COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

May 1, 2020

In the Matter of
Michael J. Cove

Docket No. 2017-031
DEP Enforcement Document
No. 00003138
PAN-CE-17-6W001

RECOMMENDED FINAL DECISION

INTRODUCTION

In this appeal, Michael J. Cove ("Mr. Cove" or "the Petitioner") challenges a $55,600.00 Penalty Assessment Notice ("PAN" or "Civil Administrative Penalty") that the Central Regional Office of the Massachusetts Department of Environmental Protection ("MassDEP" or "the Department") issued to Mr. Cove on August 23, 2017 for purported violations of the Massachusetts Wetlands Protection Act ("MWPA"), G.L. c. 131, § 40, and the Department's Wetlands Regulations at 310 CMR 10.00. The Department issued the PAN to Mr. Cove in connection with his unauthorized work in protected wetlands in an area of Sterling, Massachusetts ("the Site") spanning over portions of two different parcels of real property: (1) one parcel owned by Ann Marie Belair ("Ms. Belair"), as Trustee of the MMC Realty Trust ("the Trust") off of Flanagan Hill Road in Sterling identified by the Town of Sterling Assessor's Office on Assessors Map 25, Lot 3 ("the Trust Property"); and (2) the other parcel owned by

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New England Power Company d/b/a National Grid ("NEP") off of Flanagan Hill Road in Sterling identified by the Town of Sterling Assessor's Office on Assessors Map 46, Lot 31 ("the NEP Property"). PAN, ¶¶ 4-27. The PAN asserts that Mr. Cove performed work in the protected wetlands of Bank and Bordering Vegetated Wetlands ("BVW") at the Site without prior authorization from the Town of Sterling Conservation Commission ("SCC") or the Department pursuant to the MWPA and the Wetlands Regulations. PAN, ¶¶ 8, 20A-20C. This purported unauthorized work included Mr. Cove's clearing, filling, grading, construction of an access road, installation of a culvert and headwall, and channelization and re-location of a stream. Id. The PAN asserts that this purported unauthorized work resulted in the alteration of approximately 1,050 linear feet of Bank and 23,300 square feet of BVW in violation of the MWPA and the Wetlands Regulations. PAN, ¶¶ 20A-20C. Mr. Cove denies the PAN's allegations and requests that the PAN be vacated. See Petitioner's Appeal Notice. Mr. Cove also claims he lacks the financial ability to the pay the PAN. Id.

I conducted an evidentiary Adjudicatory Hearing ("Hearing") to resolve Mr. Cove's appeal of the Department's PAN. Per the standard practice of the Office of Appeals and Dispute Resolution ("OADR"), the Hearing was digitally recorded. Following the Hearing, OADR's Case Administrator made the digital recording available to the parties for downloading from the internet, which the parties relied on in drafting and filing their respective Closing Briefs in the case.

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

(1) Whether Mr. Cove violated the MWPA and the Wetlands Regulations as alleged by Department in the PAN?

(2) If so, did the Department properly assess the $55,600.00 PAN Penalty amount against Mr. Cove pursuant to G.L. c. 21A, § 16 and 310 CMR 5.25?

(3) If so, does Mr. Cove lack the financial ability to pay the penalty?

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

The Department, the party with the burden of proof at the Hearing regarding resolution of Issues 1 and 2,[1] presented testimonial, documentary, and photographic evidence from two witnesses in support of the PAN:

(1) Denise Child, the Section Chief of the Wetlands Program in the Department's Central Regional Office ("Ms. Child"), with more than 26 years of experience in the Department, including more than two decades of investigative and enforcement experience in the environmental field and supervising Department staff in this area;[2] and

(2) Megan E. Selby, an Environmental Analyst in the Wetlands Program of the Department's Central Regional Office ("Ms. Selby"), with nearly a decade of work experience in the wetlands field, including more than five years as an Environmental Scientist for a major private environmental consulting firm.[3]

In rebuttal, Mr. Cove, who had burden of proof on Issue 3,[4] presented two witnesses:

(1) himself;[5] and

[1] See below, at p. 14.

[2] Department's Pre-filed Direct Testimony of Denise Child ("Ms. Child's Direct PFT"), ¶¶ 1-3.

[3] Department's Pre-filed Direct Testimony of Meghan Selby ("Ms. Selby's Direct PFT), ¶¶ 1-6.

[4] See below, at pp. 14-15.

[5] Michael Cove's Pre-filed Testimony ("Mr. Cove's Direct PFT").

(2) Alton Stone, an Environmental Engineer and Wetlands Scientist registered in Massachusetts as a Professional Engineer ("Mr. Stone"), with more than 30 years of work experience in the environmental field, including nearly 20 years as the principal of his private environmental consulting firm.[6]

As discussed in detail below, based on a preponderance of the evidence presented by the Department and Mr. Cove at the Hearing and the governing statutory and regulatory requirements, I find that: (1) Mr. Cove violated the MWPA and the Wetlands Regulations as alleged by Department in the PAN; (2) Mr. Cove's violations were willful and not the result of error within the meaning of G.L. c. 21A, § 16; (3) the Department properly assessed the $55,600.00 PAN Penalty amount against Mr. Cove pursuant to G.L. c. 21A, § 16 and 310 CMR 5.25; and (4) Mr. Cove failed to demonstrate that he lacks the financial ability to pay the PAN. Accordingly, I recommend that the Department's Commissioner issue a Final Decision affirming the Department's PAN.

STATUTORY AND REGULATORY FRAMEWORK

I. THE PERMITTING REQUIREMENTS OF THE MWPA AND THE WETLANDS REGULATIONS

The purpose of the MWPA and the Wetlands Regulations is to protect wetlands and to regulate activities affecting wetlands areas in a manner that promotes the following eight statutory interests:

(1) protection of public and private water supply;

(2) protection of ground water supply;

(3) flood control;

(4) storm damage prevention;

(5) prevention of pollution;

[6] [Petitioner's] Pre-filed Direct Testimony of Alton D. Stone, PE, ASE ("Mr. Stone's Direct PFT"), ¶¶ 1-5.

(6) protection of land containing shellfish;

(7) protection of fisheries; and

(8) protection of wildlife habitat.

G.L. c. 131, § 40; 310 CMR 10.01(2); In the Matter of Gary Vecchione, OADR Docket No. WET-2014-008, Recommended Final Decision (August 28, 2014), 2014 MA ENV LEXIS 76, at 6-7, adopted as Final Decision (September 23, 2014), 2014 MA ENV LEXIS 77; In the Matter of Webster Ventures, LLC, OADR Docket No. WET-2014-016 ("Webster Ventures I"), Recommended Final Decision (February 27, 2015), 2015 MA ENV LEXIS 14, at 10-11, adopted as Final Decision (March 26, 2015), 2015 MA ENV LEXIS 10; In the Matter of Elite Home Builders, LLC, OADR Docket No. WET-2015-010, Recommended Final Decision (November 25, 2015), adopted as Final Decision (December 17, 2015), 22 DEPR 202, 204 (2015); In the Matter of Sunset City, Inc., OADR Docket No. WET-2016-016, Recommended Final Decision (March 31, 2017), 2017 MA ENV LEXIS 35, at 9-10, adopted as Final Decision (April 21, 2017, 2017 MA ENV LEXIS 33.

The MWPA and the Wetlands Regulations provide that "[n]o person shall remove, fill, dredge[,] or alter[7] any [wetlands] area subject to protection under [the MWPA and Wetlands

[7] The Wetlands Regulations at 310 CMR 10.04 define "alter" as "chang[ing] the condition" of any wetlands area subject to protection under the MWPA and the Wetlands Regulations. Examples of alterations include, but are not limited to, the following:

> (a) the changing of pre-existing drainage characteristics, flushing characteristics, salinity distribution, sedimentation patterns, flow patterns and flood retention areas;
>
> (b) the lowering of the water level or water table;
>
> (c) the destruction of vegetation;(d) the changing of water temperature, biochemical oxygen demand (BOD), and other physical, biological or chemical characteristics of the receiving water.

310 CMR 10.04. "Dredge" is defined as "deepen[ing], widen[ing], or excavat[ing], either temporarily or permanently" a protected wetlands area, and "[f]ill means to deposit any material [in a protected wetlands area] so as

Regulations] without the required authorization, or cause, suffer or allow such activity . . . ." G.L. c. 131 § 40, ¶ 32; 310 CMR 10.02(2)(a); Vecchione, 2014 MA ENV LEXIS 76, at 7; Webster Ventures I, 2015 MA ENV LEXIS 14, at 11-12; Elite Home Builders, 22 DEPR at 204; Sunset City, 2017 MA ENV LEXIS 35, at 10. "Any activity proposed or undertaken within [a protected wetlands] area[,] . . . which will remove, dredge or alter that area, is subject to Regulation under [the MWPA and the Wetlands Regulations] and requires the filing of a Notice of Intent ("NOI")" with the permit issuing authority. 310 CMR 10.02(2)(a). A party must also file an NOI for "[a]ny activity . . . proposed or undertaken within 100 feet of [any protected wetlands]" described as "the Buffer Zone" by the Regulations, "which, in the judgment of the [permit] issuing authority, will alter [any protected wetlands]." 310 CMR 10.02(2)(b).

The "[permit] issuing authority" is either the local Conservation Commission when initially reviewing the applicant's proposed work in a wetlands resource area protected by the MWPA and the Wetlands Regulations, or the Department when it assumes primary review of the proposed work or review on appeal from a local Conservation Commission decision. Healer v. Department of Environmental Protection, 73 Mass. App. Ct. 714, 717-19 (2009). Under the MWPA, a local Conservation Commission may issue an Order of Conditions authorizing or precluding proposed activities in protected wetlands areas and "[is] allowed to 'impose such conditions as will contribute to the protection of the interests described [in the MWPA and the Wetlands Regulations]'" and to require that "'all work shall be done in accordance' with the conditions they might impose. . . ." Id.

Orders of Conditions, including any findings and wetlands delineations forming the basis

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to raise an elevation, either temporarily or permanently." Id.

of the Orders, are valid for three years from the date of the Orders' issuance. 310 CMR 10.05(6)(d). However, any "order [by the Department] shall supersede the prior order of the conservation commission [issued pursuant to the MWPA and the Wetlands Regulations] . . . and all work shall be done in accordance with the [Department's] order," Id., unless the Commission has properly denied the proposed project pursuant to a local Wetlands Protection Bylaw that is more protective than the MWPA. Oyster Creek Preservation, Inc. v. Conservation Commission of Harwich, 449 Mass. 859, 866 (2007). This is the case because the MWPA "establishes Statewide minimum wetlands protection standards, [but] local communities are free to impose more stringent requirements" by enacting local Wetlands Protection Bylaws. Oyster Creek, 449 Mass. at 866; Healer, 73 Mass. App. At 716. As a result, a Superseding Order of Conditions ("SOC") issued by the Department under the MWPA approving proposed work in protected wetlands areas cannot preempt a timely decision of a local conservation commission denying approval of the proposed work based "on provisions of a local bylaw that are more protective than the [MWPA]." Oyster Creek, 449 Mass. at 866. However, this issue is not present in this case, because Mr. Cove's appeal concerns a PAN issued by the Department to enforce the requirements and prohibitions of the MWPA and the Wetlands Regulations.

II. THE PROTECTED WETLANDS AREA OF BVW AND BANK

As discussed above, at pp. 1-2, the Department's PAN asserts that Mr. Cove performed unauthorized activities at the Site that impacted the protected wetlands areas of Bank and BVW.

A. Bank

The Wetlands Regulations at 310 CMR 10.54(2)(a) define Bank as "the portion of the land surface which normally abuts and confines a water body," and it "may be partially or totally vegetated, or . . . comprised of exposed soil, gravel or stone." Bank "[is] likely to be significant"

to the advancement of all eight MWPA interests listed above. 310 CMR 10.54(1); In the Matter Robert J. Cote, OADR Docket No. WET-2017-014, Recommended Final Decision (August 9, 2018), 2018 MA ENV LEXIS 47, at 13, adopted as Final Decision (August 28, 2018), 2018 MA ENV LEXIS 46. As a result, there is a presumption under the Wetlands Regulations that "[when] a proposed activity involves the removing, filling, dredging[,] or altering of a Bank, the [local conservation commission and the Department must] presume that [the] area is significant to the [advancement of these MWPA] interests . . . ." 310 CMR 10.54(3); Cote, 2018 MA ENV LEXIS 47, at 13-14. However, "[t]he presumption is rebuttable and may be overcome upon a clear showing [by the project proponent] that the Bank does not play a role in the protection of [these MWPA] interests." Id. In the event the local conservation commission or the Department determines that the project proponent has "overcome" the presumption, it "[must] make a written determination to this effect, setting forth its grounds" on Department Form 6. Id.

