COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS

June 12, 2008

In the Matter of

JOSEPH N. ALOSSO and EVELYN R. ALOSSO

Docket No. DEP-05-184
File No. UAO-BO-04-1V001
(Penalty Appeal)
Docket No. DEP-05-185
File No. UAO-BO-04-1V001
(Enforcement Order Appeal)
Oak Bluffs

RECOMMENDED FINAL DECISION

Appeal by petitioners Joseph N. Alosso and Evelyn R. Alosso from a $28,310 civil administrative penalty issued to them by the Massachusetts Department of Environmental Protection (DEP) on October 15, 2004, pursuant to M.G.L. c. 21A, § 16 and 310 CMR 5.00, without a prior notice of noncompliance, based upon alleged willful violations of the Title 5 Regulations, 310 CMR 15.000, and an enforcement order, both related to the construction of a new personal dwelling and associated on-site sewage disposal system at 54 Carol Lane in Oak Bluffs on Martha's Vineyard.

Following a partial summary decision vacating both the enforcement order and penalty components totaling $19,685 because:

> (1) an $8,625 penalty for design flow violations was based upon an alleged, but unproved, increase in the number of bedrooms, as the evidence showed four bedrooms (rather than three) in the original house and four bedrooms in the new house; and
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> (2) as to penalties assessed for backfilling subsurface components of the new on-site sewage disposal system prior to final inspection ($1,000), applying for a certificate of occupancy before a certificate of compliance was issued for the new system ($435), constructing the system closer to the property line than the Title 5 Regulations allow ($8,625), and failing to perform two percolation tests at the site of the new system ($1,000), the undisputed material facts did not support the alleged violations or show that the violations were willful on the petitioners' part;

and a hearing on the remaining $8,625 penalty component assessed for discharging to the new system before a certificate of compliance was issued, the partial summary decision is confirmed, and the remaining penalty component is vacated (a) as to Evelyn Alosso, because DEP did not show that her violation was not the result of error or, thus, that it properly assessed a penalty against her, per 310 CMR 5.14, without first issuing to her a notice of noncompliance; and (b) as to Joseph Alosso, because DEP did not prove that it considered all of the factors listed at 310 CMR 5.25 in determining the penalty amount, as this regulation requires.

Joseph N. Alosso, Oak Bluffs, for petitioners Joseph N. Alosso and Evelyn R. Alosso.

MacDara K. Fallon, Esq., Senior Counsel, Boston, for the Department of Environmental Protection.

MARK L. SILVERSTEIN, Administrative Magistrate.

Introduction

a.

These appeals by petitioners Joseph N. Alosso and Evelyn R. Alosso challenge a $28,310 civil administrative penalty that DEP issued to them on October 15, 2004 without a prior notice of noncompliance, and an enforcement order that DEP issued to them on the same day, both for alleged violations of the Title 5 regulations, 310 CMR 15.000, in constructing a new personal dwelling to replace an older one on a 7,405-square-foot lot at 53 Carol Lane in Oak Bluffs, and in replacing the dwelling's on-site sewage disposal system. DEP alleged that these violations were "willful and not a result of error,"[1] a prerequisite for issuing a penalty to an alleged violator without first issuing to that person a notice of noncompliance. See 310 CMR 5.14.

The background facts were discussed extensively in a Partial Summary Decision that I issued on October 3, 2007. See Matter of Alosso, Docket No DEP-05-184/185, Partial Summary Decision, 14 DEPR 192 (Mass. Div. of Admin. Law App., Oct. 3, 2007). To recapitulate:

DEP concluded, based primarily upon the town assessor's records, that the Alossos had increased the number of bedrooms from three in the original single-story ranch house to four in the

[1]Notice of intent to assess administrative penalty (Oct, 15, 2004), at 4, para. 6.

new two-story house. It assumed, consequently, that the new subsurface sewage disposal system had been designed and built to receive a greater volume of sewage than was authorized for an older system, see 310 CMR 15.532, or that was allowed in a nitrogen-sensitive area, see 310 CMR 15.214(1). DEP assessed a $28,310 civil administrative penalty against the Alossos for these asserted violations and, as well, for violating Title 5 regulations governing the subsurface sewage disposal system's setback from property lines, percolation testing of the system site, and backfilling and discharging to the system prior to the issuance of a certificate of compliance by the local board of health. DEP also issued an enforcement order requiring that the Alossos limit the number of usable bedrooms in the new house to three via a deed restriction, and that they either acquire land to be used solely for nitrogen-loading credit or modify their on-site sewage disposal system to include an approved system for nitrogen reduction.

