, 2011 MA ENV LEXIS 88, *7 (Aug. 5, 2011).

its claim. Aff. Lee (2020-023), ¶¶ 4-6; Aff. Lee (2020-026), ¶¶ 4-6; Aff. Lee (2020-035), ¶¶ 4-6; Aff. Lee (2020-038), ¶¶ 4-6. As of the summary decisions, the Petitioner had provided nothing other than a recitation of its annual revenues for 2018 through 2020, which was insufficient for Mr. Lee to draw any conclusions. Aff. Lee (2020-023), ¶ 7; Aff Lee (2020-026), ¶ 7; Aff. Lee (2020-035), ¶ 7; Aff. Lee (2020-038), ¶ 7.

The Petitioner argued in its opposition to the summary decision motions that it is unable to pay the penalties assessed. Opposition (2020-023), pp. 2-3; Opposition (2020-026), p. 2; Aff. Brady (2020-035), pp. 4-5; Aff. Brady (2020-038), p. 5. In particular, it argued that the Department did not adequately consider the effect of the COVID-19 pandemic on its annual revenues. Aff. Brady (2020-023), p. 6; Aff. Brady (2020-026), p. 5; Aff. Brady (2020-035), p. 5; Aff. Brady (2020-038), p. 5. The Petitioner pointed to the April 6, 2021, orders by the Chairman of the Massachusetts Department of Public Utilities prohibiting PWSs from "shut[ing] off water service to any of their residential customers for failure to pay a bill or any portion of a bill" as the cause of the decrease in revenue. Aff. Brady (2020-023), pp. 11-12; Opposition (2020-026), p. 2; Aff. Brady (2020-035), pp. 4-5; Aff. Brady (2020-038), pp. 4-5. The Petitioner argued that the pandemic and this prohibition caused a 24% decline in revenue from 2019 to 2020. It stated that its revenue in 2018 was $62,397.59, its revenue in 2019 was $62,413.93, and its revenue in 2020 was $47,521.75.[7] Aff. Brady (2020-023), p. 3.

Since the summary decision motion, the Petitioner has provided additional financial information. On October 30, 2023, the Petitioner submitted “financial documents of Mass Tax returns for 2019 and 2020 for King’s Grant Water Co., Income statements for same for 2019, 2020, and additional information in response to Summary Decision….” 30 Oct. Filing, p. 1. That filing included

[7] It was not clear from the record whether the revenue numbers provided reflected gross revenue or net income.

spreadsheets purporting to be income statements for 2019 (id. at p. 2) and 2020 (id. at p. 3). Those documents indicated that the "income statements [were] based on tax returns." Id. at pp. 2-3. The Petitioner reported net losses of $5,307.78 and 10,932.63 in 2019 and 2020 respectively. Id. Both years listed "Salaries Expense" as $0.00. Id.

Starting on page 6 of the 30 Oct. Filing, the Petitioner provides Massachusetts Form 355S, the S Corporation Excise Return Form, for the year 2019. This is not a federal income tax return. It is signed by Mr. Brady under the pains and penalties of perjury, though it was filled out by hand and there is no indication that it was ever filed with the Commonwealth. 30 Oct. Filing, pp. 6-13. It is dated March 19, 2023. Id. at p. 6. The following two pages are Schedule A, a Balance Sheet. The balance sheet is blank but for the Petitioner's name and Federal Identification Number and an entry for "minimum excise" in the amount of $456. The Petitioner purports to own no inventory, no tangible assets, no cash, or assets of any kind. Id. at pp. 7-9. The Petitioner claims that it has no tangible or intangible property on Schedules B, C, and D. Id. at pp. 11. It had no dividends. Id. The Petitioner claimed gross income of $62,413.93. Id. at p. 12. It claimed no deductions. Id. The line for "Massachusetts taxable income" is blank. Id. The form merely lists total net operating loss of $5,307.08 without any indication on the form how that number was calculated. Id.

The remainder of the 30 Oct. Filing is the same Form 355S for 2020. It suffers from similar deficiencies. It is also signed by Mr. Brady under the pains and penalties of perjury, though it was also filled out by hand (and dated March 5, 2023, id. at p. 14) and there is no indication that it was ever filed with the Commonwealth. The Schedule A balance sheet is blank but for the Petitioner's name and Federal Identification Number and an entry for "minimum excise" in the amount of $456. Id. at pp. 15-17. The Petitioner again purports to own no inventory, no tangible assets, no cash, or assets of any kind. Id. It claims that it has no tangible or intangible property on Schedules B, C, and D. Id. at pp. 18-19. It had no dividends. Id. at p. 19. The Petitioner claimed gross income of

$47,521.75. Id. at p. 19. It claimed no deductions. Id. The line for "Massachusetts taxable income" is blank. Id. The form merely lists total net operating loss of $10,932.63 without any indication on the form how that number was calculated. Id.

On November 27, 2023, in response to the Department's Motion to Dismiss for Failure to Sustain a Case, the Petitioner submitted 2019, 2020, 2021, and 2022 IRS Forms 1120-S. Petitioner's November 27, 2023, 2019 and 2020 Filing, p. 1; Petitioner's November 27, 2023, 2021 and 2022 Filing, p. 1. These documents include certifications attesting to the accuracy of the returns under the pains and penalties of perjury. Petitioner's November 27, 2023, 2019 and 2020 Filing, p. 2; Petitioner's November 27, 2023, 2021 and 2022 Filing, p. 2. The 2019 return is signed under the pains and penalties of perjury and dated February 26, 2020. Petitioner's November 27, 2023, 2019 and 2020 Filing, p. 3. The return states that the Petitioner had gross receipts of $62,413.93 in 2019 and $67,721.01 in deductions, for an ordinary business loss of $5,307.08. Id. The balance sheet indicates that the Petitioner has $166,810 in buildings and other depreciable assets, $28,198 in loans owed to shareholders, and $289,460 in paid in capital. Id. at p. 7. There is -$239,191 in retained earnings. Id. There are no attachments explaining the line items for "other assets" and "other liabilities," even though the form requires those supplementary statements. Id. The entries on the balance sheet for the beginning of the tax year match the entries at the end of the tax year, although the total liabilities and shareholders' equity differs by approximately $1,400. Id.

The 2020 return, in contrast, is *not* signed under the pains and penalties of perjury. Id. at p. 9. The Petitioner claims that it had gross receipts of $47,521.75. Id. The Petitioner claims $58,454.38 in deductions for an ordinary business loss of $10,932.63. Id. The balance sheet for 2020 is identical to the 2019 balance sheet except that the amount of loans owed to shareholders increased by $1,000 to $29,198 and there is no entry in retained earnings. Id. at p. 13. There are no attachments explaining the line items for "other assets" and "other liabilities," even though the form requires those

supplementary statements. Id. The total liabilities and shareholders' equity entries are identical at the start and end of the year. Id. However, the individual entries on the liabilities and equity side of the balance sheet actually adds up to $340,418, not the $60,325 indicated. Id.

The 2021 return is signed under the pains and penalties of perjury and dated April 4, 2022. Petitioner's November 27, 2023, 2021 and 2022 Filing, p. 3. It claims gross income of $68,454.06. Id. Its ordinary business loss for the year was $1,688.68. Id. The balance sheet is identical to the 2020 balance sheet except that the loans from shareholders increased by $1,000 to $28,198, and the line items for retained earnings in the amount of -$239,191 are present. Id. at p. 7. There are no attachments explaining the line items for "other assets" and "other liabilities," even though the form requires those supplementary statements. Id. As with the 2019 balance sheet, the entries on the balance sheet for the beginning of the tax year match the entries at the end of the tax year, although the total liabilities and shareholders' equity differs by approximately $1,400. Id.

The 2022 return is signed under the pains and penalties of perjury and dated March 23, 2023. Id. at p. 9. The petitioner claims gross receipts of $62,219.50, and an ordinary business loss of $7,387.73. Id. The balance sheet is identical to the 2021 balance sheet in all respects, including the unexplained difference between the beginning and ending value of total liabilities and shareholders' equity. Id. As with all other years, there are no attachments explaining the line items for "other assets" and "other liabilities," even though the form requires those supplementary statements. Id.

IV. Issues.

A. OADR Docket Number 2020-023.

The former Presiding Officer conducted a Pre-Hearing Conference with the parties on February 16, 2021, and issued a Pre-Hearing Conference Report on February 25, 2021, following a conference with the parties. The former Presiding Officer identified the following issues for resolution in this appeal:

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

a. Was there a loss of water or drop in pressure to less than 20 psi, affecting 50% or more of consumers for a system serving less than 10,000 persons?