"Where the presumption . . . is not overcome [by the project proponent]," the project can only be authorized by the local conservation commission and/or the Department if the project satisfies the General Performance standards in 310 CMR 10.54(4) governing proposed work in Bank. Cote, 2018 MA ENV LEXIS 47, at 14. Specifically, the project can only be approved if it does not impair:

(1) the Bank's physical stability;

(2) the water carrying capacity of any existing channel within the Bank;

(3) groundwater and surface water quality;

(4) the Bank's capacity to provide breeding habitat, escape cover, and food for fisheries;

(5) the Bank's capacity to provide important wildlife habitat functions; and

(6) any stream crossing within the Bank.

10 CMR 10.54(4); Cote, 2018 MA ENV LEXIS 47, at 14-15.

B. BVW

The Wetlands Regulations define BVW as:

> freshwater wetlands which border on creeks, rivers, streams, ponds and lakes. The types of freshwater wetlands are wet meadows, marshes, swamps and bogs. [BVW] are areas where the soils are saturated and/or inundated such that they support a predominance of wetland indicator plants. The ground and surface water regime and the vegetational community which occur in each type of freshwater wetland are specified in [the MWPA].

310 CMR 10.55(2)(a); In the Matter of Town of Hopkinton, OADR Docket No. WET-2007-010, Recommended Final Decision, 15 DEPR 203, 205 (May 1, 2008), adopted as Final Decision (May 30, 2008), affirmed, Morrison v. Massachusetts Department of Environmental Protection, Middlesex Superior Court, C.A. MICV2008-02876 (October 16, 2009); In the Matter of Ronald and Lois Enos, OADR Docket No. WET-2012-019, Recommended Final Decision (February 22, 2013), 2013 MA ENV LEXIS 21, at 19-20, adopted as Final Decision (March 22, 2013), 2013 MA ENV LEXIS 20; In the Matter of Brian Corey, OADR Docket No. WET-2016-023, Recommended Final Decision (February 28, 2018), 2018 MA ENV LEXIS 10, at 16-17, adopted as Final Decision (March 15, 2018), 2018 MA ENV LEXIS 9. BVW are likely to be significant to the MWPA interests of protection of public and private water supply, protection of ground water supply, flood control, storm damage prevention, prevention of pollution, and protection of fisheries and to wildlife habitat. 310 CMR 10.55(1); Hopkinton, 15 DEPR at 205; Enos, 2013 MA ENV LEXIS 21, at 20; Corey, 2018 MA ENV LEXIS 10, at 17-18. "The plants and soils of [BVW] remove or detain sediments, nutrients (such as nitrogen and phosphorous) and toxic

substances (such as heavy metal compounds) that occur in run off and flood waters." Id.

Where a proposed activity will alter BVW, the Department is required to presume that the BVW is significant to the MWPA interests set forth above. 310 CMR 10.55(3); Hopkinton, 15 DEPR at 205; Enos, 2013 MA ENV LEXIS 21, at 20-21; Corey, 2018 MA ENV LEXIS 10, at 18. "This presumption is rebuttable and may be overcome upon a clear showing that the [BVW] does not play a role in the protection of [those] interests." Id. Where this presumption "is not overcome, any proposed work in [BVW] shall not destroy or otherwise impair any portion of [the] area." 310 CMR 10.55(4)(a); Hopkinton, 15 DEPR at 205-206; Enos, 2013 MA ENV LEXIS 21, at 21; Corey, 2018 MA ENV LEXIS 10, at 18. Notwithstanding this prohibition, the Department nevertheless has the discretion to issue an SOC authorizing activities "result[ing] in the loss of up to 5,000 square feet of [BVW] when [the] area is replaced in accordance with . . . [seven] general conditions and any additional, specific conditions the [Department] deems necessary to ensure that the replacement area will function in a manner similar to the area that will be lost." 310 CMR 10.55(4)(b); Hopkinton, 15 DEPR at 206; Corey, 2018 MA ENV LEXIS 10, at 18-19. The seven general conditions are the following:

> 1. the surface of the replacement area to be created ("the replacement area") shall be equal to that of the area that will be lost ("the lost area");
> 2. the ground water and surface elevation of the replacement area shall be approximately equal to that of the lost area;
> 3. The overall horizontal configuration and location of the replacement area with respect to the bank shall be similar to that of the lost area;
> 4. the replacement area shall have an unrestricted hydraulic connection to the same water body or waterway associated with the lost area;
> 5. the replacement area shall be located within the same general area of the water body or reach of the waterway as the lost area;
> 6. at least 75% of the surface of the replacement area shall be reestablished with indigenous wetland plant species within two growing seasons, and prior to said vegetative reestablishment any exposed soil in the replacement area shall be temporarily stabilized to prevent erosion in accordance with standard U.S. Soil Conservation Service methods; and

> 7. the replacement area shall be provided in a manner which is consistent with all other General Performance Standards for each resource area in Part III of 310 CMR 10.00.

310 CMR 10.55(4)(b).

In exercising its discretion under 310 CMR 10.55(4)(b) to authorize the loss of a maximum 5,000 square feet of BVW, the Department must consider the following factors:

> 1. the magnitude of the alteration and the significance of the project site to the interests identified in [the MWPA];
> 2. the extent to which adverse impacts can be avoided;
> 3. the extent to which adverse impacts are minimized; and
> 4. the extent to which mitigation measures, including replication or restoration, are provided to contribute to the protection of the interests identified in [the MWPA].

310 CMR 10.55(4)(b); Hopkinton, 15 DEPR at 206; Corey, 2018 MA ENV LEXIS 10, at 20.

In 2002, the Department adopted the Massachusetts Inland Wetland Replication Guidelines ("Wetlands Replication Guidelines") "to increase the effectiveness of [wetlands] replication mitigation by providing [project proponents] with an outline of the steps necessary to design an appropriate wetland[s] replication project." Wetlands Replication Guidelines, § 1.1, at p. 5. The Wetlands Replication Guidelines "also assis[t] [local conservation commissions] and [the] Department . . . in determining if a replication project is designed appropriately, constructed as designed, and adequately monitored to ensure the success of the [replication] project." Id.

III. THE DEPARTMENT'S AUTHORITY TO ASSESS CIVIL ADMINISTRATIVE PENALTIES

The Department is authorized by the Civil Administrative Penalties Act, G.L. c. 21A, § 16, and the Administrative Penalty Regulations at 310 CMR 5.00, to assess civil administrative penalties against parties who have:

> fail[ed] to comply with any provision of any regulation, order, license or approval

> issued or adopted by the department, or of any law which the department has the authority or responsibility to enforce . . . .

G.L. c. 21A, § 16; Franklin Office Park Realty Corp. v. Commissioner of the Department of Environmental Protection, 466 Mass. 454, 459-66 (2013); In the Matter of Kane Built, Inc., OADR Docket No. 2017-037, Recommended Final Decision (December 18, 2018), 2017 MA ENV LEXIS 77, at 13, adopted as 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); In the Matter of Iron Horse Enterprises, Inc., OADR Docket No. 2014-022, Recommended Final Decision (May 2, 2016), 2016 MA ENV LEXIS 23, at 58-59, adopted as Final Decision (May 5, 2016), 2016 MA ENV LEXIS 22; Kane, 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 310 CMR 5.12; Franklin Office Park, 466 Mass. at 461; Kane, 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, 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, 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 ("ACM") and knowingly hired a contractor to remove ACM from the property who was not qualified to remove such 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, 2017 MA ENV LEXIS 77, at 15.

As for the proper penalty amount to be assessed by the Department against a party who "[has] fail[ed] to comply with any provision of any regulation, . . . or of any law which the department has the authority or responsibility to enforce," the Civil Administrative Penalties Act, G.L. c. 21A, § 16, and the Administrative Penalty Regulations at 310 CMR 5.25 require the Department to consider 12 factors when calculating the penalty amount. Kane, 2017 MA ENV LEXIS 77, at 15. These 12 factors are discussed below, at pp. 29-54, in connection with the resolution of the issue of whether the Department properly assessed the $55,600.00 penalty

amount against Mr. Cove for the latter's violations of the MWPA and the Wetlands Regulations as set forth in the Department's PAN.

FINDINGS

I. THE PARTIES' RESPECTIVE BURDENS OF PROOF AT THE HEARING

At the Hearing, the Department had the burden of proving by a preponderance of the evidence that: (1) Mr. Cove violated the MWPA and the Wetlands Regulations as alleged by the Department in the PAN; and (2) the Department properly assessed the $55,600.00 penalty amount pursuant to G.L. c. 21A, § 16 and 310 CMR 5.25. In the Matter of West Meadow Homes, Docket Nos. 2009-023 & 024, Recommended Final Decision (June 20, 2011), 2011 MA ENV LEXIS 85, at 11-14, 28-37, adopted as Final Decision (August 18, 2011), 2011 MA ENV LEXIS 84; Kane, 2017 MA ENV LEXIS 77, at 16.

Mr. Cove, however, had the burden of proving by a preponderance of the evidence at the Hearing that he lacks the financial ability to pay the $55,600.00 penalty. In the Matter of Stephen W. Seney, OADR Docket No. 2012-019, Recommended Final Decision (March 25, 2013), 2013 MA ENV LEXIS 27, at 5, adopted by Final Decision (April 2, 2013), 2013 MA ENV LEXIS 26; In the Matter of Ferry Street Partners Investment Trust and Daniel J. Messier, Trustee, OADR Docket No. 2015-008, Recommended Final Decision (October 11, 2016), 2016 MA ENV LEXIS 63, at 53 n.7, adopted as Final Decision (December 14, 2016), 2016 MA ENV LEXIS 62. Mr. Cove's financial inability defense could not be based on conclusory statements that he lacked the financial ability to pay the penalty; instead he was required to support his claim with corroborating financial records. Ferry Street, 2016 MA ENV LEXIS 63, at 53-54, citing, In the Matter of Roofblok, Docket No. 2006-047 and 048, Final Decision, n. 6 & 7 (May 7, 2010); In the Matter of Blackinton Common, LLC, 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'"), adopted as Final Decision (January 7, 2010).

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

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

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

II. THE DE NOVO STANDARD OF REVIEW OF THE DEPARTMENT'S PENALTY DETERMINATIONS

On appeal, my review of the Department's determinations underlying the PAN, specifically that: (1) Mr. Cove violated the MWPA and Wetlands Regulations as set forth in the PAN; (2) $55,600.00 is an appropriate penalty amount assessed against Mr. Cove for the

violations; and (3) Mr. Cove failed to demonstrate that he lacks the financial ability to pay the PAN, is de novo, meaning that my review is anew based on a preponderance of the evidence presented at the Hearing and the governing statutory and regulatory requirements, irrespective of what the Department determined previously. West Meadow Homes, 2011 MA ENV LEXIS 85, at 11-14, 28-37 (Department's $6,000.00 penalty assessment against appellant for violations of 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); 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 Enterprises, Inc., 2016 MA ENV LEXIS 23, at 61-65 (Department's $30,000.00 penalty assessment for appellant's violations of Massachusetts Oil and Hazardous Material Release Prevention and Response Act, G.L. c. 21E, affirmed where Department demonstrated that penalty had a sufficient factual and legal basis); Kane, 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 this de novo standard of review, the Presiding Officer responsible for adjudicating an appeal of a PAN 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 the requirements. In the Matter of Pioneer Valley Energy Center, LLC ("PVEC"), OADR Docket

No. 2011-010, Recommended Final Decision (September 23, 2011), 2011 MA ENV LEXIS 109, at 26, adopted as 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. Commissioner of Ins., 447 Mass. 478, 481 (2006));[8] 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 as Final Decision (June 18, 2019), 2019 MA ENV LEXIS 63.