The town assessor's records were, in fact, either inconclusive as to the number of bedrooms in the original Alosso house (e.g., because they did not show the dimensions of the finished basement or any of its bedrooms), or else showed that the town assessor had valued the original house as one with four bedrooms—two on the first floor and two in the basement. 14 DEPR at 199-200. Other evidence also showed that the original house had four bedrooms rather than three, as DEP asserted. This evidence including affidavits by the original owner (who owned the house from 1972 to 1992) and by Joseph Alosso, who resided in the house with his family, first as tenants and then as owners, from 1990 until it was demolished and rebuilt in 2003-04, and unchallenged appraisal reports prepared in 1995 and in 2003. 14 DEPR at 198-99. It was therefore beyond

genuine or material dispute that the original house had four bedrooms,[2] and that the assumed design flow of its associated subsurface sewage disposal system was 440 gallons per day (110 gpd per bedroom multiplied by 4 bedrooms, per 310 CMR 15.203(1)), rather than 330 gpd as DEP had assumed. 14 DEPR at 200.

Because the new house and the original house had the same number of bedrooms, the Alossos had not increased the design capacity of the new on-site sewage disposal system over the volume that the original house was authorized to receive. In addition, the new house was not "new construction" as the Title 5 regulations define this term, and was, instead, the "replacement or repair of an existing building totally or partially destroyed or demolished" with no increase in flow to the associated subsurface sewage disposal system over the system's existing approved capacity, see 310 CMR 15.002. For this reason, the nitrogen-loading limitations that the Title 5 regulations impose upon "new construction" in nitrogen-sensitive areas, see 310 CMR 15.214, did not apply to the Alossos' new house. 14 DEPR at 200.

Accordingly, I granted a partial summary decision vacating the $8,625 penalty component that was assessed for designing and installing the system to receive more than 440 gallons of flow per day per acre from new construction in a nitrogen-sensitive area in violation of 310 CMR 15.214(1) and (2), and for increasing the actual or design flow of the upgraded system without complying fully with the requirements of the Title 5 regulations applicable to "new construction," in violation of 310 CMR 15.352. Because these violations (particularly the assumed increase in the number of bedrooms and, thus, in the design capacity of the new subsurface sewage disposal system)

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[2]/ DEP did not argue, and neither did any of its witnesses, that any of the bedrooms in the original house failed to meet the definition of "bedroom" recited at 310 CMR 15.02. 14 DEPR at 199.

were also the basis for the enforcement order, I vacated the enforcement order as well.

I also granted a partial summary decision in the Alossos' favor vacating several other penalty components totaling $11,060:

> (a) $1,000 assessed for willfully backfilling the system's subsurface components before the local health department had conducted a final inspection and authorized backfilling, in violation of 310 CMR 15.021(2), because the system's installer had carried out this backfilling and there was no evidence that the Alossos had performed, directed or controlled it. 14 DEPR at 202-03 and 204-05.
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> (b) $435 assessed for willfully violating 310 CMR 15.021(5)'s proscription against applying for a certificate of occupancy to inhabit or use "new construction" until a certificate of compliance has been issued, because the Alossos' new house was not "new construction" as 310 CMR 15.002 defines this term, and the requirements of 310 CMR 15.021(5) therefore did not apply. 14 DEPR at 204.
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> (c) $1,000 assessed for willfully failing to perform two percolation tests at the site of the new subsurface sewage disposal system, because the system plans prepared by the Alossos' civil engineers appeared to show that two tests were indeed performed, but more to the point, there was no evidence that the Alossos had performed this testing or had exercised any direction or control over the percolation testing that the engineering firm had performed, whether it was carried out at one test pit (as DEP alleged) or at two test pits as the engineers' plans appeared to show. 14 DEPR at 208.
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> (d) $8,625 assessed for willfully violating the requirement of 310 CMR 15.211(1) that there be a minimum ten-foot setback between components of an on-site sewage disposal system and the property line, because although the new system's leaching field was only five feet from the Alossos' southern and eastern property lines, the system was installed by a contractor and there was no evidence that the Alossos had personally installed or designed the system, or that they had directed and controlled the system's design or the location of the leaching field relative to the property lines. 14 DEPR at 207-08.

I denied summary decision, however, as to another penalty component—$8,625 assessed for willfully discharging to the new subsurface sewage disposal system before the local Board of Health issued a Title 5 certificate of compliance, in violation of 310 CMR 15.021(1). The Alossos moved into their new home and started discharging to the new subsurface sewage disposal system before April 9, 2004, when the Oak Bluffs Board of Health issued a certificate of compliance. 14 DEPR

at 205. Although the occurrence of this violation was not disputed, it was genuinely disputed whether DEP had considered the factors listed at 310 CMR 5.25 in assessing a penalty for this violation and, if it did, whether any of them mitigated the penalty amount. One such penalty-mitigating factor was steps taken by the Alossos to promptly come into compliance. Within nine weeks after moving into the new house, the Alossos arranged for the new on-site sewage disposal system to be uncovered and inspected by the local Board of Health, which, after inspecting the system, issued a certificate of compliance for it. 14 DEPR at 205-06. In addition, it was unclear whether DEP had adjusted this penalty component upward by 50 percent in part because the Alossos had not applied for a variance from the ten-foot setback requirement under 310 CMR 15.411(1). Id., at 207-08.

b.