2. Whether the Department correctly assessed the penalties for each of the alleged violations?

B. OADR Docket Number 2020-026.

The former Presiding Officer conducted a Pre-Hearing Conference with the parties on February 16, 2021, and issued a Pre-Hearing Conference Report on February 25, 2021, following a conference with the parties. The former Presiding Officer identified the following issues for resolution in this appeal:

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

2. Whether the Department correctly assessed the penalties for each of the alleged violations?

C. OADR Docket Number 2020-035.

The former Presiding Officer conducted a Pre-Hearing Conference with the parties on February 23, 2021, and issued a Pre-Hearing Conference Report on March 2, 2021, following a conference with the parties. The former Presiding Officer identified the following issues for resolution in this appeal:

1. Whether the Petitioner is liable for the violation of 310 CMR 22.06B(3)(f)2.?

2. Whether the COVID-19 pandemic excuses Petitioner's failure to conduct monitoring for the presence of lead and copper including applicable water quality parameters in its community water system?

3. Whether the Department correctly assessed the penalties for each of the alleged violations?

D. OADR Docket Number 2020-038.

The former Presiding Officer conducted a Pre-Hearing Conference with the parties on February 23, 2021, and issued a Pre-Hearing Conference Report on March 2, 2021, following a conference with the parties. The former Presiding officer identified the following issues for resolution in this appeal:

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

2. Whether the Department correctly assessed the penalties for each of the alleged violations?

V. The Applicable Standards.

A. The standard for summary decision.

310 CMR 1.01(11)(f) states, in relevant part,

> Any party may move with or without supporting affidavits for a summary decision in the moving party's favor upon all or any of the issues that are the subject of the adjudicatory appeal…. The decision sought shall be made if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a final decision in its favor as a matter of law. A summary decision interlocutory in character may be made on any issue although there is a genuine controversy as to other issues. Summary decision, when appropriate, may be made against the moving party….
>
> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence in Massachusetts courts, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit….
>
> When a motion for summary decision is made and supported as provided in 310 CMR 1.01(11)(e), a party opposing the motion may not rest upon the mere allegations or denials of said party's pleading, but must respond, by affidavits or as otherwise provided in 310 CMR 1.01, setting forth specific facts showing that there is a genuine issue for hearing on the merits.

This rule is "designed to avoid needless [evidentiary] adjudicatory hearings" in administrative appeals. In the Matter of SEMASS P'ship, OADR Docket No. 2012-015, Recommended Final

Decision (June 18, 2013), 2013 MA ENV LEXIS 34 at *12, adopted by Final Decision (June 24, 2013), 2013 MA ENV LEXIS 37; In the Matter of Lowe's Home Centers, Inc., OADR Docket No. WET-2009-013, Recommended Final Decision (June 19, 2009), 16 DEPR 115, 116 (2009), adopted by Final Decision (June 30, 2009); Massachusetts Outdoor Advertising Council v. Outdoor Advertising Board, 9 Mass. App. Ct. 775, 785-86 (1980) ("administrative summary judgment procedures" are appropriate to resolve administrative appeals without an adjudicatory hearing "when the papers or pleadings filed [in the case]… conclusively show… that [a] hearing can serve no useful purpose…").

"'This standard mirrors the standard set forth in [Mass. R. Civ. P.] 56'… governing [summary judgment motions in] civil suits in Massachusetts trial courts." SEMASS P'ship, 2013 MA ENV LEXIS 34 at *14; Lowe's, 16 DEPR 116; In the Matter of Roland Couillard, OADR Docket No. WET-2008-035, Recommended Final Decision, 2009 MA ENV LEXIS 7, *4 (July 11, 2008), adopted by Final Decision (August 8, 2008), 2010 MA ENV LEXIS 33. Thus, "[a] party seeking a summary decision must demonstrate that there is no genuine issue of material fact and that the party is entitled to a final decision as a matter of law." SEMASS, 2013 MA ENV LEXIS 34 at *14-15. "If the moving party meets this burden, the opposing party 'may not rest upon the mere allegations or denials of [its] pleading, but must respond, by affidavits or as otherwise provided in 310 CMR 1.01, setting forth specific facts showing that there is a genuine issue for hearing on the merits.'" Id.; 310 CMR 1.01(11)(f); Lowe's, 16 DEPR 116; Matter of William and Helen Drohan, OADR Docket No. 1995-083, Final Decision, 1996 MA ENV LEXIS 67, *4 (March 1, 1996); cf. Mass. R. Civ. P. 56(e); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991) (summary judgment properly awarded to defendant); Cabot Corp. v. AVX Corp., 448 Mass. 629, 636-37 (2007) (same). In deciding a motion for summary decision, all reasonable inferences are drawn against the non-moving

party. Matter of Town of Hopkinton, 2011 MA ENV LEXIS 88, *7 (citing King v. City of Boston, 71 Mass. App. Ct. 460 (2008), quoting Blackie v. Maine, 75 F.3d 716, 721 (1st Cir. 1996)).

B. The standard for dismissal for failure to sustain a case.

Under 310 CMR 1.01(11)(e),

> Upon the petitioner's submission of prefiled testimony, or at the close of its live direct testimony if not prefiled, any opposing party may move for the dismissal of any or all of the petitioner's claims, on the ground that upon the facts or the law the petitioner has failed to sustain its case; or the Presiding Officer may, on the Presiding Officer's own initiative, order the petitioner to show cause why such a dismissal of claims should not issue.

As recent Final Decisions of the Department have stated:

> "Dismissal [of an appeal pursuant to 310 CMR 1.01(11)(e)] for failure to sustain a case, also known as a directed decision, is appropriate when a party's direct case - generally, the testimony and exhibits comprising its prefiled direct testimony - presents no evidence from a credible source in support of its position on the identified issues." In the Matter of Thomas Vacirca, Jr., OADR Docket No. WET-2016-017, Recommended Final Decision (April 11, 2017), 2017 MA ENV LEXIS 22, at 14-15, adopted as Final Decision, (April 18, 2017), 2017 MA ENV LEXIS 28. In essence, a directed decision should be entered against the petitioner in the appeal when the petitioner does not have a reasonable likelihood of prevailing on its claims in the appeal because the petitioner's evidentiary submissions are deficient as a matter of law. Id.

Matter of Valis, OADR Docket No. 2021-015, Recommended Final Decision, 2022 MA ENV LEXIS 23, *4 (Jul. 7, 2022), Adopted as Final Decision (Jul. 25, 2022), 2022 MA ENV LEXIS 22.

Directed decision is akin to a motion for directed verdict under Mass. R. Civ. P. 50(a). Accordingly, when assessing a motion for directed verdict, I review the evidence in the light most favorable to the non-movant. Enrich v. Windmere Corp., 416 Mass. 83, 84-85 (1993); see Poirier v. Plymouth, 374 Mass. 206, 212 (1978); Chase v. Roy, 363 Mass. 402, 404 (1973).

C. The Department's authority to issue 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. Comm'r of the Department of Environmental Protection, 466 Mass. 454, 459-66 (2013); Matter of Kane Built, Inc., OADR Docket No. 2017-037, Recommended Final Decision (December 18, 2018), 2017 MA ENV LEXIS 77, *13, adopted by Final Decision (January 17, 2019), 2019 MA ENV LEXIS 8. 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); Matter of Iron Horse Enterprises, Inc., OADR Docket No. 2014-022, Recommended Final Decision (May 2, 2016), 2016 MA ENV LEXIS 23, *32, adopted by Final Decision (May 5, 2016), 2016 MA ENV LEXIS 22; Kane Built, 2017 MA ENV LEXIS 77 at *13.

Generally, the Department "may assess a civil administrative penalty on a person who fails to comply with any provision of any regulation,… or of any law which the department has the authority or responsibility to enforce [if]… such noncompliance occurred after the department had given such person written notice of such noncompliance, and after reasonable time, as determined by the department and stated in said notice, had elapsed for coming into compliance." G.L. c. 21A, § 16; 310 CMR 5.10 to 5.12; Franklin Office Park, 466 Mass. at 461; Kane Built, 2017 MA ENV LEXIS 77 at *14. However, the Department "may assess such penalty without providing such written notice if such failure to comply:… was willful and not the result of error." G.L. c. 21A, § 16; 310 CMR 5.14; Franklin Office Park, 466 Mass. at 461; Kane Built, 2017 MA ENV LEXIS 77 at *14. "[T]he willfulness exception in G.L. c. 21A, § 16 requires that the violator have undertaken intentionally the act that caused the violation, and that the violator either knew or should have known at least the facts that made the act a violation of the law." Franklin Office Park, 466 Mass. at 465-66 (Department's

$18,225.00 civil administrative penalty assessment against property owner for asbestos violations affirmed because property owner's "agents knew or should have known that [roofing] shingles [that were removed from its property] could contain asbestos"); Kane Built, 2017 MA ENV LEXIS 77 at *27-56 (Department's $67,500.00 civil administrative penalty assessment against property owner for asbestos violations affirmed because the owner was a highly experienced home builder and real estate developer who had extensive knowledge and experience in the removal of asbestos containing materials and knowingly hired an contractor who was not qualified to remove those materials). "[T]here is no requirement," however, "that a violator either was aware of the applicable environmental laws or intended to violate those laws." Franklin Office Park, 466 Mass. at 466; Kane Built, 2017 MA ENV LEXIS 77 at *15.