The de novo standard of review employed here to determine whether the Department properly issued the PAN to Mr. Cove is similar to the "rational basis test" utilized by Massachusetts courts conducting judicial review of discretionary decisions of state agencies. Kane, 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 the PAN's affirmance by the Department's Commissioner if the Presiding Officer determines based on a preponderance of the evidence presented at the evidentiary Adjudicatory Hearing and the governing statutory and regulatory requirements that the Department's determinations have a rational basis, i.e. a sufficient factual and legal

[8] PVEC involved an administrative appeal of the Department's issuance of a Sewer Permit to the proponent of a proposed electricity generating facility in Westfield, Massachusetts that authorized the proponent's discharge of wastewater into Westfield's sewer system. In lieu of an evidentiary Adjudicatory Hearing, the parties in the appeal agreed to submit the case to the Presiding Officer upon the record, which included the sworn pre-filed testimony of witnesses presented by the parties in support of their respective positions in the appeal. After reviewing the record, the Presiding Officer issued a Recommended Final Decision affirming the Department's issuance of the Sewer Permit. The subsequent Final Decision by the Department's then Commissioner, adopted all of the Presiding Officer's findings and rulings of his Recommended Final Decision except for some of the Presiding Officer's reasoning in ruling that the Department sufficiently considered climate change impacts in issuing the Sewer Permit as required by G.L. c. 30, § 61. 2011 MA ENV LEXIS 109, at 4-7. A subsequent court challenge to the Final Decision was dismissed by the Hampden Superior Court. Babinski v. Sullivan, C.A. No. 1179CV00077, Hampden Superior Court, Amended Judgment on Defendants' Motion to Dismiss (February 8, 2012).

foundation, and recommend otherwise if they do not. West Meadow Homes; Iron Horse Enterprises, Inc., supra; Kane, supra. It is important to note, however, that notwithstanding the Presiding Officer's determination and recommendation on the propriety of a PAN issued by the Department, it is the Department's Commissioner, as the final agency decision-maker in the appeal, who has the ultimate authority over the PAN's fate, and as a result, the Commissioner may affirm the PAN in whole or in part or vacate the PAN in its entirety based on the evidentiary record and the governing statutory and regulatory requirements. 310 CMR 1.01(14)(b);[9] In the Matter of Associated Building Wreckers, Inc., OADR Docket No. 2003-132, Final Decision (July 6, 2004), 11 DEPR 176 (2004) (Department's Commissioner rejected DALA[10] Administrative Magistrate's recommendation that Department's $2,500.00 penalty assessment against appellant for air pollution violations be reduced from by $625.00 to $1,875.00 after concluding Magistrate erred in determining $2,500.00 penalty amount was excessive); In the Matter of Roofblok Limited, OADR Docket Nos. 2006-047 & 048, Final Decision (May 7, 2010), 17 DEPR 377 (2010) (Department's Commissioner accepted DALA Administrative Magistrate's recommendation that Department's $86,498.50 penalty assessment against appellant for solid waste, hazardous waste, and water pollution violations be vacated, "but for different reasons than those articulated by the DALA Magistrate"); West Meadow Homes, supra (Department's Commissioner accepted Chief Presiding Officer's recommendations that

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

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

Department's Unilateral Administrative Order ("UAO) against appellant be affirmed because Department's determinations and directives in UAO regarding appellant's violations of the MWPA had a sufficient factual and legal basis but that Department's $6,000.00 civil administrative penalty assessment against appellant for the violations be vacated because Department failed to prove compliance with the Civil Administrative Penalties Act, G.L. c. 21A, § 16, in assessing penalty); Iron Horse Enterprises, Inc., supra (Department's Commissioner accepted Presiding Officer's recommendation that Department's $30,000.00 civil administrative penalty assessment for appellant's violations of G.L. c. 21E be affirmed because penalty had a sufficient factual and legal basis); Kane, supra (Department's Commissioner accepted Chief Presiding Officer's recommendation that Department's $67,250.00 civil administrative penalty assessment against appellant's violations of Department's asbestos removal regulations be affirmed because penalty had a sufficient factual and legal basis).

III. MR. COVE VIOLATED THE MWPA AND THE WETLANDS REGULATIONS AS ALLEGED BY THE DEPARTMENT IN THE PAN AND HIS VIOLATIONS WERE WILFUL AND NOT THE RESULT OF ERROR WITHIN THE MEANING OF G.L. c. 21A, § 16

The Department's PAN alleges that Mr. Cove violated the MWPA and the Wetlands Regulations by conducting unauthorized activities in the protected wetlands areas of Bank and BVW at the Site and that the violations were willful and not the result of error within the meaning of G.L. c. 21A, § 16. PAN, ¶¶ 4-27. Specifically, the Department alleges in the PAN that Mr. Cove:

(1) "altered areas subject to the [MWPA] at the Site without filing a Notice of Intent [with the SCC] or obtaining an Order of Conditions [from the SCC], in violation of [the MWPA] and [the Wetlands Regulations at] 310 CMR 10.02(2)(a)";[11]

[11] PAN, ¶ 20A.

(2) "altered approximately 1,050 linear feet of Bank [at the Site], in violation of the [P]erfromance [S]tandards [for activities in Bank as set forth in the Wetlands Regulations,] at 310 CMR 10.54(4)";[12] and

(3) "altered approximately 25,300 square feet of BVW [at the Site], in violation of the [P]erformance [S]tandards [for activities in BVW as set forth in the Wetlands Regulations,] at 310 CMR 10.55(4).[13]

At the Hearing, the Department's witnesses, Ms. Selby and Ms. Child, presented persuasive testimonial, documentary, and photographic evidence demonstrating that Mr. Cove violated the MWPA and the Wetlands Regulations as alleged by the Department in the PAN, and that Mr. Cove's violations were willful and not the result of error within the meaning of G.L. c. 21A, § 16, meaning that Mr. Cove "intentionally [undertook] the act[s] that caused the violation[s], and that [he] either knew or should have known at least the facts that made the act[s] a violation of the law." Franklin Office Park, 466 Mass. at 465-66. Specifically, Ms. Selby's and Ms. Child's testimonial, documentary, and photographic evidence, which neither Mr. Cove nor his expert witness, Mr. Stone, effectively refuted at the Hearing, demonstrated the following.

The Site is comprised of portions of two different parcels of real property in Sterling: (1) the Trust Property owned by Trust and (2) the NEP Property owned by NEP. PAN, ¶¶ 4-8; Ms. Selby's Direct PFT, ¶¶ 8-10; Ms. Child's Direct PFT, ¶¶ 5-7. Mr. Cove is a beneficiary of the Trust. Id.

On April 25, 2016, NEP informed the SCC and the Department that Mr. Cove had recently trespassed on the NEP Property from the Trust Property and conducted "apparent illegal wetlands alterations" on the NEP Property including "trenching and draining of a wetland . . .

[12] PAN, ¶ 20B. "Performance Standards" are "th[e] requirements established by [the Wetlands Regulations] for activities in or affecting [specific wetlands areas protected by the MWPA]." 310 CMR 10.04.

[13] PAN, ¶ 20C.

and apparent fill of a wetland." PAN, ¶ 6; Ms. Selby's Direct PFT, ¶ 11; Ms. Child's Direct PFT, ¶ 8; Department Hearing Exhibit 3. Mr. Cove "ha[d] [also] removed a beaver dam that was located within the wetland located on [the] NEP [P]roperty." Department Hearing Exhibit 3.

In response, on May 9, 2016, Ms. Child contacted Ms. Belair, the Trust's Trustee, to confirm whether the Trust had recently performed any work on the Trust Property. PAN, ¶ 7; Ms. Child's Direct PFT, ¶ 9. Ms. Belair informed Ms. Child that the Trust had neither performed any such work nor had authorized anyone to perform such work. Id. On behalf of the Trust, Ms. Belair granted the Department permission to conduct an inspection of the Trust Property on the following day, May 10, 2016. Id. NEP also granted the Department permission to inspect the NEP Property on that date. PAN, ¶ 8; Ms. Child's Direct PFT, ¶ 10; Ms. Selby's Direct PFT, ¶ 12.

At Ms. Child's direction, on May 10, 2016, Ms. Selby inspected the Site. PAN, ¶ 8; Ms. Child's Direct PFT, ¶ 10; Ms. Selby's Direct PFT, ¶ 12; Ms. Selby's Rebuttal PFT, ¶ 5. Also present during the inspection were: Matt Marro, the SCC's Conservation Agent; Lindsey Lefebvre, of the United States Army Corps of Engineers ("USACE"); and NEP representatives Andrea Agostino ("Ms. Agostino") and Christina Boudreau ("Ms. Boudreau"). Ms. Selby's Direct PFT, ¶ 12; Ms. Selby's Rebuttal PFT, ¶ 5. During the inspection, Ms. Selby observed that unauthorized work had taken place within the protected wetlands of Bank and BVW at the Site. PAN, ¶ 8; Ms. Child's Direct PFT, ¶ 10; Ms. Selby's Direct PFT, ¶ 12.[14] The unauthorized work

[14] Ms. Selby also determined that the unauthorized work had also taken place in the protected wetlands areas of Land Under Water Bodies ("LUW") and Riverfront Area associated with an unnamed stream. Ms. Selby's Direct PFT, ¶ 12. The PAN, however, did not assess any civil administrative penalties against Mr. Cove for having performed unauthorized work in those protected wetlands areas. As a result, this Recommended Final Decision does not focus on Mr. Cove's purported unauthorized work in the LUW and Riverfront Area.

included clearing, filling, and grading, construction of access roads, installation of a culvert and headwall, and channelization and relocation of a stream. PAN, ¶ 8; Ms. Selby's Direct PFT, ¶ 12.

Ms. Selby reported the results of her inspection of the Site to Ms. Child. Ms. Child's Direct PFT, ¶ 10. Several days after Ms. Selby's inspection, on May 13, 2016, Ms. Child contacted Mr. Cove by telephone to discuss the results of Ms. Selby's inspection. PAN, ¶ 10; Ms. Child's Direct PFT, ¶ 12. In the telephone conversation, Mr. Cove admitted that he had conducted the unauthorized work in the protected wetlands at the Site that Ms. Selby had observed during her inspection of the Site. Id. Mr. Cove also agreed to cease all work at the Site and stated that he had retained Mr. Stone, his wetlands consultant, to assess the wetland impacts caused by Mr. Cove's unauthorized work at the Site. Id. Ms. Child documented her telephone conversation with Mr. Cove in an electronic mail ("e-mail") message that she forwarded to him on the same day. Id.; Department Hearing Exhibit 4. In her e-mail message, Ms. Child confirmed that "during the past year [Mr. Cove had] cleared, filled, and trenched" at the Site "for the purpose of preventing the land [on the Trust Property] from flooding and possible future use of the land for growing hay . . . [or] other commercial uses . . . ." Department Hearing Exhibit 4. Ms. Child also confirmed that Mr. Cove "[had] installed a drainage pipe [and that in the area where the pipe was installed] there was already some old piping . . . that [had] deteriorated[, which he] replaced and extended . . . ." Id.

As a result of Mr. Cove's violations of the MWPA and the Wetlands Regulations at the Site, on May 20, 2016, the Department issued a Unilateral Administrative Order ("May 2016 UAO") to Mr. Cove: (1) asserting that he had performed unauthorized work in the protected wetlands areas of Bank and BVW at the Site in violation of the MWPA and the Wetlands

Regulations; (2) directing him to "immediately [] cease and desist from all further [unauthorized] activities [in protected wetlands areas] at the Site" in violation of the MWPA and the Wetlands Regulations; and (3) directing him to take remedial measures within specific deadlines to correct his violations of the MWPA and the Wetlands Regulations. PAN, ¶¶ 11A-11F; Ms. Child's Direct PFT, ¶ 13; Ms. Selby's Direct PFT, ¶ 14; Department Hearing Exhibit 5, ¶¶ 8-16. The remedial actions that the May 2016 UAO directed Mr. Cove to perform included submitting to the Department: (1) by June 10, 2016, an Assessment Report prepared by a wetlands scientist/specialist evaluating the extent of alterations to all wetlands areas at Site; and (2) by June 19, 2016, a Restoration Plan also prepared by a wetlands scientist/specialist setting forth a detailed narrative plan for the complete restoration of those altered wetlands areas. PAN, ¶¶ 11D-11F; Ms. Child's Direct PFT, ¶ 13; Ms. Selby's Direct PFT, ¶ 14; Department Hearing Exhibit 5, ¶¶ 16D-16F.