I identified the following issues regarding the remaining penalty component:

1. Was the discharge prior to issuance of the certificate of compliance a willful violation of 310 CMR 15.021(1) or was it the result of error?

2. In determining the penalty amount ($8,625), did DEP consider the penalty factors listed at 310 CMR 5.25?

If so:

3. Do any of these penalty factors support a downward adjustment of this penalty amount?

4. Did DEP adjust this penalty amount upward by 50% in part because the petitioners did not seek a setback variance under 310 CMR 15.411(1)?

If so:

5. Because not seeking a variance under 310 CMR 15.411(1) is not a violation of the Title 5 Regulations and therefore cannot be penalized, what reduction of this penalty amount is

warranted?[3]

Because the Alossos denied these alleged violations and, as well, that the violations were willful and not the result of error, DEP had the burden of proving, by a preponderance of the evidence, that the violations occurred and were willful rather than the result of error. See 310 CMR 5.36(2), (3).

I held a hearing on the remaining penalty component on March 14, 2008. The witnesses who testified at the hearing were:

For DEP:

(1) Ronald J. White, who is employed in DEP's Bureau of Resource Protection in Boston as an Environmental Engineer V. White has been employed at DEP since 1979 primarily as an Environmental Engineer. He is a Certified Wastewater Treatment Facility Operator, a Registered Sanitarian, a DEP Certified Soil Evaluator, and a DEP-approved Title 5 System Inspector. White graduated from Wentworth Institute of Technology in 1978 with a Bachelor of Science Degree in civil engineering technology.

(2) David R. Ferris, who is currently the Acting Program Manager of Watershed Permitting in DEP's Boston office. Ferris has been the Acting Program Manager of Watershed Permitting in DEP's Boston office since 2004, and before that served for 14 years as Section Chief of DEP's Water Pollution Control Section. He has been employed at DEP since 1980. Ferris is a Certified Massachusetts Soils Evaluator and Septic System Inspector, and is an Engineer in Training. He graduated from the Wentworth Institute of Technology in 1979 with a Bachelor of Science Degree in civil engineering technology.

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[3]/ Order re Further Proceedings (November 14, 2007).

(3) Shirley L. Fauteux, who has served since May 1993 as the Health Agent for the Oak Bluffs Board of Health.[4]

For Joseph Alosso and Evelyn Alosso:

Joseph Alosso, one of the petitioners and the co-owner (with his wife Evelyn) of the lot, house and subsurface sewage disposal system in question. Alosso is also the Edgartown (Massachusetts) Wastewater Treatment Commission's facilities manager, and the operator and manager of the Oak Bluffs wastewater treatment facility. He is a former member of the Oak Bluffs Board of Health.[5]

The record was closed at the conclusion of the hearing on March 4, 2008, with the exception of post-hearing memoranda, which DEP and the Alossos each filed on March 28, 2008.

Discussion

1.

The first issue to be decided is whether discharging to the Alossos' new subsurface sewage disposal system before the local Board of Health issued a certificate of compliance was a willful violation of 310 CMR 15.021(1) or the result of error.

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[4]/ DEP submitted prefiled direct testimony for all three of its witnesses, each sworn-to September 29, 2005. Fauteux appeared at the hearing pursuant to subpoena.

[5]/ At the hearing, Alosso adopted, as his prefiled direct testimony, his September 30, 2007 affidavit in support of his opposition to DEP's motion for summary decision and his cross-motion for summary decision. See Order Following Hearing (Mar. 4, 2008), at 2.

a.

DEP's penalty assessment notice, which was issued without a prior notice of noncompliance, asserted that this violation (as well as the others for which DEP assessed the $28,310 penalty against the Alossos) was "willful and not a result of error in accordance with 310 CMR 5.14."[6]

A civil administrative penalty may be assessed without a prior notice of noncompliance when the penalized failure to comply is "willful and not the result of error," 310 CMR 5.10, 5.14. Neither "willful" nor "not the result of error" is defined in DEP's Administrative Penalty Regulations, 310 CMR 5.00, or in the enabling statute, M.G.L. c. 21A, §16.

Several decisions concerning DEP civil administrative penalties have held that allegedly violative conduct is willful if the conduct was intended, even if there was no specific intent to violate the law. See Central Water District Associates v. Department of Environmental Protection, C.A. No. 93-0536, Memorandum of Decision and Order on Plaintiff's Appeal from an Administrative Penalty and ALJ Decision Pursuant to G.L. c. 30A (Worcester Super. Ct., Mar. 9, 1994), affirming Matter

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[6]/ 310 CMR 5.14, part of DEP's Administrative Penalty Regulations, provides that:

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

310 CMR 5.11 provides that:

> A Penalty may be assessed only for a failure to comply that
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> (1) at the time it occurred constituted noncompliance with a Requirement
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> (a) which was then in effect; and
> (b) to which that person was then subject; and
> (c) to which these Regulations apply.
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> (2) occurred on or after September 2, 1986.

of Central Water District, Inc., Docket No. 87-114, Final Decision (Feb. 2, 1993) (lowering a pond behind a dam without a wetlands permit was willful, even though the petitioner believed it was entitled to perform this work). See also Matter of Worcester County Refrigeration, Inc., Docket Nos. 96-112 and 96-113, Final Decision at 15-17, 5 DEPR 41, 44-45 (Mar. 11, 1998) (excavating asbestos-insulated steel and pipe and leaving it on the ground in a haphazard manner was deliberate and hence willful), and Matter of John's Insulation, Inc., Docket No. 90-149, Final Decision, 2 DEPR 218 (Oct. 5, 1995) (willfulness "requires only the intent to do an act that violates the law if done, and nothing more.").