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

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

> (1) The actual and potential impact on public health, safety and welfare, and the environment, of the failure(s) to comply that would be penalized;
>
> (2) The actual and potential damages suffered, and actual or potential costs incurred, by the Commonwealth, or by any other person, as a result of the failure(s) to comply that would be penalized;
>
> (3) Whether the person who would be assessed the Penalty took steps to prevent the failure(s) to comply that would be penalized;
>
> (4) Whether the person who would be assessed the Penalty took steps to promptly come into compliance after the occurrence of the failure(s) to comply that would be penalized;
>
> (5) Whether the Person who would be assessed the Penalty took steps to remedy and mitigate whatever harm might have been done as a result of the failure(s) to comply that would be penalized;

> (6) Whether the person being assessed the Penalty has previously failed to comply with any regulation, order, license, or approval issued or adopted by the Department, or any law which the Department has the authority or responsibility to enforce;
>
> (7) Making compliance less costly than the failure(s) to comply that would be penalized;
>
> (8) Deterring future noncompliance by the person who would be assessed the Penalty;
>
> (9) Deterring future noncompliance by persons other than the person who would be assessed the Penalty;
>
> (10) The financial condition of the person who would be assessed the Penalty;
>
> (11) The public interest; and
>
> (12) Any other factor(s) that reasonably may be considered in determining the amount of a Penalty, provided that said factor(s) shall be set forth in the Penalty Assessment Notice.

Iron Horse, 2016 MA ENV LEXIS 23 at *59-61; Kane Built, 2017 MA ENV LEXIS 77 at *57-59. Although consideration of each of the 12 factors set forth above is mandatory, neither the Civil Administrative Penalties Act, G.L. c. 21A, § 16, nor the Department's Administrative Penalty Regulations at 310 CMR 5.25 "defines 'consider' or 'considerations,' and neither requires any particular quantum or degree of consideration [by the Department]; nor does either the statute or the regulation[s] specify what the Department must review in considering any of the penalty factors." Matter of Roofblok Ltd., 2010 MA ENV LEXIS 185, *12, Final Decision (May 7, 2010); Kane Built, 2017 MA ENV LEXIS 77 at *59. Accordingly, the statute and the regulations "leave[] the weight to be given each factor to [the Department's] discretion," and, accordingly, "[t]he penalty assessment amount… is not a factual finding but the exercise of a discretionary grant of power" on the Department's part. Roofblok, 2010 MA ENV LEXIS 185 at *18.

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

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

OADR's *de novo* review of a PAN issued by the Department is based on the evidence in the record and the governing statutory and regulatory requirements, irrespective of what the Department determined previously. Matter of West Meadow Homes, Docket Nos. 2009-023 & 024, Recommended Final Decision (June 20, 2011), 2011 MA ENV LEXIS 85, *11-14, *28-37, adopted by Final Decision (August 18, 2011), 2011 MA ENV LEXIS 84 (Department's $6,000.00 penalty assessment against appellant for violations of the MWPA vacated where Department proved that appellant committed violations but failed to prove it considered all 12 required statutory factors under G.L. c. 21A, § 16 in assessing penalty); Matter of Seney, 2013 MA ENV LEXIS 27 at *13-41 (Department's $53,937.50 penalty assessment for appellant's violations of Department's asbestos removal regulations affirmed where Department demonstrated that penalty had a sufficient factual and legal basis and appellant failed to demonstrate he lacked the financial ability to pay the penalty); Iron Horse, 2016 MA ENV LEXIS 23 at *61-65 (Department's $ 30,000.00 penalty assessment for appellant's violations of Massachusetts Oil and Hazardous Material Release Prevention and Response Act, G.L. c. 21E, affirmed where Department demonstrated that penalty had a sufficient factual and legal basis); Kane Built, 2017 MA ENV LEXIS 77 at *18-93 (Department's $ 67,250.00 civil administrative penalty assessment against appellant's violations of Department's asbestos removal

regulations affirmed where Department demonstrated that penalty had a sufficient factual and legal basis).

Under the *de novo* standard of review, the Presiding Officer makes (1) findings of fact based on a preponderance of the evidence with no deference to any prior factual determinations of the Department and (2) legal determinations based on the governing statutory and regulatory requirements with deference to the Department's reasonable interpretations or construction of those requirements. Matter of Pioneer Valley Energy Center, LLC, OADR Docket No. 2011-010, Recommended Final Decision (September 23, 2011), 2011 MA ENV LEXIS 109 at *26, adopted by Final Decision (November 9, 2011), 2011 MA ENV LEXIS 108 ("[a]n administrative agency's [reasonable] interpretation of a statute the agency is charged with enforcing is entitled to 'substantial deference'", citing Commerce Ins. v. Comm'r of Ins., 447 Mass. 478, 481 (2006)); In the Matter of Edwin Mroz, OADR Docket No. 2017-021, Recommended Final Decision (June 7, 2019), 2019 MA ENV LEXIS 57, *38-40, adopted by Final Decision (June 18, 2019), 2019 MA ENV LEXIS 63.

The *de novo* standard of review to determine whether the Department properly issued the PAN is similar to the "rational basis test" utilized by Massachusetts courts conducting judicial review of discretionary decisions of state agencies. Kane Built, 2017 MA ENV LEXIS 77 at *18-20; Mroz, 2019 MA ENV LEXIS 57 at *39 (and cases cited). Under this standard of review, while the Presiding Officer's review of the Department's environmental violation and civil administrative penalty determinations is *de novo*, the Presiding Officer should recommend that the Department's Commissioner affirm the PAN if the Presiding Officer determines based on a preponderance of the evidence and the applicable statutes and regulations that the Department's determinations have a rational basis, i.e., a sufficient factual and legal foundation, and recommend otherwise if they do not. West Meadow Homes, 2011 MA ENV LEXIS 85 at *11-14, *28-37; Iron Horse, 2016 MA ENV LEXIS 23 at *59-61; Kane Built, 2017 MA ENV LEXIS 77 at *60.

Importantly, however, notwithstanding the Presiding Officer's determination and recommendation on the propriety of a PAN issued by the Department, the Department's Commissioner, as the final agency decision-maker in the appeal, has the ultimate authority over the PAN's fate, and as a result, the Commissioner may affirm the PAN in whole or in part or vacate the PAN in its entirety based on the evidentiary record and the governing statutory and regulatory requirements. 310 CMR 1.01(14)(b); Matter of Associated Building Wreckers, Inc., OADR Docket No. 2003-132, Final Decision (July 6, 2004), 11 DEPR 176 (2004) (Commissioner rejected Magistrate's determination that $2,500.00 penalty amount was excessive and recommended a reduction from $2,500.00 to $1,875.00); Roofblok, 2010 MA ENV LEXIS 185 (Commissioner vacated $86,498.50 penalty assessment for solid waste, hazardous waste, and water pollution violations, "but for different reasons than those articulated by the DALA[8] Magistrate").

F. The burdens of proof.

The Department has the burden of proving by a preponderance of the evidence that: (1) the Petitioner committed the violations alleged in the PAN; and (2) the Department properly assessed the penalty amount pursuant to G.L. c. 21A, § 16 and 310 CMR 5.25. West Meadow Homes, 2011 MA ENV LEXIS 85 at *11-14, *28-37; Kane Built, 2017 MA ENV LEXIS 77 at *16.