The May 2016 UAO informed Mr. Cove of his right to file an administrative appeal with OADR to challenge the May 2016 UAO "within twenty-one (21) days from the date of [its issuance]." Department Hearing Exhibit 5, ¶¶ 20-23. The 21st day after the May 2016 UAO's issuance on May 20, 2016 was June 10, 2016. Mr. Cove did not appeal the May 2016 UAO to OADR. PAN, ¶ 12; Ms. Child's Direct PFT, ¶ 14; Ms. Selby's Direct PFT, ¶ 15.[15] He also

[15] The Department contended at the Hearing that the un-appealed May 2016 UAO barred Mr. Cove from challenging the PAN's wetlands violations determinations against Mr. Cove in this appeal because the un-appealed May 2016 UAO made the same determinations. Department's Closing Brief (May 18, 2018), at pp. 4-5. In support of its position, the Department cited several Massachusetts appellate court decisions holding that the "settled principles of claim and issue preclusion, formerly called the 'doctrine of res judicata'" exist to prevent re-litigation of settled matters and that these principles "ha[ve] been applied . . . to the decisions of administrative agencies and cove[r] un-appealed agency final orders." Conservation Commission of Falmouth v. Robert B. Pacheco, 49 Mass. App. Ct. 737, 742 n.5 (2000) (party barred from challenging in court local conservation commission's authority to take enforcement action against party for wetlands violations where party failed to appeal commission's prior order rejecting the party's claim). These decisions also hold that "[a party] challenging the validity of an order before an agency or a court is bound by an un-appealed adverse ruling, not only as to the grounds [the party] raised, but [also] as to those [the party] might have raised but elected to forgo." Laura Giuffrida v. Zoning Board of Appeals of

failed to perform the remedial actions required by the UAO within the deadlines established by the May 2016 UAO. Id.

As a result of his failure to comply with the May 2016 UAO, on July 18, 2016 the Department issued Mr. Cove a Notice of Enforcement Conference ("NOEC") requesting that he attend a meeting with Department staff at the Department's Central Regional Office on July 27, 2016 ("the Enforcement Conference") to discuss the wetlands violations that the Department believed he had committed at the Site as a result of his unauthorized work and possible solutions to ensure his compliance with the May 2016 UAO.[16] The Enforcement Conference took place as scheduled on July 27, 2016. PAN, ¶ 14; Ms. Child's Direct PFT, ¶ 16; Ms. Selby's Direct PFT, ¶ 17. In attendance at the Enforcement Conference were Mr. Cove, Ms. Child, and Ms. Selby. Id. At the Enforcement Conference, they discussed the wetlands violations that the Department believed Mr. Cove had committed as a result of his unauthorized work in Bank and BVW at the Site. Id. They also discussed his failure to comply with the May 2016 UAO's requirement that he provide the Department by June 10, 2016, an Assessment Report prepared by a wetlands

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Falmouth, 68 Mass. App. Ct. 396, 401 (2007). However, these litigation preclusion principles do not govern the un-appealed May 2016 UAO in Mr. Cove's case because the claims of the May 2016 UAO and PAN are not identical for the following reasons.

The May 2016 UAO and the PAN assert different amounts of alterations of Bank and BVW caused by Mr. Cove's unauthorized work at the Site. The May 2016 UAO, issued more than one year prior to the Department's issuance of the PAN, asserted, based on Ms. Selby's May 10, 2016 inspection of the Site, that Mr. Cove's unauthorized work at the Site had altered approximately 800 linear feet of Bank and 38,000 square feet of BVW. Department Hearing Exhibit 5, ¶¶ 8, 10-12. The PAN asserted, based on the same inspection performed by Ms. Selby *and* a February 14, 2017 Assessment Report prepared by Mr. Cove's wetlands consultant of the Site, that nearly 25% more linear feet of Bank (1,050 linear feet) and nearly 35% less square feet of BVW (25,300 square feet) had been altered by Mr. Cove's unauthorized work at the Site. PAN, ¶¶ 8, 17-20C.

[16] NOEC also informed Mr. Cove that the purpose of the Enforcement Conference was also to negotiate the amount of the civil administrative penalty that the Department would assess against him for his wetlands violations at the Site. Department Hearing Exhibit 6, at pp. 1-2; PAN, ¶ 13; Ms. Child's Direct PFT, ¶ 15; Ms. Selby's Direct PFT, ¶ 16. The penalty discussion portion of the Enforcement Conference and what occurred after the Enforcement Conference regarding the penalty assessment is discussed in detail below, at pp. 47-51, in connection my finding and ruling that the Department properly assessed the $55,600.00 civil administrative penalty amount against Mr. Cove for his wetlands violations at the Site.

scientist/specialist evaluating the extent of alterations to all wetlands areas at Site caused by his unauthorized work at the Site. Id. Mr. Cove agreed to submit the Assessment Report by August 17, 2016. Id. As discussed below, he failed to meet that self-imposed deadline and submitted the Assessment Report six months later in February 2017.

As of February 8, 2017, Mr. Cove had neither provided the Assessment Report nor the Restoration Plant to the Department as required by the May 2016 UAO. PAN, ¶ 16; Ms. Child's Direct PFT, ¶ 18; Department Hearing Exhibit 7. On that date, Ms. Child spoke with Mr. Cove by telephone and requested that he provide the Department with both the Assessment Report and the Restoration Plan required by the May 2016 UAO. Id. Mr. Cove agreed to submit both of those items to the Department by February 15, 2017. Id.

On February 14, 2017, Mr. Cove submitted an Assessment Report prepared by his wetlands expert, Mr. Stone. PAN, ¶ 17; Ms. Child's Direct PFT, ¶ 19; Ms. Selby's Direct PFT, ¶ 18; Ms. Selby's Rebuttal PFT, ¶ 6; Department Hearing Exhibit 8. Based on her review of the Assessment Report and earlier May 10, 2016 inspection of the Site, Ms. Selby determined that Mr. Cove's unauthorized work at the Site had resulted in alteration of: (1) approximately 1,050 linear feet of Bank at the Site, in violation of the Performance Standards for activities in Bank as set forth in the Wetlands Regulations, at 310 CMR 10.54(4); and (2) approximately 25,300 square feet of BVW at the Site, in violation of the Performance Standards for activities in BVW as set forth in the Wetlands Regulations, at 310 CMR 10.55(4). Ms. Selby's Direct PFT, ¶¶ 20B-22C. These are the same violations set forth in the PAN. PAN, ¶¶ 20B-20C.

At the Hearing, Mr. Stone testified that the alterations to the Bank and BVW area at the Site were not caused by Mr. Cove. Mr. Stone's Direct PFT, ¶¶ 9-17. Specifically, with respect to the alterations of Bank area at the Site, Mr. Stone testified that the alternations were caused by

an unidentified party's previous gravel operations at the Site. Mr. Stone's Direct PFT, ¶¶ 9-11. Regarding the BVW alteration, Mr. Stone testified that "the area which is the subject of the BVW violation, reflects relatively recent plant growth (meaning more recent than the last 15 years)" and that such "[p]lant growth . . . reflects that the area [in question] was previously mined by prior owners" of the Site. Mr. Stone's Direct PFT, ¶¶ 12-13. Mr. Stone also attempted to cast blame on NEP for any wetlands alterations at the Site by testifying that NEP "ha[d] done substantial landscaping and alteration work in the area over the years, including maintaining power lines, cart paths, access roads, paving, erection of high tension wires, and other normal operations relative to their business activities as a power company." Id., ¶ 16.

Ms. Selby effectively refuted Mr. Stone's testimony by testifying that: (1) her review of "historic aeria[l] [photographs of the Site taken in] the 1990's, 2001, 2005, 2008, 2011, 2013, 2015, and 2017" available on MassGIS[17] and a 1988 topographical map of the Site prepared by the U.S. Geological Survey ("USGS"),[18] and (2) the observations she made of the Site conditions during her May 10, 2016 inspection of the Site, confirmed that "portions of the Site ha[d] been

[17] A "Geographic Information System" or "GIS" is:

> is a computer system capable of capturing, storing, analyzing, and displaying geographically referenced information; that is, data identified according to location. Practitioners also define a GIS as including the procedures, operating personnel, and spatial data that go into the system.

In the Matter of Jodi Dupras, OADR Docket No. WET-2012-026, Recommended Final Decision (July 3, 2013), 2013 MA ENV LEXIS 40, at 37, adopted as Final Decision (July 12, 2013), 2013 MA ENV LEXIS 61; Vecchione, 2014 MA ENV LEXIS 76, at 21;.In the Matter of Francis P. and Debra A. Zarette, Trustees of Farm View Realty Trust, OADR Docket No. WET-2016-030, Recommended Final Decision (February 20, 2018), 2018 MA ENV LEXIS 7, at 39, n.21, adopted as Final Decision (March 1, 2018), 2018 MA ENV LEXIS 6; Mroz, 2019 MA ENV LEXIS 57 at 49-50, n.21. "MassGIS" is the Commonwealth agency that has created a comprehensive, statewide database of spatial information for mapping and analysis supporting environmental planning and management. Dupras 2013 MA ENV LEXIS 40, at 37 38; Vecchione 2014 MA ENV LEXIS 76, at 21; Zarette, 2018 MA ENV LEXIS 7, at 39, n.21; Mroz, 2019 MA ENV LEXIS 57 at 49-50, n.21.

[18] According to its internet website, the USGS is "the Nation's largest water, earth, and biological science and civilian mapping agency [that] collects, monitors, analyzes, and provides science about natural resource conditions, issues, and problems." https://www.usgs.gov/about/about-us/who-we-are; Mroz, 2019 MA ENV LEXIS 57 at 50, n.22.

historically altered [possibly] . . . for gravel removal or a similar earth removal activity[,] [but] [n]one of [that] . . . activity occurred within the [portion of the Site]" where Mr. Cove performed his unauthorized work. Ms. Selby's Rebuttal PFT, ¶¶ 7-9. Ms. Selby also provided persuasive testimony that NEP was not responsible for the alterations to the Bank and BVW areas because Mr. Cove had performed unauthorized work "within the power line easement that [NEP] operate[s] and maintain[s]" at the Site and that during her May 16, 2016 inspection of the Site, she confirmed with NEP's representative, Ms. Agostino, "that no [NEP] projects had occurred within the power line easement in the last 10 years and that [Ms. Agostino] wasn't aware of the last time vegetation management had occurred" at the Site. Ms. Selby's Rebuttal PFT, ¶ 10.

As noted above, the May 2016 UAO also required Mr. Cove to provide the Department with a Restoration Plan prepared by a wetlands scientist/specialist setting forth a detailed narrative plan for the complete restoration of the altered wetlands areas at the Site. PAN, ¶¶ 11D-11F; Ms. Child's Direct PFT, ¶ 13; Ms. Selby's Direct PFT, ¶ 14; Department Hearing Exhibit 5, ¶¶ 16D-16F. The Assessment Report he submitted to the Department on February 14, 2017 included a broad conceptual plan for restoration of the wetland resource areas at the Site but failed to contain a detailed narrative or plan for the restoration. PAN, ¶ 17; Ms. Child's Direct PFT, ¶ 19; Ms. Selby's Direct PFT, ¶ 18; Department Hearing Exhibit 8. The Assessment Report also proposed to leave a cart path in place at the Site ("Cart Path 1", as identified in the Assessment Report), which would result in unpermitted fill of Bank and BVW. Ms. Child's Direct PFT, ¶ 19; Ms. Selby's Direct PFT, ¶ 18.

On March 28, 2017, Ms. Child forwarded a letter to Mr. Cove informing him that his Assessment Report failed to contain a detailed narrative or plan for wetlands restoration at the Site and that he needed to provide that information to the Department by April 14, 2017. Ms.

Child's Direct PFT, ¶ 19; Department Hearing Exhibit 9; PAN, ¶ 21. As of April 19, 2017, Mr. Cove had failed to provide that information to the Department. PAN, ¶ 18; Ms. Selby's Direct PFT, ¶ 19. On that date, Ms. Selby notified Mr. Cove's wetlands consultant, Mr. Stone, that the Assessment Report failed to contain a detailed narrative or plan for wetlands restoration at the Site and that this information had to be provided to the Department. Id.

On May 2, 2017, Mr. Cove contacted Ms. Child by telephone to discuss the Assessment Report. PAN, ¶ 19; Ms. Child's Direct PFT, ¶ 19. Ms. Child explained to Mr. Cove again that the Assessment Report failed to contain sufficient information to constitute a Restoration Plan and that greater detail was required. Id.

On May 9, 2017, the Department's legal counsel forwarded an e-mail message to Mr. Cove's legal counsel, including a copy of Ms. Child's March 28, 2017 letter to Mr. Cove as discussed above and requesting that Mr. Cove provide the Restoration Plan to the Department by May 12, 2017. Department's Hearing Exhibit 11; Ms. Child's Direct PFT, ¶ 24; PAN, ¶ 23. As of August 23, 2017, the date when the Department issued the PAN against him, Mr. Cove had still not submitted the Restoration Plan to the Department.[19] PAN, ¶ 25.