"Not the result of error" has also been construed in DEP penalty appeal decisions. The phrase means "that the violations are not 'accidental, unforeseeable and beyond the control of the regulated entity.'" Matter of Cummings Properties Management, Inc., Docket No. 98-030, Final Decision, 7 DEPR 139, 145 (Oct. 20, 2000), quoting DEP's June, 1999 "Guidance on Applying 'Willful and Not the Result of Error' as a Precondition to Assessing a Penalty." Relying upon representations by others that the conduct in question would work no violation cannot make the resulting violation accidental, unforeseeable and beyond the actor's control or, thus, the result of error unless this reliance was "reasonable in the circumstances." See Matter of Cummings Properties Management, Inc., Docket No. 98-019, Recommended Final Decision, 9 DEPR 34, 50 (Nov. 21, 2001), adopted by Final Decision (Mar. 15, 2002) (petitioner building owners claimed that asbestos violations related to demolition and renovation work in a building were the result of error, because they concluded reasonably that no asbestos-containing materials were present at the site other than vinyl asbestos floor tiles in the building and transite panels on the outside cooling tower based upon representations by the commercially-sophisticated prior owner that the premises had undergone

asbestos abatement, and based upon the absence of visible asbestos during the pre-purchase building walkthrough; however, this reliance was not reasonable in the circumstances, because (1) from the plain language of the purchase and sale agreement, and from the disclaimer in a survey to which the agreement referred, the petitioners knew that the verbal representations to them regarding prior asbestos abatement did not cover non-visible areas of the building's interior, including air-handling equipment, (2) for the same reasons, they knew that there were areas in the building that were not visible and that asbestos could be present in non-visible areas of buildings generally and in or on specific non-visible components such as air handling equipment, (3) a disclaimer in the survey and the exceptions recited by the purchase and sale agreement signaled the need for a professional asbestos survey and abatement consultation before demolition and renovation work began at the trade center, but none was sought or obtained before this work began, and (4) the survey, which was undertaken shortly after DEP inspected the work site, revealed that an extensive amount of non-transite asbestos-containing material remained at the building and required professional abatement). See also Matter of Anger, Docket No. DEP-05-721, Recommended Final Decision, at 10 (Mass. Div. of Admin. Law App., Mar. 6, 2008), adopted by Final Decision with partial modification of penalty amount reduction (Mass. Dep't of Envtl. Prot., Mar. 28, 2008) (demolition contractor's reliance on verbal assurances from property owner and general contractor that a building was free of asbestos did not render its failure to notify DEP prior to beginning demolition work that involved asbestos-containing materials, as 310 CMR 7.15(1)(b) required, either unintentional or the result of error, and DEP was justified, thus, in issuing a penalty assessment notice to the demolition contractor without first issuing a notice of noncompliance).

b.

The facts material to the penalty portion that DEP assessed against the Alossos for discharging to the new subsurface sewage disposal system before a certificate of compliance was issued are these:

(1) On July 30, 2003, an application for a disposal system construction permit to abandon the Alossos' existing subsurface sewage disposal system and replace it with a new system as shown on a plan dated July 28, 2003 was filed with the Oak Bluffs Board of Health. The designer's name was given on the application as "SB&H Inc.," shorthand for Schofield, Barbini & Hoehn, Inc., the civil engineering firm that prepared the system plan. The soil evaluator was listed as "C. Alley." An individual named Christopher P. Alley was employed by Schofield, Barbini & Hoehn, Inc. at the time and would later sign a letter to the Oak Bluffs Board of Health, as "project engineer," stating that the Alossos' system had been installed per the plan and met Title 5 requirements. At the end of the disposal system construction permit application was the following statement: "The undersigned agrees to install the described Individual Sewage Disposal System in accordance with the provisions of Title 5 and further agrees not to place the system in operation until a Certificate of Compliance has been issued by the Board of Health." Alley signed, as "Agent" on the signature line following this statement, and the date July 28, 2003 appears there as well. Neither Joseph Alosso nor his wife signed this application. Below Alley's signature there appeared, next to the preprinted word "Inspections," the following handwritten statement: "Engineer to inspect excavation or leaching facility." See DEP's motion for summary decision (August 24, 2005); supporting Affidavit of Ronald J. White, sworn-to August 24, 2005, at Exhibit 2.