The Petitioner has raised as a defense that it lacks the financial ability to pay the penalty. The Petitioner has the burden to prove inability to pay by a preponderance of the evidence. Matter of Stephen W. Seney, OADR Docket No. 2012-019, Recommended Final Decision (Mar. 25, 2013), 2013 MA ENV LEXIS 27 at *5, adopted by Final Decision (Apr. 2, 2013), 2013 MA ENV LEXIS 26; Matter of Ferry Street Partners Investment Trust and Daniel J. Messier, Trustee, OADR Docket No. 2015-008, Recommended Final Decision (Oct. 11, 2016), 2016 MA ENV LEXIS 63, *53 n.7,

[8] Massachusetts Division of Administrative Law Appeals.

adopted by Final Decision (Dec. 14, 2016), 2016 MA ENV LEXIS 62. The Petitioner's financial inability defense cannot be based on conclusory statements that it lacks the financial ability to pay the penalty; the Petitioner must support the claim with corroborating financial records. Ferry Street, 2016 MA ENV LEXIS 63, at *53-54, citing, Roofblok, 2010 MA ENV LEXIS 185 at *8 n. 6 & 7; In the Matter of Blackinton Common, LLC, Docket No. 2007-115 & 147, Recommended Final Decision (Sep. 25, 2009) (financial inability defense "must include financial statements, tax returns, and other competent 'kind[s] of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs'"), adopted by Final Decision (Jan. 7, 2010).

VI. Analysis.

A. Summary decision on OADR Docket Number 2020-023.

1. Violation of 310 CMR 22.15(9)(a).

Under 310 CMR 22.15(9)(a), "each public water supplier shall notify the Department and its local Board of Health as soon as possible, but not more than two hours after obtaining knowledge of a potential or actual Emergency described in 310 CMR 22.15(9)(b)1…." The emergencies identified in the regulations include "Loss of water or drop in pressure to less than 20 psi, affecting 50% or more of consumers for a system serving less than 10,000 persons." 310 CMR 22.15(9)(b)1.a.. The Department alleges in the PAN that the Petitioner violated 310 CMR 22.15(9)(a) because it had an obligation to report the decrease in water pressure to the Department and the North Attleboro Board of Health ("BoH") within two hours after obtaining knowledge of a potential or actual Emergency because there was a potential for water pressure to drop to less than 20 psi for more than 50% of the Petitioner's customers, and it failed to make the report.

a) Violation of 310 CMR 22.15(9)(a).

It is undisputed that on the morning of June 18, 2020, at approximately 6:00 a.m., the Petitioner observed a drop in water pressure in its main tank to 25 psi. Aff. Brady (2020-023), p. 10

(After Action Report dated July 13, 2020). The cause of the drop in pressure was due to an electrical short in wiring to the submersible pump. Id. The amperage provided to the pump was approximately 12% lower than the 230 amperes required for efficient operation of the pump system. Id. at p. 1.

The Petitioner does not contest that it did not inform the Department or the Attleboro BoH of the loss in water pressure within two hours of 6 a.m. Instead, the Department was informed of the loss in water pressure by two customers who called after 10:30 a.m. Aff. McLaughlin (2020-023), ¶¶ 4-5. The Department attempted to contact Mr. Brady by phone at 11 a.m., but his voicemail was full. Id. at ¶ 6. The Department did not communicate with anyone from the Petitioner until Mr. McLaughlin spoke with an operator at the facility at 1:15 p.m.. Id. at ¶ 7. While the Petitioner did contact the North Attleboro Fire Department to ask for assistance, it concedes that the BoH was not contacted. Aff. Brady (2020-023), p. 10.

It is apparent from the record that there was a potential that the water pressure of more than 50% of its customers would drop below 20 psi, triggering the reporting obligation. On the morning of June 18, 2020, the pressure in the tank was 25 psi. Aff. Brady (2020-023), p. 10. At that time, the Petitioner only had one operating pump. Aff. McLaughlin (2020-023), ¶ 21. The Petitioner was unable to restore pressure until 5 p.m., and only then by manually operating the pump. Aff. Brady (2020-023), p. 10. An electrician finally repaired the electrical issue at 8 p.m. that evening. Id. Given that the water pressure of the system is highest in the holding tank, and because of friction in the system, it was reasonable to conclude that the customers' water pressure was lower than 25 psi, and likely lower than 20 psi. Aff. McLaughlin (2020-023), ¶ 25. Given the foregoing, there was a clear potential for water pressure to drop to less than 20 psi for more than 50% of the Petitioner's customers. This constituted an Emergency under the Regulations.

The Petitioner argues that the time frame for reporting the failure of the pump was 24 hours because the failure was attributable to an electrical outage. Aff. Brady (2020-023), p. 5. While 310

CMR 22.15(9)(b)2.c. does require "notification within 24 hours" for "[d]amage to power supply equipment or loss of power," this situation involved *both* a loss of power and a fall in water pressure. At best, the loss of power and water pressure triggered reporting obligations under both 310 CMR 22.15(9)(b)1.a. *and* 310 CMR 22.15(9)(b)2.c.. By failing to contact the Department and the BoH within two hours, the Petitioner violated 310 CMR 22.15(9)(a).

2. Whether the violation was willful.

"When viewed in the context of the administrative penalties act and the purpose of its enactment, it is apparent that the Legislature intended a 'willful' violation of the environmental protection laws administered by the DEP to be a violation that has been committed by a party who knew or, due to his experience or expertise, should have known the operative facts that made his actions a violation of the law." Franklin Office Park, 466 Mass. at 463; Kane Built, 2017 MA ENV LEXIS 77 at *27-56. The Petitioner argues that its conduct could not be willful because it did not know that it was required to report the drop in pressure to the Department within 2 hours. Rebuttal (2020-023), pp. 1-2. Even taking the fact of the Petitioner's lack of knowledge[9] in the light most favorable to the non-movant, see Matter of Town of Hopkinton, 2011 MA ENV LEXIS 88 at *7 (citing King v. City of Boston, 71 Mass. App. Ct. 460 (2008)), this does not make the violation not willful.

The operative fact in this case is the drop in water pressure in its main tank. Cf. Franklin Office Park, 466 Mass. at 463 ("the operative fact was that the shingles at the site likely contained asbestos"). The Petitioner had actual knowledge of the drop in pressure beginning at 6 a.m. on June 18, 2020. Aff. Brady (2020-023), p. 10. The Petitioner, based on the experience of the Petitioner's

[9] Mr. McLaughlin testifies that he told the Petitioner of the two-hour reporting requirement in November 2017. Aff. McLaughlin (2020-023), ¶ 19. Mr. Brady testifies that he did not know of the two-hour reporting requirement. Aff. Brady (2020-023), p. 3. For purposes of the summary decision motions, I take the facts in the light most favorable to the Petitioner.

operators, should have known that a drop in pressure was an emergency that needed to be reported to the Department and the BoH. Its knowledge of the drop in pressure should have caused the Petitioner to report the situation to the Department and the BoH. Its failure to do so was therefore willful.

3. Extenuating circumstances.

A PWS does not have to comply with the two-hour reporting requirement if "the water supplier establishes, by a preponderance of the evidence, that extenuating circumstances prevented notification within such two hour time period." 310 CMR 22.15(9)(a). The Petitioner does not offer facts that there were extenuating circumstances preventing it from contacting the Department within two hours. The Petitioner instead argues that, because the cause of the outage was electrical, the time period to notify the Department was 24 hours. Aff. Brady (2020-023), p. 5. However, the Petitioner was able to phone the North Attleboro Fire Department very soon after learning of the drop in pressure. Aff. Brady (2020-023), p. 3. There were therefore no extenuating circumstances exempting the Petitioner from compliance with the two-hour reporting requirement.

4. The Department's assessment of the penalty.

The Department assessed a penalty of $5,750.00 against the Petitioner. It calculates penalties referring first to its "Guidelines for Calculating Civil Administrative Penalties." Aff. McLaughlin (2020-023), ¶ 34. The guidelines describe in general how to calculate a civil administrative penalty and how Department personnel are to consider the factors listed in G.L. 12 c. 21A, § 16, and 310 CMR 5.25 in the penalty calculations. Id. The second tool that the Department uses is a computer program called PenCalc. Id. at ¶ 35. PenCalc provides Department personnel with a standardized mechanism for demonstrating and documenting their consideration of each of the required factors in calculating the civil administrative penalty for each regulatory violation alleged. Id. PenCalc performs the arithmetical calculations associated with calculating penalties to eliminate mathematical errors. Id.