In sum, Mr. Cove violated the MWPA and the Wetlands Regulations as alleged by Department in the PAN and the violations were willful and not the result of error within the meaning of G.L. c. 21A, § 16. A preponderance of the evidence as set forth above demonstrates that Mr. Cove intentionally committed the acts that caused the violations: his unauthorized work in the Bank and BVW areas of the Site and he knew or should have known at least the facts that made the acts a violation of the law. Franklin Office Park, 466 Mass. at 465-66. As discussed in

[19] As discussed below, at pp. 47-51, he also had failed to provide complete financial documentation to the Department in support of his claim that he lacked the financial ability to pay a civil administrative penalty for the wetlands violations he committed at the Site.

the next section below, a preponderance of the evidence presented at the Hearing also demonstrated that the Department properly assessed the $55,600.00 PAN Penalty amount against Mr. Cove pursuant to G.L. c. 21A, § 16 and 310 CMR 5.25 for his wetlands violations at the Site.

IV. THE DEPARTMENT PROPERLY ASSESSED PENALTIES TOTALING $55,600.00 AGAINST MR. COVE FOR HIS VIOLATIONS OF THE MWPA AND WETLANDS REGULATIONS AS ALLEGED BY THE DEPARTMENT IN THE PAN

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

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

(1) The actual and potential impact on public health, safety and welfare, and the environment, of the failure(s) to comply that would be penalized;

(2) The actual and potential damages suffered, and actual or potential costs incurred, by the Commonwealth, or by any other person, as a result of the failure(s) to comply that would be penalized;

(3) Whether the person who would be assessed the Penalty took steps to prevent the failure(s) to comply that would be penalized;

(4) Whether the person who would be assessed the Penalty took steps to promptly come into compliance after the occurrence of the failure(s) to comply that would be penalized;

(5) Whether the Person who would be assessed the Penalty took steps to remedy and mitigate whatever harm might have been done as a result of the failure(s) to comply that would be penalized;

(6) Whether the person being assessed the Penalty has previously failed to comply with any regulation, order, license, or approval issued or adopted by the Department, or any law which the Department has the authority or responsibility to enforce;

(7) Making compliance less costly than the failure(s) to comply that would be penalized;

(8) Deterring future noncompliance by the person who would be assessed the Penalty;

(9) Deterring future noncompliance by persons other than the person who would be assessed the Penalty;

(10) The financial condition of the person who would be assessed the Penalty;

(11) The public interest; and

(12) Any other factor(s) that reasonably may be considered in determining the amount of a Penalty, provided that said factor(s) shall be set forth in the Penalty Assessment Notice.

Iron Horse Enterprises, Inc., 2016 MA ENV LEXIS 23, at 60-61; Kane, 2017 MA ENV LEXIS 77, at 57-59. Although consideration of the 12 factors set forth above is mandatory, neither the Civil Administrative Penalties Act, G.L. c. 21A, § 16, nor the Department's Administrative Penalty Regulations at 310 CMR 5.25 "defines 'consider' or 'considerations,' and neither requires any particular quantum or degree of consideration [by the Department]; nor does either the statute or the regulation[s] specify what the Department must review in considering any of the penalty factors." Roofblok, 17 DEPR at 378; Kane, 2017 MA ENV LEXIS 77, at 59. As a result, the Act and the Regulations "leave[] the weight to be given each factor to [the Department's] discretion," and, accordingly, "[t]he penalty assessment amount . . . is not a factual finding but the exercise of a discretionary grant of power" on the Department's part. Roofblok, 17 DEPR at 380; Iron Horse Enterprises, Inc., 2016 MA ENV LEXIS 23, at 59-60; Kane, 2017 MA ENV LEXIS 77, at 59-60.

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

administrative appeal challenging a Department's penalty assessment, the Department has the burden of "demonstrat[ing] by a preponderance of the evidence [at the evidentiary adjudicatory hearing] that it [appropriately exercised] . . . its discretion in determining the [penalty] amount," meaning "that it sufficiently considered the required statutory and regulatory factors, and such consideration is reflected in the penalty amount." Id. If there is a sufficient factual and legal basis to support the Department's exercise of discretion in determining the penalty amount, the penalty should be affirmed. Id.

B. The Department's Tools for Making Civil Administrative Penalty Assessments

To assist Department personnel in making civil administrative penalty determinations in accordance with the requirements of G.L. c. 21A, § 16 and 310 CMR 5.25, the Department has developed the following tools: (1) a guidance document entitled "Guidelines for Calculating Civil Administrative Penalties 310 CMR 5.00 Revised Policy ENF-2010-001" adopted on April 15, 2010 ("the Penalty Guidelines"); (2) a computer program entitled "PenCalc"; and (3) a database containing Base Penalty Amounts for violations of specific environmental statutory or regulatory requirements. Ms. Childs' Direct PFT, ¶¶ 29-32; Department Hearing Exhibits 12 and 13.

1. The Department's Penalty Guidelines and "PenCalc" Tool

The Penalty Guidelines describe in general how Department personnel should calculate a civil administrative penalty using the 12 factors set forth in G.L. c. 21A, § 16 and 310 CMR 5.25. Ms. Childs' Direct PFT, ¶ 29. In conjunction with the Penalty Guidelines, MassDEP developed PenCalc, which generates a Penalty Calculation Worksheet for MassDEP personnel to complete while calculating a penalty. Id. "The purposes [Penalty Calculation] Worksheet is to

provide MassDEP personnel with a standardized format for demonstrating and documenting their consideration of each of the required [12] factors in calculating the civil administrative penalty for each [alleged environmental] violation [set forth in the PAN]." Id. The Penalty Calculation Worksheet memorializes the determinations that Department personnel have made in calculating the penalty for each alleged environmental violation and is provided to the alleged violator at the same time when the Department issues the PAN. Kane, 2017 MA ENV LEXIS 77, at 61. A copy of the Penalty Calculation Worksheet that the Department provided to Mr. Cove when the Department issued the PAN to Mr. Cove ("the Cove Penalty Calculation Worksheet") is contained in Department Hearing Exhibit 13.

2. The Department's Base Penalty Amounts for Specific Environmental Violations

The Department has established Base Penalty Amounts for violations of specific statutory or regulatory environmental requirements "[to] ensur[e] that all penalties for violations of the same statutory or regulatory requirement start out at the same dollar amount and increase or decrease from that dollar amount depending upon the circumstances of the particular instance of violation, based on the applicability of the factors in M.G.L. c. 21A, §16 and. 310 CMR 5.25." Kane, 2017 MA ENV LEXIS 77, at 68. "The Base Penalty Amount is the starting dollar amount to which any upward and downward adjustments are made [by the Department in accordance with the Penalty Guidelines], as appropriate, to determine the total administrative penalty [amount] for [the] violation." Id. The Base Penalty Amounts are contained in the Department's database known as Citation Maintenance, from which PenCalc draws the information for the

Penalty Calculation Worksheet. Ms. Childs' Direct PFT, ¶ 32.

Here, as set forth in the PAN and Ms. Childs' testimony,[20] the $55,600.00 penalty amount that the Department assessed against Mr. Cove is the sum of three penalty amounts for his violations of three specific provisions of the Wetlands Regulations:

Penalty Amount No. 1:	$5,600.00 for violating 310 CMR 10.02(2)(a) by "alter[ing] areas subject to the [MWPA] at the Site without filing a Notice of Intent [with the SCC] or obtaining an Order of Conditions [from the SCC]";[21]
Penalty Amount No. 2:	$25,000.00 for violating 310 CMR 10.54(4) by "alter[ing] approximately 1,050 linear feet of Bank [at the Site], in violation of the [P]erformance [S]tandards [for activities in Bank]";[22] and
Penalty Amount No. 3:	$25,000.00 for violating 310 CMR 10.55(4) by "alter[ing] approximately 25,300 square feet of BVW [at the Site], in violation of the [P]erformance [S]tandards [for activities in BVW]."[23]

At the Hearing, Ms. Child testified that the Base Penalty Amounts for violations of these regulations are: (1) $4,000.00 per day for a violation of 310 CMR 10.02(2)(a);[24] (2) $25,000.00 per day for a violation of 310 CMR 10.54(4), which is the maximum daily penalty;[25] and (3) $20,000.00 per day for a violation of 310 CMR 10.55(4).[26] As discussed below, at pp. 34-54, in accordance with the Penalty Guidelines and the 12 penalty factors of 310 CMR 5.25 and G.L.

[20] Ms. Child testified that she was responsible for developing and finalizing the Department's $55,600.00 penalty assessment against Mr. Cove. Ms. Childs' Direct PFT, ¶¶ 27-66; Ms. Child's Rebuttal PFT, ¶¶ 1-4.

[21] PAN, ¶¶ 20A, 28A; Ms. Childs' Direct PFT, ¶¶ 31-41.

[22] PAN, ¶¶ 20B, 28B; Ms. Childs' Direct PFT, ¶¶ 42-53.

[23] PAN, ¶¶ 20C, 28C; Ms. Childs' Direct PFT, ¶¶ 54-66.

[24] Ms. Childs' Direct PFT, ¶ 32.

[25] Ms. Childs' Direct PFT, ¶ 44.

c. 21A, § 16, the Department properly: (1) increased the Base Penalty Amounts for Mr. Cove's violations of 310 CMR 10.02(2)(a) and 310 CMR 10.55(4) to $5,600.00 and $25,000.00 respectively, and (2) assessed the maximum daily Base Penalty Amount of $25,000.00 against him for his violation of 310 CMR 10.54(4).

C. The Department Properly Selected the "Wilful and Not the Result of Error" Pre-Condition for Each of the Three Penalty Amounts

PenCalc requires Department personnel to select one of the pre-conditions for a civil administrative penalty under G.L. c. 21A, §16 and 310 CMR 5.10 "that must exist in order for MassDEP to assess a civil administrative penalty for a regulatory violation . . . ." Kane, 2017 MA ENV LEXIS 77, at 66-67. In assessing each of the three penalty amounts totaling $55,600.00 that the Department assessed against Mr. Cove for violating 310 CMR 10.02(2)(a), 310 CMR 10.54(4), and 310 CMR 10.55(4), respectively, Ms. Child selected "willful and not the result of error" as the precondition for Mr. Cove's violation of each regulation. Ms. Childs' Direct PFT, ¶¶ 31, 42, 54. Ms. Childs' selection of this precondition is more than supported by a preponderance of the evidence presented at the Hearing as discussed above, at pp. 19-29, which established that Mr. Cove's violations of the three Wetlands Regulations at issue were willful and not the result of error.

D. The Department Properly Considered the 12 Penalty Factors in Assessing Each of the Three Penalty Amounts

Ms. Child testified that the Penalty Guidelines and the Penalty Calculation Sheet group the 12 penalty factors of 310 CMR 5.25 and G.L. c. 21A, § 16 into six general categories, specifically, (1) gravity-based factors (Penalty Factors 1 and 2); (2) Good Faith/Lack of Good

[26] Ms. Childs' Direct PFT, ¶ 56.

Faith factors (Penalty Factor 3, 4, and 5); (3) previous noncompliance (Penalty Factor 6); (4) economic benefit (Penalty Factor 7); (5) financial consideration factors (Penalty Factors 8, 9, and 10); and (6) Public Interest and Other Factors specific to the case (Penalty Factors 11 and 12). Ms. Child's Direct PFT, ¶ 30. As set forth below, Ms. Child provided detailed testimony regarding how she considered all of these factors in assessing each of the three penalty amounts for Mr. Cove's violations of 310 CMR 10.02(2)(a), 310 CMR 10.54(4), and 310 CMR 10.55(4), respectively.