(2) An application for a certificate of occupancy for the new dwelling was filed with the Oak

Bluffs Building Department, either by the Alossos, their contractor, or their civil engineering firm, on August 19, 2003. 14 DEPR at 203-04.[7]

(3) On November 21, 2003, the Oak Bluffs Board of Health issued a disposal system construction permit to "abandon an individual sewage disposal system" at "Carol Lane" (the street on which the Alossos lived). This document was signed by Board of Health Agent Shirley Fauteux. DEP's motion for summary decision (August 24, 2005); supporting Affidavit of Ronald J. White, sworn-to August 24, 2005, at Exhibit 2.

(4) Fauteux learned from the Board of Health's administrative assistant on November 25, 2003 that the installer of the Alossos' new subsurface sewage disposal system had called to advise that "they were ready for the inspection of the Title 5 system at the Site for the following day, November 26th." 14 DEPR at 203, quoting Prefiled Direct Testimony of Shirley Fauteux, sworn-to September 29, 2005, at 2, para. 4.

(5) In a letter dated November 26, 2003 and signed by Christopher P. Alley as "project engineer," Schofield, Barbini & Hoehn, Inc. (the civil engineering firm that had designed the Alossos' new subsurface sewage disposal system) certified to the Oak Bluffs Board of Health that it had inspected the system, constructed by J.T. Vogel Excavation, Inc., and found that it met Title 5 requirements and was "approved as constructed." 14 DEPR at 202.[8]

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[7]/ The Partial Summary Decision inadvertently identified the Health Department, at 14 DEPR 203-04, as the agency from which a certificate of occupancy was sought. It was clearly the Oak Bluffs Building Department; the Oak Bluffs Health Department was responsible for issuing a Title 5 certificate of compliance. I correct the Partial Summary Decision to reflect this fact. Neither the error, nor its correction, affected the outcome of the Partial Summary Decision, which focused instead upon the order in which these certificates were issued, their relevance to the alleged violation, and whether this portion of the penalty could be decided summarily.

[8]/ A copy of this letter entered the record previously as an exhibit to Joseph Alosso's summary decision-related affidavit; another copy was marked in evidence as Hearing Exh. P-1.

(6) Oak Bluffs Health Agent Shirley Fauteux attempted to inspect the Alossos' new subsurface sewage disposal system on November 26, 2003, but found the system's components covered and, as a result, could not inspect the system. According to Joseph Alosso, the system installer (Vogel) had covered it because the weather forecast was for heavy rains and he was concerned that this would wash sand and gravel into the system if it were left exposed. Alosso, who at the time was Fauteux's supervisor at the Health Department, also believed that Fauteux was traveling off-island for the Thanksgiving weekend and therefore would not be inspecting the system on November 26, 2003. Whether through inadvertence or for reasons the record does not disclose, the system's inspection was not rescheduled, and Fauteux did not request that the contractor or the Alossos have the system uncovered for inspection, as 310 CMR 15.021 allowed her to do. 14 DEPR at 203.

(7) The Oak Bluffs Building Department issued a temporary occupancy certificate for the Alossos' new house on December 12, 2003, when its construction was nearly complete. The Building Department issued a final occupancy certificate for the new house on February 6, 2004. 14 DEPR at 203-04.

(8) The Oak Bluffs Board of Health issued a certificate of compliance for the Alossos' new on-site sewage disposal system on April 29, 2004, after the Alossos had moved into their new home. 14 DEPR at 204.

The Alossos do not dispute moving into their new house or, thus, discharging to the new subsurface sewage disposal system before the Oak Bluffs Board of Health issued a Title 5 certificate of compliance for it. As the Partial Summary Decision noted, however, "although residing in the new house was clearly intentional, the penalty was assessed for a willful violation that was not based

upon error, and the absence of error is genuinely disputed." 14 DEPR at 205. The error in question, as Alosso explained it, was relying upon (1) his engineering firm's certification to the Oak Bluffs Board of Health on November 26, 2003 that the new system met Title 5 requirements, and (2) the certificate of occupancy issued by the Board for the new dwelling, which per local practice (according to Alosso) was regarded as granting permission to occupy the new dwelling fully, including discharge to the new subsurface sewage disposal system. Id.

c.

I marked in evidence copies of disposal system construction permit applications that were filed with the Oak Bluffs Board of Health for subsurface sewage disposal systems at several other properties. They are similar in form and content to the disposal system construction permit that was filed for the Alossos' new system.[9] All of them included the same statement at the bottom of the disposal system construction permit application: "The undersigned agrees to install the described Individual Sewage Disposal System in accordance with the provisions of Title 5 and further agrees not to place the system in operation until a Certificate of Compliance has been issued by the Board of Health." On none of the forms in the record did the property owner sign on this line below this statement, or anywhere else on the form. Each was signed, instead, by an individual other than the property owner who was employed by the system designer or installer.[10]

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[9]/ See Hearing Exhs. 8, 9, 12, 13 and 14. All of these disposal system construction permit applications for other properties were filed in 1998-99. However, it was undisputed that the same form was in use in 2003, when Schofield, Barbini & Hoehn, Inc. filed plans for the Alossos' new subsurface sewage disposal system with the Oak Bluffs Health Department and applied for a disposal system construction permit.