Mr. McLaughlin calculated the total penalty first by assessing the base penalty amounts for the violation in accordance with the guidelines. Aff. McLaughlin (2020-023), ¶ 42. He (correctly) describes the violation as "willful." Id. at ¶ 39. He then made no adjustments to the penalties based on the twelve statutory factors, finding that the gravity of the violations did not warrant an upward adjustment, id. at ¶¶ 45-46; that the Petitioner had no history of noncompliance, id. at ¶ 47; that there was no basis for adjustment on good faith or lack of good faith, id. at ¶¶ 48-49; that there was no basis for adjustments based on inability to pay or future deterrence, id. at ¶¶ 50-51; that the public's interest in the violations did not warrant an upward adjustment, id. at ¶¶ 52-53; and that the Petitioner did not benefit from the violation. Id. at ¶¶ 60-61. The total penalty is therefore equal to the base penalty amount. Mr. McLaughlin's testimony is uncontroverted. I find that the Department adequately considered each of the twelve factors, and that its calculation of the penalty is reasonable and within its discretion.

B. Summary decision on OADR Docket Number 2020-026.

1. Violation of 310 CMR 22.05(1)(a)3.

Under 310 CMR 22.05(1)(a)3.,

> A Supplier of Water shall develop and implement a written coliform sampling plan that identifies sampling sites and a sample collection schedule that are representative of water throughout the Distribution System. These plans, including any revisions to these plans, are subject to Department review, revision and approval. The Supplier of Water shall ensure that an approved sampling plan continues to be representative of water throughout the Distribution System, including seeking Department approval for a sampling plan revision as necessary. Monitoring required by 310 CMR 22.05(1) and (2) may take place at a customer's premises, a Department approved dedicated sampling station, or other designated compliance sampling location. Routine and repeat sample sites and any Sampling Points necessary to meet the requirements of 310 CMR 22.05(1) and (2), and 22.26 must be reflected in the sampling plan.

As a regulated PWS, the Petitioner is required to develop and implement a coliform sampling plan. Aff. McLaughlin (2020-026), ¶ 9. The Petitioner admits to not providing a coliform sampling plan

prior to the PAN. Aff. Brady (2020-026), p. 1. Moreover, the Petitioner failed to have a plan in place from at least 2013 and through the date of the PAN. Rebuttal Aff. McLaughlin (2020-026), ¶ 2.

The Petitioner states that it did not provide a coliform sampling plan because it was seeking "clarification on the technical specifics and technical need for this NEW requirement to sample the source (ground) water in this case." Aff. Brady (2020-026), p. 1 (emphasis in original). While the Petitioner may have required assistance in refining a plan, the undisputed evidence shows that the Petitioner had been without a plan since 2013, nearly seven years at the time of the PAN. Rebuttal Aff. McLaughlin (2020-026), ¶ 2. Even crediting the Petitioner's testimony that it had technical questions, it has failed to produce evidence that it required more than seven years to come into compliance. As a result, the Petitioner violated 310 CMR 22.05(1)(a)3.

2. Violation of 310 CMR 22.05(1)(a).

Under 310 CMR 22.05(1)(a),

> Each Supplier of Water shall collect total coliform samples at sites which are representative of water throughout the Distribution System, at the entry point to the Distribution System, and at storage facilities. All such samples shall be collected at the frequency applicable to total coliform sampling set forth in the coliform sampling plan for that Supplier of Water's Public Water System. Samples required to be collected at the entry point to the Distribution System, in accordance with an approved coliform sampling plan required by 310 CMR 22.05(1)(a)3., shall be collected in addition to the minimum number of samples required pursuant to 310 CMR 22.05(1)(b), as set forth in 310 CMR 22.05: Table 1. Samples required to be collected at storage facilities, in accordance with an approved coliform sampling plan required by 310 CMR 22.05(1)(a)3., shall be collected in addition to the minimum number of samples required pursuant to 310 CMR 22.05(1)(b), as set forth in 310 CMR 22.05: Table 1, unless otherwise provided in the coliform sampling plan. The Department may require additional routine monitoring samples to ensure adequate Distribution System representation.

As a regulated PWS, the Petitioner is required to collect coliform samples at sites representative of the water throughout its distribution system. Aff. McLaughlin (2020-026), ¶ 12. Suppliers are also required to collect a sample of untreated, raw water if the water at the entry point is not representative

of the source. Id. That is the case here, because the Petitioner treats its water with potassium hydroxide. Id. It is undisputed that the Petitioner did not provide samples of water other than in the distribution system prior to the PAN. Id.

The Petitioner claims several reasons that justified it not performing the sample collections. First, it states that it was difficult to collect the samples because it required the installation of additional plumbing. Aff. Brady (2020-026), p. 2. Second, it states that the Department had not required samples from the entry point in the past and that this requirement was new. Id. However, the regulations were amended in 2016, four years before the PAN. Rebuttal Aff. McLaughlin (2020-026), ¶ 3. What's more, the requirement that samples must be collected if the water at the entry point to the distribution system is not representative of the source has been in place since at least 2004. See 310 CMR 22.05 (2004). The Petitioner has provided no evidence of justification for noncompliance. The Petitioner therefore violated 310 CMR 22.05(1)(a)3..

3. Violation of 310 CMR 22.15(4).

Under 310 CMR 22.15(4),

> Every Supplier of Water shall report to the Department at least once each month the use of chemicals added to the water supply. Such reports shall include, but not be limited to, the name of the chemical, the amount added, the resulting concentration of the chemical in the water, and the reason for adding the chemical to the water.

It is undisputed that the Petitioner's water is treated with potassium hydroxide. Aff. McLaughlin (2020-026), ¶ 13; Aff. Brady (2020-026), p. 3. As such, it is required to provide monthly reports documenting what chemicals were used to treat the water and the concentration of the chemical in the water. Aff. McLaughlin (2020-026), ¶ 10. The Petitioner failed to submit chemical addition reports in March 2020, April 2020, May 2020, and June 2020. Id.; Aff. Brady (2020-026), p. 3.

The only justification that the Petitioner provides is that it did not know that it could provide estimates in the reports. Aff. Brady (2020-026), p. 3. However, the Petitioner does not contest that it

did not file the estimates until after they asked Mr. McLaughlin whether they could. Rebuttal Aff. McLaughlin (2020-026), ¶ 5. There is no reason given why it did not ask earlier and, again, there is no justification for the Petitioner's delay in compliance. The Petitioner violated 310 CMR 22.15(4).

4. Violation of 310 CMR 22.15(5).

Under 310 CMR 22.15(5),

> Every Supplier of Water shall report electronically to the Department annually, by the due date specified each year on a form prescribed by the Department, full and complete information describing the operation of the Public Water System during the prior year, including but not limited to, the amount of water that passes through their Distribution Systems during the preceding calendar year. A Supplier of Water may request, on a form provided by the Department, approval for a hardship exemption from electronic reporting for the annual report due that year, based on a lack of internet access or service. If granted, the Supplier of Water shall make a paper filing for that year using a form provided by the Department. In no event shall the Supplier of Water fail to file the annual report by the due date specified above.

The Petitioner does not dispute that it was required to file its Annual Statistical Report for 2019. Aff. Brady (2020-026), p. 3. However, it contends that the report, as compiled by the Department, contained information that was incorrect. Id. Mr. Brady testifies that he was uncomfortable with attesting to the accuracy of the report because of these errors. Id. However, there is a field in the form that allows the Petitioner to dispute any information that it deems to be incorrect. Rebuttal Aff. McLaughlin (2020-026), ¶ 6. The Petitioner failed to avail itself of the comments field, instead sending a PDF of the report printed out and with handwritten notations. Aff. Brady (2020-026), p. 3.

That all said, the Petitioner only submitted the report on August 15, 2020. Petitioner's Opposition ("Opposition"), p. 11. The PAN was sent to the Petitioner on July 29, 2020, two weeks before the Petitioner submitted the report. Aff. McLaughlin (2020-026), ¶ 4.[10] There is no justification given for the delay. I therefore find that the Petitioner violated 310 CMR 22.15(5).

[10] The affidavit states that the PAN was sent July 9, 2020, but the PAN itself is dated July 29, 2020.

5. Whether the violations were willful.

The Petitioner argues that its conduct could not be willful because the Petitioner is unable to familiarize itself with the Regulations and did comply after it was informed of its noncompliance. However, these justifications do not mitigate "willfulness" as defined in the controlling case law.

The operative facts in this case are (1) the Petitioner did not have a coliform sampling plan in place since 2013, (2) the Petitioner failed for many years to collect coliform samples at locations other than the distribution system, (3) the Petitioner failed to file chemical addition reports for several months, and (4) the Petitioner failed to file its Annual Statistical Report until after the PAN was issued. Cf. Franklin Office Park, 466 Mass. at 463 ("the operative fact was that the shingles at the site likely contained asbestos"). The Petitioner had actual knowledge of each of these facts. Aff. Brady, pp. 1-3. The Petitioner, based on its decades of experience (Rebuttal Aff. McLaughlin, ¶ 6) should have known of the requirements for its compliance with each of the relevant regulations. Its violation was therefore willful.