1. The Department Properly Considered Gravity Based Factors of Penalty Factors 1 and 2 in Assessing Each of the Three Penalty Amounts

a. The Criteria of Penalty Factors 1 and 2

Penalty Factors 1 and 2 as set forth in 310 CMR 5.25(1) and 5.25(2) and G.L. c. 21A, § 16 are gravity based factors intended "to indicate the seriousness of the particular violation relative to other violations of the same statutory or regulatory requirement." Kane, 2017 MA ENV LEXIS 77, at 70. These Penalty Factors respectively require the Department to consider the following in making a penalty assessment:

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

The Penalty Guidelines expressly prohibit the Department from using gravity-based adjustments to decrease the Base Penalty Amount for a violation. Kane, 2017 MA ENV LEXIS 77, at 70. Hence, in considering Penalty Factors 1 and 2 in Mr. Cove's case, the Department could only increase the Base Penalty Amounts for his violations of 310 CMR 10.02(2)(a), 310 CMR

10.54(4), and 310 CMR 10.55(4), respectively, if the Department had a sufficient factual and legal basis for the increase. Id.

b. The Department's Consideration of the Criteria of Penalty Factors 1 and 2 In Assessing Each of the Three Penalty Amounts

Ms. Child testified that in accordance with the Penalty Guidelines, she considered the gravity based criteria of Penalty Factors 1 and 2 in assessing each of the penalties for Mr. Cove's violations of 310 CMR 10.02(2)(a), 310 CMR 10.54(4), and 310 CMR 10.55(4), and her consideration of these factors resulted in the following determinations:

(1) no increase to the $4,000.00 Base Penalty Amount for his violation of 310 CMR 10.02(2)(a)[27];

(2) no increase to the $25,000.00 Base Penalty Amount for his violation 310 CMR 10.54(4);[28] and

(3) a 10% increase to the $20,000.00 Base Penalty Amount for his violation of 310 CMR 10.55(4) because he altered portions of BVW at the Site that are located in a protected habitat area, specifically an area that had been mapped by the Massachusetts Natural Heritage and Endangered Species Program ("NHESP") as Priority Habitats of Rare Species (PH394) and Estimated Habitats of Rare Wildlife (EH276).[29]

At the Hearing, Mr. Cove presented no evidence demonstrating that Ms. Child's three determinations resulting from her consideration of Penalty Factors 1 and 2 in assessing each of

[27] Ms. Child's Direct PFT, ¶ 33.

[28] Ms. Child's Direct PFT, ¶ 45.

[29] Ms. Childs' Direct PFT, ¶¶ 11, 57. The 10% increase is shown in the sixth column of Line 3 on the Cove Penalty Calculation Worksheet. Department's Hearing Exhibit 13. The NHESP is administered by the Massachusetts Division of Fisheries and Wildlife ("MASSWILDLIFE"), which "is responsible for the conservation of freshwater fish and wildlife in the Commonwealth, including endangered plants and animals." https://www.mass.gov/orgs/division-of-fisheries-and-wildlife; https://www.mass.gov/orgs/masswildlifes-natural-heritage-endangered-species-program; https://www.mass.gov/orgs/division-of-fisheries-and-wildlife. "Areas delineated as Priority Habitats [by the NHESP] are protected and can include wetlands, uplands, and marine habitats." https://docs.digital.mass.gov/dataset/massgis-data-nhesp-priority-habitats-rare-species.

the penalties for Mr. Cove's violations of 310 CMR 10.02(2)(a), 310 CMR 10.54(4), and 310 CMR 10.55(4) were improper. Mr. Cove's Direct PFT, ¶¶ 1-21; Mr. Stone's Direct PFT, ¶¶ 1-17. Moreover, Ms. Child's three determinations were proper because they satisfy the reasonableness test by being in the lower portion of the authorized penalty range for a violation of 310 CMR 10.02(2)(a), 310 CMR 10.54(4), and 310 CMR 10.55(4). Kane, 2017 MA ENV LEXIS 77, at 80 (a civil administrative penalty "that . . . is in the lower portion of the statutory range [permitted for the penalty] easily satisfies [the reasonableness] . . . test"). As discussed above, under the Penalty Guidelines governing the Department's consideration of the gravity-based adjustments of Penalty Factors 1 and 2, the lower portion of the authorized penalty range for a violation of 310 CMR 10.02(2)(a), 310 CMR 10.54(4), or 310 CMR 10.55(4) is either no increase or a minimal increase in the Base Penalty Amounts for violations of these regulations. The Department made no increases in the Base Penalty Amounts for Mr. Cove's violations of 310 CMR 10.02(2)(a) and 310 CMR 10.54(4), and made a minimal 10% increase in the Base Penalty Amount for his violation of 310 CMR 10.55(4). The 10% increase in the Base Penalty Amount for his violation of 310 CMR 10.55(4) also had a rational basis: Mr. Cove altered BVW located in a protected habitat area.

2. The Department Properly Considered Penalty Factors 3, 4, and 5 in Assessing Each of the Three Penalty Amounts

a. The Criteria of Penalty Factors 3, 4 and 5

Penalty Factors 3, 4, and 5 as set forth in 310 CMR 5.25(3), 5.25(4), and 5.25(5) and G.L. c. 21A, § 16 are "Good Faith/Lack of Good Faith Adjustment" factors, which require the Department to consider the following in making a penalty assessment:

Penalty Factor 3: Whether the person who would be assessed the Penalty

took steps to prevent the failure(s) to comply that would be penalized (310 CMR 5.25(3));

Penalty Factor 4: Whether the person who would be assessed the Penalty took steps to promptly come into compliance after the occurrence of the failure(s) to comply that would be penalized (310 CMR 5.25(4)); and

Penalty Factor 5: Whether the Person who would be assessed the Penalty took steps to remedy and mitigate whatever harm might have been done as a result of the failure(s) to comply that would be penalized (310 CMR 5.25(5)).

Penalty Factor 3, 4, and 5 authorize the Department to make upward or downward adjustments to a Base Penalty Amount based on the facts of the case. Kane, 2017 MA ENV LEXIS 77, at 72. "The [Penalty] Guidelines state that application of [the Good Faith/Bad Faith] adjustments may result in a 0% to 50% downward or upward adjustment" and that "[t]hese adjustments are intended to evaluate a violator's actions, omissions, and conduct related to environmental compliance, but not the violator's 'good' or 'bad' personality." Kane, 2017 MA ENV LEXIS 77, at 72-73. "In applying these adjustments, the [Penalty] Guidelines instruct MassDEP personnel to consider the following: [1] the degree of control the violator had over the events, and whether the violator took reasonable precautions against the events; [2] the foreseeability of the events, and whether the violator knew or should have known of the hazards associated with the events; [3] whether the violator knew of the legal requirement(s) violated (the [Penalty] Guidelines state that MassDEP personnel can adjust upward only for this consideration); [4] the amount of control the violator had over how quickly the violation was, or could have been,

remedied; and [5] what the violator did, and how quickly, to remedy the violation." Id.

b. The Department's Consideration of the Criteria of Penalty Factors 3, 4, and 5 In Assessing Each of the Three Penalty Amounts

Ms. Child testified that that in accordance with the Penalty Guidelines, she considered the Good Faith/Lack of Good Faith criteria of Penalty Factors 3, 4, and 5 in assessing each of the penalties for Mr. Cove's violations of 310 CMR 10.02(2)(a), 310 CMR 10.54(4), and 310 CMR 10.55(4), and her consideration of these factors resulted in 10% increases in each of the Base Penalty Amounts for Mr. Cove's violations of these regulations. Ms. Child's Direct PFT, ¶ 35 (310 CMR 10.02(2)(a));[30] Ms. Child's Direct PFT, ¶ 47 (310 CMR 10.54(4));[31] Ms. Child's Direct PFT, ¶ 59 (310 CMR 310 CMR 10.55(4)).[32] She testified that she made these 10% increases because of Mr. Cove's failure to:

(1) inform the Department of the wetlands violations he had committed at the Site (the Department only learned of those violations after NEP informed the Department in April 2016 of Mr. Cove's unauthorized work at the Site);[33] and

(2) perform the remedial measures he was ordered to perform by the

[30] The 10% increase in the $4,000.00 Base Penalty Amount for Mr. Cove's violation of 310 CMR 10.02(2)(a) is shown in the eighth column of Line 1 on the Cove Penalty Calculation Worksheet. Department's Hearing Exhibit 13.

[31] The 10% increase in the $25,000.00 Base Penalty Amount for Mr. Cove's violation of 310 CMR 10.54(4) is shown in the eighth column of Line 2 on the Cove Penalty Calculation Worksheet. Department's Hearing Exhibit 13. This 10% increase ultimately was not assessed against Mr. Cove in the PAN because the maximum daily penalty for a violation of 310 CMR 10.54(4) is $25.000.00. Ms. Child's Direct PFT, ¶ 52.

[32] The 10% increase in the $20,000.00 Base Penalty Amount for Mr. Cove's violation of 310 CMR 310 CMR 10.55(4) is shown in the eighth column of Line 3 on the Cove Penalty Calculation Worksheet. Department's Hearing Exhibit 13.

[33] Ms. Child's Direct PFT, ¶ 35; See also PAN, ¶¶ 6-8; Ms. Child's Direct PFT, ¶¶ 8-10; Ms. Selby's Direct PFT, ¶¶ 11-12; Ms. Selby's Rebuttal PFT, ¶ 5; Department Hearing Exhibit 3.

May 2016 UAO within the deadlines established by the UAO.[34]

Ms. Child's reasoning for making these 10% increases is more than supported by the evidence presented at the Hearing.

As discussed in detail above, at pp. 22-29, the remedial measures that the May 2016 UAO required Mr. Cove to perform was his submittal to the Department by June 10, 2016, of an Assessment Report prepared by a wetlands scientist/specialist evaluating the extent of alterations to all wetlands areas at Site. Mr. Cove provided this Assessment Report to the Department on February 14, 2017, eight months after the June 10, 2016 deadline and only after much follow up communications Ms. Child and/or Ms. Selby had with Mr. Cove or his wetlands expert, Mr. Stone. The May 2016 UAO also directed Mr. Cove to provide the Department by June 19, 2016, a Restoration Plan prepared by a wetlands scientist/specialist setting forth a detailed narrative plan for the complete restoration of the altered wetlands areas. See above, at pp. 22-29. Mr. Cove never submitted this Restoration Plan to the Department notwithstanding the numerous requests that Ms. Child and/or Ms. Selby made to Mr. Cove or his wetlands expert for the Restoration Plan in the year following the May 2016 UAO's issuance and prior to the PAN's issuance. Id.

At the Hearing, Mr. Cove presented no evidence refuting Ms. Child's testimony that she properly considered the Good Faith/Lack of Good Faith criteria of Penalty Factors 3, 4, and 5 in assessing in each of the penalties for Mr. Cove's violations of 310 CMR 10.02(2)(a), 310 CMR 10.54(4), and 310 CMR 10.55(4). Mr. Cove's Direct PFT, ¶¶ 1-21; Mr. Stone's Direct PFT, ¶¶ 1-17. He would have been hard-pressed to refute Ms. Child's testimony based on the evidence presented at the Hearing as discussed in detail above. Indeed, based on the evidence,

[34] Ms. Child's Direct PFT, ¶ 35.

Ms. Child would have been warranted in increasing the Base Penalty Amounts by more than 10% and to a maximum of 50% in accordance with the Penalty Guidelines. The fact that Ms. Child kept the upward adjustment to the lower 10% level evidences the reasonableness of her determination. Kane, 2017 MA ENV LEXIS 77, at 80 (a civil administrative penalty "that . . . is in the lower portion of the statutory range [permitted for the penalty] easily satisfies [the reasonableness] . . . test").

3. The Department Properly Considered Penalty Factor 6 in Assessing Each of the Three Penalty Amounts

a. The Criteria of Penalty Factor 6

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

> Whether the person being assessed the Penalty has previously failed to comply with any regulation, order, license, or approval issued or adopted by the Department, or any law which the Department has the authority or responsibility to enforce.