[10]/ Two of the disposal system construction permit applications in the record (Hearing Exhs. 9 and 14) were signed by Christopher Alley, the same person who signed the November 26, 2003 letter to the Oak Bluffs Board of Health (Hearing Exh. P-1) certifying that the Alossos' system had been built in

Other similarities show that the Alossos' application process followed the same procedure that other such applications followed in Oak Bluffs. As was true of the disposal system construction permit application for the Alossos' new system, none of the other applications in the record includes a certification by the system designer or installer that the system had been installed per the approved plans and met Title 5 requirements. Although the certificate of compliance at the bottom of the form required the identification of the installer and the designer, none of them required that the installer or designer sign the certificate. There were no such signatures on any of the certificates of compliance in the record, and instead the name of the designer and/or installer was hand-printed on each of these forms.[11] The only person who signed these certificates was Shirley Fauteux, as inspector. None of the parties asserted that there existed a separate form on which the system designer or installer was required to certify that a new or modified subsurface sewage disposal system was built per the approved plans and met Title 5 requirements. Fauteux did not testify that there was any such form; nor did she testify that the certification that Schofield, Barbini & Hoehn, Inc. sent to the Health Department on November 26, 2003 regarding the Alossos' new system was contrary to practice or unusual in any other respect.

Although the Alossos' application process was not atypical in Oak Bluffs, the question is what the Alossos could have reasonably expected to happen after their system designer sent the letter to the Health Department certifying that the new system had been built according to the approved plan and met Title 5 requirements.

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accordance with the design plans, met Title 5 requirements, and was "approved as constructed."

[11]/ With the exception of one form on which neither the system designer nor the system installer was identified (Hearing Exh. P-9), the name of the installer and/or designer was hand-printed on each of the certificates of compliance signed by the Health Department inspector

Oak Bluffs Health Department agent Shirley Fauteux was questioned about the process for issuing Title 5 certifications for new subsurface sewage disposal systems in Oak Bluffs. She testified that the system designer and installer were required to sign a document stating that the system was installed in accordance with the plans identified on the application for a disposal system construction permit and approved by the Health Department. After Fauteux or another Board of Health agent inspected the system, the Board of Health would issue a certificate of compliance (on a DEP-approved form) certifying that the system had been installed in accordance with Title 5 and the approved design plans.

This sequence was not followed in the Alossos' case. As noted above, Fauteux attempted to inspect the Alossos' new subsurface disposal system on November 26, 2003 but found it had been covered. There was no followup inspection later that year, and nor did the Health Department issue a certificate of compliance for the new system in 2003. Nonetheless, the Building Department issued a temporary certificate of occupancy for the Alossos' new house on December 12, 2003. The Health Department had still not yet issued a certificate of compliance as of February 6, 2004, when the Building Department issued a final certificate of occupancy for the new house.

There was nothing unusual about this, at least not in Oak Bluffs. Fauteux explained, on cross-examination during the March 4, 2008 hearing, that the Oak Bluffs Building Department issued certificates of occupancy without waiting for the Health Department to issue a Title 5 certificate of compliance. She waged an "an ongoing battle" to get the Health Department to resolve this situation, apparently without success, and she complained about this situation to DEP, which suggested that she write a letter requesting its assistance. She did so on December 29, 2003, in a

letter addressed to DEP's Southeast Regional Office in Lakeville.[12] Her letter stated:

> I am writing to request an opinion on the enforceability of 310 CMR 15.021(5) relative to the Building Department granting a Certificate of Occupancy without first receiving a copy of the Certificate of Compliance from the Board of Health.
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> One sentence in 310 CMR 15.021(5) states that "No person shall apply for a Certificate of Occupancy or inhabit or use new construction until a Certificate of Compliance has been issued by the approving authority." The Oak Bluffs Building Official states there is no such language in the Building Code and, in many cases, Certificates of Occupancy are being issued without Certificates of Compliance.
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> I am seeking a definitive judgment, as this is an ongoing disagreement between the two departments. Is the Town ultimately in violation of Title 5 if occupancy is allowed without a Certificate of Compliance from the Board of Health? Since Title 5 is being revised, can this problem be addressed in the revision process?

The record includes no response by DEP to Fauteux's December 29, 2003 inquiry, and it is not clear whether there was one. In early March, 2004, DEP received another inquiry, this time from Oak Bluffs Board of Health member William White, regarding the issuance of a certificate of compliance for the Alossos' new subsurface sewage disposal system.[13] DEP's response to White's inquiry stated, among other things, that:

> (1) Per 310 CMR 15.021(2), the new system could not be backfilled or otherwise concealed from view until the Health Department had inspected it and granted permission for backfilling, but if the system's components had been covered before inspection, the system would have to be uncovered at the Health Department's request, per 310 CMR 15.021(2); and
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> (2) A certificate of compliance for the new system could not be issued until the system had

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[12]/ Letter, Shirley L. Fauteux, Health Agent, to Jeffrey Gould, Department of Environmental Protection, dated December 29, 2003. This letter was marked in evidence as Hearing Exh. P-7.