6. The Department's assessment of the penalty.

The Department assessed the following penalties against the Petitioner:

Violation of 310 CMR 22.05(1)(a)3.	$1,000.00
Violation of 310 CMR 22.05(1)(a)	$860.00
Violation of 310 CMR 22.15(4)	$1,160.00
Violation of 310 CMR 22.15(5)	$290.00
Total	$3,310.00

Mr. McLaughlin calculated the total penalty first by assessing the base penalty amounts for the respective violations in accordance with the guidelines. Aff. McLaughlin (2020-026), ¶¶ 26-27, 53-54, 79-80, 105-06. He (correctly) describes the violations as "willful." Id. at ¶¶ 22, 49, 75, 101. He then made no adjustments to the penalties based on the twelve statutory factors, finding that the gravity of the violations did not warrant an upward adjustment, id. at ¶¶ 28-29, 55-56, 81-82, 107-08; that the Petitioner had no history of noncompliance, id. at ¶¶ 30, 57, 83, 109; that there was no basis

for adjustment on good faith or lack of good faith, id. at ¶¶ 31-32, 58-59, 84-85, 110-11; that there was no basis for adjustments based on inability to pay or future deterrence, id. at ¶¶ 33-34, 60-61, 86-87, 112-13; that the public's interest in the violations did not warrant an upward adjustment, id. at ¶¶ 35-36, 62-63, 88-89, 114-15; and that the Petitioner did not benefit from the violation. Id. at ¶¶ 43-44, 70-71, 96-97, 122-23. The total penalty is therefore equal to the base penalty amounts. Mr. McLaughlin's testimony is uncontroverted. I find that the Department adequately considered each of the twelve factors, and that its calculation of the penalty is reasonable and within its discretion.

C. Summary decision on OADR Docket Number 2020-035.

1. Violation of 310 CMR 22.06B(3)(f)2.

Under 310 CMR 22.06B(3)(f),

> Upon reviewing the results of tap water and water quality parameter monitoring by the system, both before and after the system installs optimal corrosion control treatment, the Department shall designate:…
>
> 2. a minimum pH value, measured in all tap samples. Such value shall be equal to or greater than 7.0, unless the Department determines that meeting a pH level of 7.0 is not technologically feasible or is not necessary for the system to optimize corrosion control….

The Petitioner's water source is treated with potassium hydroxide to control corrosion throughout the system. Aff. McLaughlin (2020-026), ¶ 6; Aff. Brady (2020-035), p. 1. Under this regulation, the Department requires the Petitioner to maintain its water at a pH greater than or equal to 7.0. The Petitioner measures the pH of its water daily. Aff. McLaughlin (2020-035), ¶ 5. At no time has the Department determined that meeting a pH level of 7.0 is not technically feasible for the Petitioner or is not necessary for the Petitioner's system to optimize corrosion control. Id. at ¶ 4; Rebuttal Aff. McLaughlin (2020-035), ¶ 2a. On two occasions (one in April 2020 and another in June 2020), the Petitioner reported pH of 6.8. Id. at ¶ 5; Aff. Brady (2020-035), p. 4 (May 27, 2021). On another 63 occasions from January 2020 through August 2020, the Petitioner reported pH of 6.9. Aff. McLaughlin (2020-035), ¶ 5; Aff. Brady (2020-035), p. 4.

The Petitioner argues that it should be held to the Environmental Protection Agency's recommended pH for water, which is generally between 6.5 and 8.5. Petitioner's Opposition (2020-035), p. 1. This interpretation of the applicable regulation is incorrect. The applicable federal regulation:

> impose[s] requirements applicable to systems and states in the designation of optimal corrosion control treatment for a system that is optimizing or reoptimizing corrosion control treatment [including]…. (f) … (2) A minimum pH value measured in all tap samples. Such a value shall be equal to or greater than 7.0, unless the State determines that meeting a pH level of 7.0 is not technologically feasible or is not necessary for the system to optimize corrosion control.

40 CFR 141.82. Because the Petitioner uses corrosion controls, federal regulations impose the stricter pH minimum on the Petitioner. Rebuttal Aff. McLaughlin (2020-035), ¶ 7.

The Petitioner next argues that the readings may be erroneous because there is an eight second delay between the activation of the water pump and the activation of the potassium hydroxide pump. Opposition (2020-035), p. 1. The Petitioner suggests that the measurements may have been taken during this window and therefore the results erroneous. Id. There is no evidence provided of when the measurements were taken. Regardless, even assuming the measurements were taken during this 8 second period, the onus is on the Petitioner to ensure adequate testing. The Petitioner could, for example, reduce the delay between activation of the water flow and activation of the chemical feed pump if the flow meter causes an unacceptable delay between the two events. Rebuttal Aff. McLaughlin (2020-035), ¶ 2. The Petitioner has not demonstrated any justification for its failure to adequately regulate the pH of its water, and therefore it is in violation of 310 CMR 22.06B(3)(f)2..

2. Violation of 310 CMR 22.06B(1)(h) and 310 CMR 22.06B(11)(a)1.

Under 310 CMR 22.06B(1)(h),

> Tap water monitoring for lead and copper, monitoring for water quality parameters, source water monitoring for lead and copper, and analyses of the monitoring results under 310 CMR 22.06B(1) shall be completed in compliance with 310 CMR 22.06B(7) through (10).

Similarly, 310 CMR 22.06B(11)(a)1. states, in relevant part,

> Except as provided in 310 CMR 22.06B(11)(a)1.h., a water system shall report the information specified below for all tap water samples specified in 310 CMR 22.06B(7) and for all water quality parameter samples specified in 310 CMR 22.06B(8) within the first ten days following the end of each applicable monitoring period specified in 310 CMR 22.06B(7) and (8) (i.e., every six-months, annually, every three years, or every nine years).

The gravamen of both violations is that the Petitioner failed to file correct lead and copper monitoring results for the first quarter of 2020. Aff. McLaughlin (2020-035), ¶¶ 12-15. The Petitioner agrees. Opposition (2020-035), p. 2.

The Petitioner argues that a new schedule was implemented at the start of the COVID-19 pandemic. Id. However, the new collection schedule was actually implemented in January 2020, prior to the pandemic. Rebuttal Aff. McLaughlin (2020-035), ¶ 3. The Department provided the Petitioner with a 3-Year Water Quality sampling schedule for 2020 through 2022, dated January 7, 2020. Id. The sampling schedule showed "Lead and Copper Rule" sampling at "10 Approved Taps" during the second and fourth quarters of 2020 through 2022." Id. This is not an adequate justification for noncompliance.

The Petitioner also argues that its testing has never found excessive levels of lead or copper in its water. Aff. Brady (2020-035), p. 4. This contention is not relevant to the requirements imposed by the cited regulation. The Petitioner last argues that "[t]he wells are 35 feet apart and draw from the exact same aquifer with the exact same chemistry as demonstrated by the extensive testing required by the [Department]." Opposition (2020-035), p. 3. This argument is similarly unavailing; the testing requirements are set by the Environmental Protection Agency and the Department cannot countermand them. Rebuttal Aff. McLaughlin (2020-035), ¶ 3. For these reasons, the Petitioner violated 310 CMR 22.06B(1)(h) and 310 CMR 22.06B(11)(a)1..

3. Violation of 310 CMR 22.06B(7)(a).

Under 310 CMR 22.06B(7)(a),

> By the applicable date for commencement of monitoring under 310 CMR 22.06B(7)(d)1., each water system shall complete a materials evaluation of its distribution system in order to identify a pool of targeted sampling sites that meets the requirements of 310 CMR 22.06B(7), and which is sufficiently large to ensure that the water system can collect the number of lead and copper tap samples required in 310 CMR 22.06B(7)(c). All sites from which first draw samples are collected shall be selected from this pool of targeted sampling sites. Sampling sites may not include faucets that have point-of-use or point-of-entry treatment devices designed to remove inorganic contaminants. Once the sampling sites are selected they must be submitted to the Department on the required form for approval. All samples must be collected in accordance with the system's Department-approved sampling plan.

In this case, the Petitioner did not provide samples from approved sampling sites. The Department provided a worksheet listing the approved sample sites, including 10 approved sampling locations and three alternative sampling locations. Aff. McLaughlin (2020-035), ¶ 16.