Penalty Factor 6 "refers to previous violations over time by a given violator, including documented failures by the violator to comply with either the same or any other environmental regulations, laws or requirements." Kane, 2017 MA ENV LEXIS 77, at 77. "The [Penalty] Guidelines state that the adjustment under [Penalty Factor 6] may result in a 0 to 50% upward adjustment [to the base penalty amount] only" because "no downward adjustments are allowed for this factor." Id. Thus, in considering Penalty Factor 6 in Mr. Cove's case, the Department could not decrease the Base Penalty Amounts for his violations of 310 CMR 10.02(2)(a), 310 CMR 10.54(4), and 310 CMR 10.55(4), but only increase them by a maximum of 50% if the

Department had a sufficient factual and legal basis for the increase. Id.

b. The Department's Consideration of the Criteria of Penalty Factor 6 In Assessing Each of the Three Penalty Amounts

Ms. Child testified that that in accordance with the Penalty Guidelines, she considered the "previous noncompliance" criteria of Penalty Factor 6 in assessing each of the penalties for Mr. Cove's violations of 310 CMR 10.02(2)(a), 310 CMR 10.54(4), and 310 CMR 10.55(4), and her consideration of these factors resulted in 30% increases in each of the Base Penalty Amounts for Mr. Cove's violations of these regulations. Ms. Child's Direct PFT, ¶ 34, Ms. Child's Rebuttal PFT, ¶¶ 2-4, Department Hearing Exhibit No. 14 (310 CMR 10.02(2)(a));[35] Ms. Child's Direct PFT, ¶ 46 (310 CMR 10.54(4));[36] and Ms. Child's Direct PFT, ¶ 58 (310 CMR 310 CMR 10.55(4)).[37] She testified that she made these 30% increases because of Mr. Cove's history of noncompliance with other environmental regulations, specifically his recent violations of the Department's Underground Storage Tank Regulations at 310 CMR 80.00. Ms. Child's Direct PFT, ¶¶ 34, 46, 58; Ms. Child's Rebuttal PFT, ¶¶ 2-4; Department Hearing Exhibit No. 14.

Ms. Child testified that Mr. Cove's violations of the Department's Underground Storage Tank Regulations arose out of the improper presence of a two-compartment underground storage tank ("the Tank") at Mr. Cove's real property in Hubbardston, Massachusetts ("the Hubbardston

[35] The 30% increase in the $4,000.00 Base Penalty Amount for Mr. Cove's violation of 310 CMR 10.02(2)(a) is shown in the seventh column of Line 1 on the Cove Penalty Calculation Worksheet. Department's Hearing Exhibit 13.

[36] The 30% increase in the $25,000.00 Base Penalty Amount for Mr. Cove's violation of 310 CMR 10.54(4) is shown in the seventh column of Line 2 on the Cove Penalty Calculation Worksheet. Department's Hearing Exhibit 13. This 30% increase ultimately was not assessed against Mr. Cove in the PAN because the maximum daily penalty for a violation of 310 CMR 10.54(4) is $25.000.00. Ms. Child's Direct PFT, ¶ 52.

[37] The 30% increase in the $20,000.00 Base Penalty Amount for Mr. Cove's violation of 310 CMR 10.55(4) is shown in the seventh column of Line 3 on the Cove Penalty Calculation Worksheet. Department's Hearing Exhibit 13.

Property"). Ms. Child's Direct PFT, ¶ 34; Ms. Child's Rebuttal PFT, ¶¶ 2-4; Department Hearing Exhibit No. 14, ¶¶ 8-19. The violations are evidenced by the following documentary evidence that the Department presented at the Hearing:

(1) a September 8, 2011 Notice of Noncompliance ("NON") that the Department issued to Mr. Cove directing him to remove the Tank from the Hubbardston Property in accordance with the Department's Underground Storage Tank Regulations because the Tank had not been used for over two years;[38]

(2) a May 15, 2012 NON that the Department issued to Mr. Cove regarding his failure to remove the Tank from the Hubbardston Property as previously directed by the September 8, 2011 NON and directing him again to remove the Tank in accordance with the Department's Underground Storage Tank Regulations because the Tank had not been used for over two years;[39]

(3) an August 8, 2013 NON that the Department issued to Mr. Cove regarding his continued failure to remove the Tank from the Hubbardston Property and failure to obtain a Third Party Inspection of the Tank documenting its contents and condition in accordance with the Department's Underground Storage Tank Regulations;[40]

(4) a $500.00 Standard Penalty Assessment Notice ("SPAN") that the Department issued to Mr. Cove on March 31, 2014 as a result of his failure to obtain a Third Party Inspection of the Tank in accordance with the Department's Underground Storage Tank Regulations, which he did not appeal;[41] and

(5) a June 15, 2017 UAO the Department issued to Mr. Cove, which he did not appeal and which directed him to perform certain remedial actions, including removing the Tank from the Hubbardston Property under the guidance of an environmental consultant retained by him having expertise

[38] Department Hearing Exhibit 14, ¶ 9, at p. 2; ¶ 14, at p. 3.

[39] Department Hearing Exhibit 14, ¶ 10, at p. 2; ¶ 14, at p. 3.

[40] Department Hearing Exhibit 14, ¶¶ 11-12, at p. 2; ¶¶ 13-14, at p. 3.

[41] Department Hearing Exhibit 14, ¶ 15, at p. 3. According to the Department, a "SPAN" is "a pre-assessed penalty for violations of required submittal requirements for several MassDEP programs." https://openamend.org/assets/PDFs/EEADP_Definitions.pdf.

> in the removal of underground storage tanks and any permits required by the Town of Hubbardston's Fire Department to remove the Tank.[42]

In response, Mr. Cove offered no probative evidence refuting Ms. Child's testimony that she properly considered the prior environmental violations criteria of Penalty Factor 6 in assessing each of the penalties for Mr. Cove's violations of 310 CMR 10.02(2)(a), 310 CMR 10.54(4), and 310 CMR 10.55(4). Mr. Cove's Direct PFT, ¶¶ 1-21; Mr. Stone's Direct PFT, ¶¶ 1-17. In fact, he falsely claimed in his testimony that he had not violated the Department's Underground Storage Tank Regulations in the five years preceding his testimony (2013-2018), when the evidence as set forth above, demonstrated otherwise. Mr. Cove's Direct PFT, ¶ 21. Specifically, he falsely testified that "[t]here have not been [any] new violations [of the Department's Underground Storage Tank Regulations] . . . within the last five years." Moreover, he was barred from making those contentions because he failed to appeal the 2014 SPAN and 2017 UAO discussed above.[43]

4. The Department Properly Considered Penalty Factor 7 in Assessing Each of the Three Penalty Amounts

a. The Criteria of Penalty Factor 7

Penalty Factor 7 as set forth in 310 CMR 5.25(7) and G.L. c. 21A, § 16 is an "economic benefit" factor which requires the Department to consider "[m]aking compliance less costly than the failure(s) to comply that would be penalized." Kane, 2017 MA ENV LEXIS 77, at 78. "The [Penalty] Guidelines state that MassDEP should calculate an economic benefit number and add it to the gravity-based penalty whenever there is an indication that a violation resulted in an economic benefit to the violator in the form of delayed compliance costs, avoided compliance

[42] Department Hearing Exhibit No. 14, ¶¶ 20A-20F, at pp. 3-4.

[43] See n. 15, above, at pp. 23-24.

costs, or profits from unlawful activity." Id. "Use of the economic benefit adjustment factor ensures that compliance by the violator is less costly than its penalized cost for failures to comply, so that noncompliance is more costly than compliance." Id. "[This factor] is meant at a minimum to remove any economic benefits resulting from noncompliance." Id., at 78-79.

b. The Department's Consideration of the Criteria of Penalty Factor 7 In Assessing Each of the Three Penalty Amounts

Ms. Child testified that in accordance with the Penalty Guidelines, she considered the economic benefit criteria of Penalty Factor 7 in assessing each of the penalties for Mr. Cove's violations of 310 CMR 10.02(2)(a), 310 CMR 10.54(4), and 310 CMR 10.55(4), and her consideration of these factors resulted in her not making any upward or downward adjustments to the Base Penalty Amounts for violations of these regulations. Ms. Child's Direct PFT, ¶¶ 39, 51, 63. She testified that in considering Penalty Factor 7 she could not identify any economic benefit that Mr. Cove obtained from his violations of 310 CMR 10.02(2)(a), 310 CMR 10.54(4), and 310 CMR 10.55(4). Id.

In response, Mr. Cove offered no probative evidence refuting Ms. Child's testimony that she properly considered the economic benefit criteria of Penalty Factor 7 in assessing each of the penalties for his violations of 310 CMR 10.02(2)(a), 310 CMR 10.54(4), and 310 CMR 10.55(4). Mr. Cove's Direct PFT, ¶¶ 1-21; Mr. Stone's Direct PFT, ¶¶ 1-17. This includes his failure to present any probative evidence warranting a downward adjustment or decrease in the Base Penalty Amounts for his violations of these regulations based on the economic benefit criteria of

Penalty Factor 7.

5. The Department Properly Considered Penalty Factors 8, 9, and 10 in Assessing Each of the Three Penalty Amounts

a. The Criteria of Penalty Factors 8, 9, and 10

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

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

"The [Penalty] Guidelines state that the financial considerations may result in a 0% to 50% downward or upward adjustment" of the base penalty amount, and that "[t]hese adjustments consider the financial condition of the violator being assessed the civil administrative penalty." Kane, 2017 MA ENV LEXIS 77, at 82. "The [Penalty] Guidelines instruct MassDEP personnel to make downward adjustments to the penalty based on the inability of the violator to pay [the penalty], and upward adjustments to the penalty based on its potential to deter noncompliance by the violator in question and other potential violators." Id. "The [Penalty] Guidelines make clear that the burden to demonstrate inability to pay rests on the violator and that MassDEP personnel should not consider inability to pay as a factor in the penalty assessment determination process if the violator fails to provide sufficient written documentation" of the violator's financial condition. Id. Also, "MassDEP personnel may not use the inability to pay factor to justify a

downward adjustment if the violator refuses to correct a serious violation, and "[t]he [Penalty] Guidelines further indicate that downward adjustments may be warranted if the deterrence effect of the penalty is less important than getting the violator into compliance or to carry out a remedial measure, and assessment of the full penalty will significantly impede the ability of the violator to comply or carry out a remedial measure." Id., at 82-83.

b. The Department's Consideration of the Criteria of Penalty Factors 8, 9, and 10 In Assessing Each of the Three Penalty Amounts

Ms. Child testified that prior to the PAN's issuance and in accordance with the Penalty Guidelines she considered the financial consideration factors of Penalty Factors 8, 9, and 10 in assessing each of the penalties for Mr. Cove's violations of 310 CMR 10.02(2)(a), 310 CMR 10.54(4), and 310 CMR 10.55(4) by attempting to gain an understanding of his financial condition but he failed to cooperate in that endeavor by not being forthcoming about his financial condition. Ms. Child's Direct PFT, ¶¶ 15-19, 23-25, 36, 48, 60; Ms. Selby's Direct PFT, ¶ 17. As a result, she made no adjustments to the Base Penalty Amounts for Mr. Cove's violations of 310 CMR 10.02(2)(a), 310 CMR 10.54(4), and 310 CMR 10.55(4) based on the financial factors of Penalty Factors 8, 9, and 10. Id. Ms. Child's determination is more than supported by the following evidence that the Department presented at the Hearing.

As discussed in detail above, at pp. 24-25, on July 18, 2016, more than one year prior to issuing the PAN in August 2017, the Department issued a NOEC to Mr. Cove scheduling the July 27, 2016 Enforcement Conference with him to discuss the Wetlands violations he committed at the Site and failure to comply with the May 2016 UAO. The NOEC informed Mr. Cove that the Department intended to assess a civil administrative penalty against him for his Wetlands violations at the Site and he would be required to provide sufficient financial

documentation to the Department demonstrating that he lacked the financial ability to pay a civil administrative penalty. Department Hearing Exhibit 6, at pp. 1-2; PAN, ¶ 13; Ms. Child's Direct PFT, ¶ 15; Ms. Selby's Direct PFT, ¶ 16. At the July 27, 2016 Enforcement Conference, Mr. Cove claimed that he lacked the financial ability to pay any civil administrative penalty. PAN, ¶ 14; Ms. Child's Direct PFT, ¶¶ 16; Ms. Selby's Direct PFT, ¶ 17. In response, at the Enforcement Conference Ms. Child provided Mr. Cove with a list of the financial documentation that he was required to provide to the Department to demonstrate his financial inability to pay claim. PAN, ¶ 14; Ms. Child's Direct PFT, ¶¶ 16, 36; Ms. Selby's Direct PFT, ¶ 17. This required financial documentation included Mr. Cove having to complete and sign under the pains and penalties of perjury, an Individual Ability to Pay Claim form setting forth in detail his household living expenses, assets, and liabilities. Department Hearing Exhibit 9. It also included Mr. Cove having to provide the Department with a signed Request for Transcript of Tax Return form authorizing the federal Internal Revenue Service ("IRS") to provide copies of his most recent federal income tax returns to the Department. Id.