[13]/ Hearing Exh. P-4: Letter, William White, Oak Bluffs Board of Health Member, to Brian Dudley, DEP Southeast Regional Office, dated March 8, 2004.

been uncovered and inspected by the Board of Health or its agent.[14]

In a further response two weeks later, DEP advised White that all of the components of the new system had to be exposed "to a comparable condition as existed prior to backfilling so that compliance with the code can be determined for all facets of the design."[15]

The Alossos' new subsurface sewage disposal system was uncovered, subsequently, and it was then inspected by White, who signed a certificate of compliance for the new system that was issued on April 9, 2004.[16]

d.

310 CMR 15.021(5) proscribes inhabiting or using new construction until a Title 5 certificate of compliance has been issued. All other circumstances aside, therefore, the issuance of a certificate of occupancy by the Oak Bluffs Building Department should have indicated to the Alossos that the new system had been inspected, passed and issued a certificate of compliance by the Board of Health and could be used without violating Title 5.

There were other circumstances afoot at the time in question, however, that made it risky to rely solely upon the issuance of a certificate of occupancy as authorizing discharge to the new system. Through early 2004, the Oak Bluffs Building Department was issuing certificates of occupancy without awaiting the issuance of certificates of compliance, a practice that had generated

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[14]/ Hearing Exh. P-17: Letter, Brian A. Dudley, Bureau of Resource Protection, DEP Southeast Regional Office, to William White, Oak Bluffs Board of Health, dated March 12, 2004.

[15]/ Hearing Exh. P-18: Letter, Brian A. Dudley, Bureau of Resource Protection, DEP Southeast Regional Office, to William White, Oak Bluffs Board of Health, dated March 31, 2004.

[16]/ A copy of the certificate of compliance was marked in evidence as Hearing Exh. P-16.

conflict between the Building Department and Health Agent Fauteux. That Joseph Alosso was the Health Agent's supervisor at the Board of Health suggests strongly that the conflict between Fauteux and the Building Department would have come to his attention. The record does not show, or even suggest, that he was unaware of this conflict. Awareness of the conflict to any degree would have suggested a need to check with Fauteux or with other Health Department employees to confirm whether she had inspected the new subsurface disposal system at the Alossos' new home and issued a certificate of compliance for it.

In addition, Joseph Alosso knew that the Health Agent had not inspected the new subsurface sewage disposal system or determined whether it complied with Title 5 requirements.[17] The Health Agent did not reschedule an inspection, and neither did Alosso (see above, at 14). For proof that the new system operated properly and could be used he relied, instead, upon the system inspection conducted by its designer, Schofield, Barbini & Hoehn, Inc., and the project engineer's letter dated November 26, 2003 certifying to the Board of Health that it had inspected the system and found that it met Title 5 requirements and was "approved as constructed." (see above, at 13). He did so only because this had been the local practice,[18] and not because he knew for certain that this type of letter made the Health Agent's inspection or the Board of Health's certificate of compliance superfluous. Joseph Alosso knew, nonetheless, that the Health Agent had not inspected the system and that the system had not been issued a Title 5 certificate of compliance. A telephone call to the Health Agent, or a review of Health Department records for the new system in early February 2004 (when the

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[17]/ Affidavit of Joseph N. Alosso (filed in opposition to DEP's motion for summary decision and in support of petitioners' cross-motion for summary decision), sworn-to September 30, 2005, at 3, para. 14, and at 4, para. 18.

[18]/ Id.

Alossos moved into their new house) would have revealed that no certificate of compliance had been issued.

In these circumstances, I cannot find that Joseph Alosso's reliance upon anything other than a certificate of compliance as authorizing use of the new subsurface sewage disposal system was reasonable. His violation of 310 CMR 15.021(1), through discharge to the new system before a certificate of compliance was issued, was, therefore, not "accidental," "unforeseeable" or "beyond his control." See Matter of Cummings Properties Management, Inc. and Matter of Anger (discussed above, at 10-11). His use of the new system without a certificate of compliance was not the result of error, and DEP did not run afoul of 310 CMR 5.14 by issuing him a penalty for violating 310 CMR 15.021(1) without first issuing a notice of noncompliance.

In contrast, there is no evidence in the record as to what Evelyn Alosso knew or should have known about the status of the new subsurface disposal system's inspection or about what particular act or certificate authorized its use. As far as I can tell from the record, Mrs. Alosso was never employed by the Oak Bluffs Health Department and did not apply for any of the permits or certificates that the new house or its new subsurface sewage disposal system needed. Health Inspector Fauteux testified to no conversations or written communications with Mrs. Alosso about the new system (or about anything else, for that matter). Mr. Alosso could have been asked on cross-examination whether he discussed such matters as inspection, occupancy certificates and certificates of compliance with his wife, but no such questions were asked of him.