The first sampling location is the only one of the approved sample sites with results reported for the time period. Id. Instead, the Petitioner reported results for nine other unapproved sample sites. Id. The Petitioner does not contest these allegations. Opposition (2020-035), 2-3. The Petitioner suggests that it had difficulty obtaining ten samples during testing in 2005, 15 years before, but, as the Department notes, the Petitioner "did not communicate with the Department regarding sampling difficulties." Rebuttal Aff. McLaughlin (2020-035), ¶ 4. The Petitioner therefore violated 310 CMR 22.06B(7)(a).

4. Whether the violations were willful.

The Petitioner argues that its conduct could not be willful because its actions were not "deliberate" or "intentional." Opposition (2020-035), p. 3. However, this misstates the applicable legal standard. The operative facts in this case are that the Petitioner measured pH levels below 7.0 on 65 occasions, that the Petitioner failed to correctly file its lead and copper testing results, and that it

collected samples from sources that had not been previously approved. Cf. Franklin Office Park, 466 Mass. at 463 ("the operative fact was that the shingles at the site likely contained asbestos"). The Petitioner had actual knowledge of each of these facts. Aff. Brady (2020-035), pp. 1-4. The Petitioner, based on its decades of experience (Aff. Brady (2020-035), pp. 2-3) should have known of the requirements for its compliance with each of the relevant regulations. Its violation was therefore willful.

5. The Department's assessment of the penalty.

The Department assessed the following penalties against the Petitioner:

Violation of 310 CMR 22.06B(3)(f)2.	$860.00
Violation of 310 CMR 22.06B(1)(h)	$860.00
Violation of 310 CMR 22.06B(7)(a)	$0.00
Violation of 310 CMR 22.06B(11)(a)1.	$0.00
Total	$1,720.00

Mr. McLaughlin calculated the total penalty first by assessing the base penalty amounts for the respective violations in accordance with the guidelines. Aff. McLaughlin (2020-035), ¶¶ 35-36, 63-64. He (correctly) describes the violations as "willful." Id. at ¶¶ 30, 58. He then made no adjustments to the penalties based on the twelve statutory factors, finding that the gravity of the violations did not warrant an upward adjustment, id. at ¶¶ 37-38; that the Petitioner had no history of noncompliance, id. at ¶¶ 39, 67; that there was no basis for adjustment on good faith or lack of good faith, id. at ¶¶ 40-41, 68-69; that there was no basis for adjustments based on inability to pay or future deterrence, id. at ¶¶ 42-43, 70-71; that the public's interest in the violations did not warrant an upward adjustment, id. at ¶¶ 44-45, 72-73; and that the Petitioner did not benefit from the violation. Id. at ¶¶ 52-53, 80-81. The total penalty is therefore equal to the base penalty amounts. Mr. McLaughlin's testimony is uncontroverted. I find that the Department adequately considered each of the twelve factors, and that its calculation of the penalty is reasonable and within its discretion.

D. Summary decision on OADR Docket Number 2020-038.

1. Violation of 310 CMR 22.04(6).

Under 310 CMR 22.04(6), "By no later than December 31, 2001, all Public Water Systems shall install meter(s) at location(s) sufficient to record each system's total production of water from all sources, including water purchased from and/or water sold to other Public Water Systems." Here, it is uncontroverted that the Petitioner's water meter was nonfunctional during the February 2020 inspection. Aff. McLaughlin (2020-038), ¶ 5; Aff. Brady, p. 1. Even though the PAN was issued on November 4, 2020, at the time of briefing this motion in June 2021, the Petitioner conceded that the problem remained unresolved. Petitioner's Opposition (2020-038), p. 2. The Petitioner provides no valid justification for failing to repair the meter. It is therefore in violation of 310 CMR 22.04(6).

2. Violation of 310 CMR 22.21(3)(a).

Under 310 CMR 22.21(3)(a),

> Any person who obtains Department approval for a community public water system that relies entirely upon groundwater sources shall provide additional wells, wellfield, or springs and pumping equipment, or the equivalent, capable of producing the same volumes and quality of water as the system's primary well, wellfield, or spring at all times, or shall provide the storage capacity equivalent to the demand of at least two average days if approved by the Department, unless an interconnection with another public water system has been provided which can adequately provide the quantity and quality of water needed.

The Petitioner in this instance has two wells, as the Regulations require. Aff. McLaughlin (2020-038), ¶ 6. Prior to the inspection, the Department learned that Well 1 was not operational. Id. At the time of the February 2020 inspection, Well 1 was still not operational, and Well 2 was being used as the primary well. Id. Even though it was equipped with a jockey pump, Well 1 did not have the capacity to compensate if Well 2 failed. Id.

The Petitioner's only justification for failing to repair Well 1 is that while Well 1 has a functional pump, that pump is not permitted to draw enough water to allow it to compensate if Well 2

fails. Aff. Brady (2020-038), p. 2. However, the Petitioner has not sought a permit that would permit it to pump more. Aff. McLaughlin (2020-038), ¶ 3 (June 16, 2021). The Petitioner is therefore in violation of 310 CMR 22.21(3)(a).

3. Violation of 310 CMR 22.04(14).

Under 310 CMR 22.04(14)(b),

> All Chemical Feed Systems subject to 310 CMR 22.04(14)(b) shall be equipped with control systems and alarm systems, consisting at a minimum and meeting at a minimum the following:… 2…. a. Each water pump and associated metering pump(s) shall automatically shut down, and the alarm system shall immediately send an alarm to a properly Certified Operator, if the analyzer for the critical chemical injected into the water system detects a parameter that is out of the range set in the analyzer….

Because the Petitioner treats its water with potassium hydroxide, Aff. McLaughlin (2020-038), ¶ 8C, which is a chemical feed system, it is required to comply with this regulation. However, during the February 2020 inspection, the water pump lacked an alarm. Id. at ¶ 7, Opposition (2020-038), p. 3. The Petitioner contends that "our current system meets [the requirements of the Regulations] and that while we do have a pH analyzer, the alarms are unnecessary." Opposition (2020-038), p. 3; Aff. Brady (2020-038), p. 3. The Petitioner cannot unilaterally deem that alarms are unnecessary. The Petitioner offers no other justification for its noncompliance and is therefore in violation of 310 CMR 22.04(14).

4. Whether the violation was willful.

The Petitioner argues that its conduct could not be willful because its actions were not "deliberate" or "intentional." Opposition, p. 4. However, this misstates the applicable legal standard. The operative facts in this case are that the water meter was not operational, Well 1 was not operational, and the pH analyzing system lacked a call-out alarm. Cf. Franklin Office Park, 466 Mass. at 463 ("the operative fact was that the shingles at the site likely contained asbestos"). The Petitioner had actual knowledge of each of these facts. Aff. Brady (2020-038), pp. 1-4. The Petitioner, based on

its decades of experience (Aff. Brady (2020-038), p. 2) should have known of the requirements for its compliance with each of the relevant regulations. Its violation was therefore willful.

5. The Department's assessment of the penalty.

The Department assessed the following penalties against the Petitioner:

Violation of 310 CMR 22.04(6)	$860.00
Violation of 310 CMR 22.21(3)(a)	$860.00
Violation of 310 CMR 22.04(14)	$5,750.00
Total	$7,470.00

Mr. McLaughlin calculated the total penalty first by assessing the base penalty amounts for the respective violations in accordance with the guidelines. Aff. McLaughlin (2020-038), ¶¶ 22, 50, 78. He (correctly) describes the violations as "willful." Id. at ¶¶ 16, 44, 72. He then made no adjustments to the penalties based on the twelve statutory factors, finding that the gravity of the violations did not warrant an upward adjustment, id. at ¶¶ 23-24, 51-52, 79-80; that the Petitioner had no history of noncompliance, id. at ¶¶ 25, 53, 81; that there was no basis for adjustment on good faith or lack of good faith, id. at ¶¶ 26-27, 54-55, 82-83; that there was no basis for adjustments based on inability to pay or future deterrence, id. at ¶¶ 28-29, 56-57, 84-85; that the public's interest in the violations did not warrant an upward adjustment, id. at ¶¶ 30-31, 58-59, 86-87; and that the Petitioner did not benefit from the violation. Id. at ¶¶ 38-39, 66-67, 94-95. The total penalty is therefore equal to the base penalty amounts. Mr. McLaughlin's testimony is uncontroverted. I find that the Department adequately considered each of the twelve factors, and that its calculation of the penalty is reasonable and within its discretion.