Per the request of Mr. Cove's attorney, on August 18, 2016 and again on January 24, 2017, the Department provided Mr. Cove's attorney with the same list of required financial documentation that Ms. Child had previously provided to Mr. Cove at the July 27, 2016 Enforcement Conference. PAN, ¶ 15; Ms. Child's Direct PFT, ¶¶ 17, 36. As of February 8, 2017, Mr. Cove had not yet provided the required financial documentation to the Department. Ms. Child's Direct PFT, ¶ 18; Department Hearing Exhibit 7. On that date, Ms. Child spoke with Mr. Cove by telephone to discuss his failure to provide the required financial documentation to the Department. Id. During the course of the conversation, Mr. Cove agreed

to submit the required financial documentation to the Department by February 15, 2017. Id.

Mr. Cove failed to provide the required financial documentation to the Department by February 15, 2017 as he had promised to Ms. Child. As of March 28, 2017, Mr. Cove still had not provided the required financial documentation to the Department. Ms. Child's Direct PFT, ¶¶ 19, 36; Department Hearing Exhibit 9; PAN, ¶ 21. As a result, on that date, Ms. Child forwarded a letter to Mr. Cove requesting that he provide the required financial documentation to the Department by no later than April 14, 2017. Id. In the letter, Ms. Child noted that the Department "ha[d] made a number of attempts to . . . negotiate a settlement agreement with [him]" regarding the amount of the civil administrative penalty that the Department would assess against him for his wetlands violations at the Site but the Department's efforts had failed due to his failure to provide the Department with the required financial documentation. Id. Ms. Child informed Mr. Cove in the letter that if he failed to provide the required financial documentation to the Department by April 14, 2017, the Department would unilaterally issue a civil administrative penalty assessment against him. Id.

On April 18, 2017, Mr. Cove submitted incomplete financial documentation to the Department in support of his claim that he lacked the financial ability to pay a civil administrative penalty to the Department. Ms. Child's Direct PFT, ¶¶ 23, 36; Department Hearing Exhibit 10; PAN, ¶ 22. Specifically, he failed to include copies of his most recent income tax returns. Department Hearing Exhibit 11.

On May 9, 2017, the Department's legal counsel forwarded an e-mail message to Mr. Cove's legal counsel, including a copy of Ms. Child's March 28, 2017 letter to Mr. Cove as discussed above and requesting that Mr. Cove provide copies of his most recent income tax returns to the Department by May 12, 2017. Department's Hearing Exhibit 11; Ms. Child's

Direct PFT, ¶ 24; PAN, ¶ 23. As of August 23, 2017, the date when the Department issued the PAN against him, Mr. Cove still had not submitted his most recent income tax returns to the Department. PAN, ¶ 24; Ms. Child's Direct PFT, ¶ 25.

At the Hearing, Mr. Cove repeated his assertion that he lacks the financial ability to pay the PAN for a litany of reasons, including that he is self-employed and only earns $60,000.00 per year as a septic system installer and operator of a "porta-potty" business. Mr. Cove's Direct PFT, ¶¶ 6, 16, 19. He also claimed to be heavily in debt with real property mortgages totaling $400,000.00 and owing an unspecified amount of real estate taxes. Id., ¶¶ 8, 13. He also claimed to have incurred an unspecified amount of "significant legal expenses" in litigation against his former partner, Ms. Belair, the Trustee of Trust regarding "issues of forgery and fraud in her attempts to make herself a beneficiary of the . . . Trust which holds title to the [Trust Property]." Id., ¶¶ 10-12. He also blamed Ms. Belair for his purported failure to file income tax returns, accusing her of having "destroyed many documents necessary [for him] to adequately prepare a tax return . . . ." Id., ¶ 15. I do not find any of Mr. Cove's testimony claiming a financial inability to pay the PAN to be credible for the following reasons.

First, as discussed in detail above, for well over one year prior to the PAN's issuance the Department, principally through Ms. Child, made numerous requests to Mr. Cove for complete financial information so that the Department could properly evaluate his financial inability to pay claim. In response, he provided incomplete financial information. By way of example, prior to the PAN's issuance, Mr. Cove provided no information to the Department regarding his annual income, but at the Hearing he claimed for the first time that his annual income was only $60,000.00. Mr. Cove's PFT, ¶¶ 6, 16, 19. He also claimed for the first time that he was unable to provide copies of his recent income tax returns to the Department because his former partner,

Ms. Belair, destroyed his personal data that would have enabled him to prepare and file those returns. Id., ¶ 15. He presented no evidence that he applied to the federal Internal Revenue Service ("IRS") and the Massachusetts Department of Revenue ("DOR") for an extension of time to file his federal and Massachusetts income tax returns respectively due to Ms. Belair's alleged actions.

I also give no credence to Mr. Cove's testimony claiming a financial inability to pay the PAN because none of his claims are supported by reliable documentation establishing his assets, liabilities, and income. At the Hearing, he had the burden of supporting his claims with corroborating financial records, such as "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.'" In the Matter of Blackinton Common, LLC, Docket No. 2007-115 & 147, Recommended Final Decision (September 25, 2009), adopted as Final Decision (January 7, 2010). Instead, he made conclusory statements about his purported income and debts, which do not suffice. Ferry Street, 2016 MA ENV LEXIS 63, at 53-54, citing, In the Matter of Roofblok, Docket No. 2006-047 and 048, Final Decision, n. 6 & 7 (May 7, 2010).

6. The Department Properly Considered Penalty Factor 11 in Assessing Each of the Three Penalty Amounts

a. The Criteria of Penalty Factor 11

Penalty Factor 11 as set forth in 310 CMR 5.25(11) and G.L. c. 21A, § 16 is a "public interest" factor which requires the Department to consider the public interest in making a penalty assessment. Kane, 2017 MA ENV LEXIS 77, at 83-84. "[U]nder the [Penalty] Guidelines, the Public Interest factor 'may result in a 0 - 50% downward or upward adjustment'" to a Base Penalty depending upon the circumstances of the case. Id., at 84. However, "any upward

adjustment [to a Base Penalty Amount] must be carefully evaluated [by the Department] to avoid duplication of the other [penalty] adjustment factors [authorized by the Penalty Guidelines] . . . ." Id. Also, "in some instances, there [may exist] compelling public concerns that would not be served by unduly penalizing a violator." Id.

The Penalty Guidelines set forth the following considerations for the Department to make "Public Interest" adjustments to a Base Penalty Amount:

> "(1) Would removal of the economic benefit result in plant closings, bankruptcy, or other extreme financial burden, and is there an important public interest in allowing the firm to continue in business?
>
> (2) Will limited violator funds be used to pay the penalty instead of cleaning up the site or correcting the violation effectively, thereby further jeopardizing the public?
>
> (3) Would an enforcement action against a nonprofit public entity such as a municipality or a publicly-owned utility threaten to disrupt continued provision of essential services?
>
> (4) Are alternative penalties an option?
>
> (5) Is there a substantial risk of creating precedent that will have a significant adverse effect upon the Department's ability to enforce the law or [c]lean up pollution if the case is taken to trial?"

Kane, 2017 MA ENV LEXIS 77, at 84-85.

b. The Department's Consideration of the Criteria of Penalty Factor 11 In Assessing Each of the Three Penalty Amounts

Ms. Child testified that in accordance with the Penalty Guidelines, she considered public interest criteria of Penalty Factor 11 in assessing each of the penalties for Mr. Cove's violations of 310 CMR 10.02(2)(a), 310 CMR 10.54(4), and 310 CMR 10.55(4), and her consideration of these factors resulted in her not making any upward or downward adjustments to the Base Penalty Amounts for Mr. Cove's violations of these regulations. Ms. Child's Direct PFT, ¶¶ 37,

49, 61. In response, Mr. Cove offered no probative evidence refuting Ms. Child's testimony that she properly considered the public interest criteria of Penalty Factor 11 in assessing each of the penalties for Mr. Cove's violations of 310 CMR 10.02(2)(a), 310 CMR 10.54(4), and 310 CMR 10.55(4). Mr. Cove's Direct PFT, ¶¶ 1-21; Mr. Stone's Direct PFT, ¶¶ 1-17. This includes his failure to present any probative evidence warranting a downward adjustment or decrease in the Base Penalty Amounts for violations of these regulations based on the public interest criteria for Penalty Factor 11.

7. The Department Properly Considered Penalty Factor 12 in Assessing Each of the Three Penalty Amounts

a. The Criteria of Penalty Factor 12

The last penalty factor: Penalty Factor 12 as set forth in 310 CMR 5.25(12) and G.L. c. 21A, § 16 requires the Department to consider "[a]ny other factor(s) that reasonably may be considered in determining the amount of a Penalty, provided that [the] factor(s) shall be set forth in the Penalty Assessment Notice." Kane, 2017 MA ENV LEXIS 77, at 85-86. The Penalty Guidelines state that "other factor(s)" falling within the purview of Penalty Factor 12 may result in a 0 - 50% downward or upward adjustment of the base penalty amount. Id.

b. The Department's Consideration of the Criteria of Penalty Factor 12 In Assessing Each of the Three Penalty Amounts

Ms. Child testified that in accordance with the Penalty Guidelines, she considered Penalty Factor 12 in assessing each of the penalties for Mr. Cove's violations of 310 CMR 10.02(2)(a), 310 CMR 10.54(4), and 310 CMR 10.55(4), and her consideration of these factors resulted in her not making any upward or downward adjustments to the Base Penalty Amounts for his violations of these regulations. Ms. Child's Direct PFT, ¶¶ 38, 50, 62. In response, Mr. Cove offered no probative evidence refuting Ms. Child's testimony that she properly considered Penalty Factor

12 in assessing each of the penalties for Mr. Cove's violations of 310 CMR 10.02(2)(a), 310 CMR 10.54(4), and 310 CMR 10.55(4). Mr. Cove's Direct PFT, ¶¶ 1-21; Mr. Stone's Direct PFT, ¶¶ 1-17. This includes his failure to present any probative evidence warranting a downward adjustment or decrease in the Base Penalty Amounts for violations of these regulations based on the criteria for Penalty Factor 12.

CONCLUSION

Based on the foregoing, I recommend that the Department's Commissioner issue a Final Decision affirming the Department's $55,600.00 PAN against Mr. Cove because a preponderance of evidence presented at the Hearing demonstrated that: (1) Mr. Cove violated the Department's Wetlands Regulations at 310 CMR 10.02(2)(a), 10.54(4), and 10.55(4) as alleged by the Department in the PAN; (2) Mr. Cove's violations were willful and not the result of error within the meaning of G.L. c. 21A, § 16; (3) the Department properly assessed the $55,600.00 PAN Penalty amount against Mr. Cove pursuant to G.L. c. 21A, § 16 and 310 CMR 5.25 for his violations of 310 CMR 10.02(2)(a), 10.54(4), and 10.55(4); and (4) Mr. Cove failed to prove that he lacks the financial ability to pay the $55,600.00 PAN amount.

Salvatore M. Giorlandino

Date: May 1, 2020

Salvatore M. Giorlandino
Chief Presiding Officer

NOTICE-RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Chief Presiding Officer. It has been transmitted to the Commissioner for his Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d), and may

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

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

SERVICE LIST

Petitioner: Michael J. Cove
7 Crowley Road
Sterling, MA 01564;

Legal representative: Robert J. Cirillo, Jr., Esq.
1099 Main Street
Clinton, MA 01510
e-mail: Robert@CirilloLaw.com;

The Department: Mary Jude Pigsley, Regional Director
MassDEP/Central Regional Office
8 New Bond Street
Worcester, MA 01606
e-mail: MaryJude.Pigsley@mass.gov;

Marielle Stone,
Deputy Regional Director
MassDEP/CERO
Bureau of Water
Resources
8 New Bond Street
Worcester, MA 01606
e-mail: Marielle.Stone@mass.gov;

Denise Child,
Section Chief,
Wetlands Program
MassDEP/CERO
Bureau of Water
Resources
8 New Bond Street
Worcester, MA 01606
e-mail: Denise.Child@mass.gov;

Legal representative: C. David Bragg,
Senior Counsel
MassDEP/Office of General Counsel
One Winter Street
Boston, MA 02108
e-mail: David.Bragg@mass.gov;

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cc: Anne Berlin Blackman,
Chief Regional Counsel
MassDEP/CERO
8 New Bond Street
Worcester, MA 01606
e-mail: Anne.Blackman@mass.gov;

Rebecca Tobin,
Senior Regional Counsel
MassDEP/CERO
8 New Bond Street
Worcester, MA 01606
e-mail: Rebecca.Tobin@mass.gov;

Leslie DeFilippis, Paralegal
MassDEP/Office of General Counsel
One Winter Street
Boston, MA 02108.