E. Directed decision on the Petitioner's alleged inability to pay.

For each of the PANs at issue in these consolidated appeals, the Department was unable to determine that the Petitioner had an inability to pay the penalties due to its failure to provide sufficient financial data to the Department to assess the claim. Aff. Lee (2020-023), ¶¶ 4-6; Aff. Lee (2020-026), ¶¶ 4-6; Aff. Lee (2020-035), ¶¶ 4-6; Aff. Lee (2020-038), ¶¶ 4-6. The Petitioner provided

nothing other than a recitation of its annual revenues for 2018 through 2020, which was insufficient for Mr. Lee to draw a conclusion. Aff. Lee (2020-023), ¶ 7; Aff. Lee (2020-026), ¶ 7; Aff. Lee (2020-035), ¶ 7; Aff. Lee (2020-038), ¶ 7. It was unclear whether the annual revenues provided were gross revenue or net income.

On summary decision in each of the matters, I found that the Petitioner had failed to support its claim of inability to pay with corroborating financial records. See Ferry Street, 2016 MA ENV LEXIS 63 at *53-54, citing Matter of Roofblok Ltd., 2010 MA ENV LEXIS 185 at *8 n. 6 and 7; Aff. Lee, ¶ 7; Blackinton Common, Docket No. 2007-115 & 147, Recommended Final Decision (September 25, 2009) (financial inability defense "must include financial statements, tax returns, and other competent 'kind[s] of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs'"). I noted that the COVID-19 pandemic affected numerous industries in unpredictable ways and gave the Petitioner the opportunity to supplement the record with facts in support of its alleged inability to pay.

As part of the summary decisions, I quoted the following from the Department's Comprehensive Policy for Assessing Financial Condition (Nov. 3, 2014) ("Policy"):

> MassDEP has determined that certain information is required in order to assess the validity of a claimant's claim of inability to pay. A claimant seeking MassDEP's consideration of its financial condition under this policy must provide the required information in order for MassDEP to evaluate such a claim. Absent the claimant's provision of the necessary information, MassDEP's initial penalty calculation will not be reduced based upon an assertion of inability to pay.
>
> MassDEP may request additional information as necessary to assist it in its evaluation and reserves the right to conduct an independent investigation to confirm the accuracy and completeness of any material submitted.
>
> a) Tax Returns: All Claimants must provide signed and legible complete final copies of their three (3) most recently-filed federal tax returns including all schedules, statements, forms, worksheets and attachments, and an executed copy of IRS Form 4506T. These tax returns should be for the three (3) most recent tax years for which returns were due.

Claimants must explain the absence of any year (such as an extension of time to file) and provide supporting documentation to MassDEP. Claimants may provide additional tax returns if they believe such returns provide a more complete picture of their financial condition. MassDEP may request additional federal returns, to assist in its evaluation of an inability-to-pay claim. MassDEP may also request additional information as necessary to provide an adequate understanding of particular items listed on the tax returns. Staff should not request Massachusetts state tax returns, and, if received, should return them uninspected.

b) Individual Financial Data Request Form: Individual claimants must completely and legibly fill out the required Individual Financial Data Request Form(s) attached to this Policy. All claimants should be prepared to provide reasonable documentation for items submitted pursuant to this policy, such as proof of mortgage amount or receipts for particular expenses.

c) Justification for Claim: In its sole discretion MassDEP may require claimants asserting an inability to pay to provide a written justification for their contention that they have insufficient financial resources to pay the proposed/assessed penalty, with specific reference to the information provided above. MassDEP may also require a formal explanation of any mitigating factors that should be noted when reviewing the financial information. Such factors shall include, but not be limited to, estimates of corrective action cost estimates that the claimant will undertake to return to compliance.

d) Certification: All materials submitted by the claimant shall be accompanied by the following certification statement that is signed by the claimant:

I, [name of person authorized to act on behalf of claimant], attest under the pains and penalties of perjury:

(a) that I have personally examined and am familiar with the information contained in this submittal, including any and all documents accompanying this certification statement;

(b) that, based on my inquiry of those individuals responsible for obtaining the information, the information contained in this submittal is to the best of my knowledge and belief, true, accurate, and complete; and

(c) that I am authorized and empowered to act on behalf of the claimant; and

I am aware that there are significant penalties, including but not limited to, possible fines and imprisonment, for submitting false, misleading, inaccurate, or incomplete information.

(emphasis in original).

In short, under the Department's Policy, an applicant seeking a penalty waiver for inability to pay must provide the following:

- Federal tax returns for three years, including all schedules, statements, forms, worksheets and attachments;
- An executed copy of IRS Form 4506T, Request for Transcript of Tax Return;
- A filled out Individual Financial Data Request Form ("IFDR Form");
- A certification under the pains and penalties of perjury.

These requirements were made known to the Petitioner in the Affidavits of Holly Lee that were filed in 2021, more than two years prior to the Petitioner's productions. See Aff. Lee (2020-023), ¶ 5; Aff. Lee (2020-026), ¶ 5; Aff. Lee (2020-035), ¶ 5; Aff. Lee (2020-038), ¶ 5.

Despite numerous opportunities to do so, the Petitioner has failed to file full documentation required in accordance with the Department's policy. The Petitioner was informed in mid-2021 in Mr. Lee's affidavits what information was required. Aff. Lee (2020-023), ¶ 5; Aff. Lee (2020-026), ¶ 5; Aff. Lee (2020-035), ¶ 5; Aff. Lee (2020-038), ¶ 5. The Petitioner did not supplement the summary decision record in the two years between receiving those affidavits and my orders on the summary decision motions. I again informed the Petitioner what was required in my June 28, 2023, orders on the motions for summary decision by quoting extensively from the Policy.

The parties agreed that the Petitioner would have until October 30, 2023, to file documents to allow the Department to conduct its analysis under the Policy. On October 30, 2023, the Petitioner filed various Massachusetts excise tax forms and unsworn income statements. None of these documents met the requirements of the Policy. It was not until November 27, 2023, and after the Department filed its motion for directed decision, that the Petitioner filed federal tax returns for 2019, 2020, 2021, and 2022. The 2020 tax return was not executed under the pains and penalties of perjury.

Also, the November 27, 2023, filing did not provide an executed Form 4506-T. The Petitioner did not provide that document until December 12, 2023, and failed to fill it out correctly. As of this date, the Petitioner has not filed an IFDR Form.

It is not the Department's responsibility to obtain the information necessary to prove a Petitioner's inability to pay. That burden clearly falls on the Petitioner. Matter of Stephen W. Seney, 2013 MA ENV LEXIS 27 at *5. Despite several years of knowing what documentation was required, the Petitioner failed to provide that information in a timely matter. The Department is not required to draw the information from the Petitioner piecemeal well after the parties' agreed-to deadline.

More importantly, however, the substance of what the Petitioner provided does not even make out a *prima facie* case of inability to pay. The 2020 Federal tax return is unsigned, and none of the returns indicate any depreciation, which makes them unable to be used in the Department's Estimated Available Cash Flow analysis. See Policy, p. 10 ("The first part of the analysis determines the Estimated Available Cash Flow for each of the three most recently completed tax years by adding the taxable income before net operating losses or special deductions to the depreciation."). The IRS Form 4506-T also failed to attest that the signer had the authority to execute the document, making it useless to the Department.

The Petitioner also failed to file the IFDR Form or provide any basis for not filing the form. That form requires that all household members provide three years or tax returns and identify all sources of income. They must disclose their monthly expenses, including household rent, home maintenance, utility costs, insurance, taxes, and tuition. They must also disclose their bank accounts, investments, retirement funds, vehicles, real estate, and credit cards. In short, by not filing the Individual Financial Data Request Form, the Petitioner has attempted to sidestep identifying anything about its owners' personal finances.

These many omissions[11] prevent the Department from rendering a fulsome analysis of the Petitioner's ability to pay in accordance with the Policy. The Petitioner has simply failed to carry its burden, and a directed decision on this issue is appropriate.

VII. Conclusion.

Based on the undisputed facts and the Petitioner's failure to submit information sufficient to allow the Department to assess its ability to pay the penalties, the Department has carried its burden on liability, and the Petitioner has failed to carry its burden on inability to pay. I therefore recommend that the Department's Commissioner issue a Final Decision affirming the penalties in each of the PANS in their entirety.

Date: January 8, 2024

Patrick M. Groulx
Presiding Officer

[11] To be clear, I am not making a credibility judgment about the Petitioner's submissions. I take the facts in those submissions in the light most favorable to the Petitioner. However, even crediting all of their contents, the Petitioner has still failed to make a *prima facie* case of inability to pay due to the numerous omissions.

NOTICE OF RECOMMENDED FINAL DECISION

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

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

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