There is no basis in the record for finding, thus, that Mrs. Alosso's reliance upon the certificate of occupancy as authorizing use of the new house's subsurface sewage disposal system was unreasonable in the circumstances or, thus, that her violation of 310 CMR 15.021(1) was not

the result of error. Because DEP failed to show that Mrs. Alosso's violation of 310 CMR 15.021(1) was not the result of error, it failed to justify, per 310 CMR 5.14, its assessment of a penalty against her for this violation without first issuing a notice of noncompliance.

Accordingly I vacate, as to Evelyn Alosso, the remaining $8,125 penalty for violation of 310 CMR 15.021(1).

2.

I turn next to whether, in assessing a penalty against Joseph Alosso for this violation, DEP considered the penalty factors listed at 310 CMR 5.25.

a.

The penalty amount must reflect a consideration of the penalty-mitigating factors listed in DEP's Administrative Penalty Regulations at at 310 CMR 5.25.[19] Consideration of these factors is

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[19]/ 310 CMR 5.25 provides that:

In determining the amount of each Penalty, the Department shall consider each of the following:

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

(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

mandatory. Central Water District Associates v. Dep't of Environmental Protection, C.A. No. 93-0536, Memorandum of Decision and Order on Plaintiff's Appeal from an Administrative Penalty and ALJ's Decision Pursuant to G.L. c. 30A, at 15, n. 15 (Worcester Super. Ct., Mar. 29, 1994), affirming Matter of Central Water District, Inc., Docket N o. 87-114, Final Decision (Feb. 2, 1993); Matter of Matt, Trustee, East Ashland Street Realty Trust, Docket Nos. 97-011/012, Final Decision, 5 DEPR 160, 166-67 (Oct. 7, 1998). Because neither the penalty statute, M.G.L. c. 21A, § 16, nor DEP's administrative penalty regulations, 310 CMR 5.00, defines "consider" or "consideration," both are given "their ordinary and common meanings" and accordingly "what is required is that the penalty factors be thought about and taken into account." Matt; 5 DEPR at 167.

Matt explains further:

> Not thinking about a factor or not taking it into account clearly does not meet this requirement. Neither the administrative penalty statute nor the administrative penalty regulations requires, on the other hand, a detailed analysis of the penalty factors; nor do they require that the penalty factors be given any particular weight or that their consideration,

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penalized.

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

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

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

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

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

(11) The public interest.

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

> whether individually or collectively, result in an adjustment of the penalty amount. The question relative to penalty factor consideration is, thus, only whether it occurred and not whether consideration of the penalty factors was satisfactory in terms of quality or quantity.

Id. The level of proof needed to show consideration of the penalty factors "is not particularly high," and instead:

> It should be enough to show that [DEP] gave some thought to the penalty factors in computing the penalty based upon the information that was available to it at the time. The credibility of that information, its completeness, and the weight it should be given have nothing to do with whether the penalty factors were considered. Those matters are relevant, instead, to the penalty amount.

Id. If DEP "in fact" considered each of the penalty factors into account before it issued the penalty assessment notice, the focus shifts to "what the record shows now with respect to each of the penalty factors and as to whether that evidence supports a downward penalty adjustment." Matt; 5 DEPR at 167.

At issue in Matt was a solid waste penalty assessed by DEP against a realty trust operating a landfill. DEP had previously issued a notice of noncompliance (NON) to the trust that specified the violations in question and provided an opportunity to correct them. The trust's disregard of the prior NON figured in DEP's consideration of the penalty factors prescribed at 310 CMR 5.25. DEP, in contrast, issued no prior NON to the Alossos before it assessed the penalty challenged here.

Matt provides, nonetheless, a helpful example of what it means to think sufficiently about the penalty factors and take them into account in assessing a penalty, whether a prior NON was issued or not. In that case, testimony by the DEP Regional Director (who had determined the amount of the penalty assessed against the realty trust) showed that he had in fact considered the penalty factors prescribed at 310 CMR 5.25. As the decision explains:

> The penalty assessed against the [realty] trust consist[ed] of two "base penalty" amounts of

> $12,500 for each of the solid waste violations alleged in the penalty assessment notice—operating a solid waste facility without a site assignment, in violation of 310 CMR 16.06, and operating or maintaining an open dump or dumping ground, in violation of 310 CMR 19.014. The base penalty amounts were established by the Department for specific statutory and regulatory violations, such as those alleged here, to assure consistency when penalties are issued; they are the "starting point" for penalty calculations made by Department staff.
>
> Deputy Regional Director [David] Johnson testified that he considered all of the factors specified at 310 CMR 5.25; he chose, however, not to adjust the penalty upward or downward on the basis of any of them because the $12,500 base penalty assessed for each of the two solid waste violations alleged appeared to be appropriate. In reaching this conclusion, Johnson found particularly persuasive the potential health, safety and environmental impact of the solid waste—the first penalty factor listed at 310 CMR 5.25, in other words. Johnson testified that the proximity of the solid waste to private residences and the lack of restriction on site access were "[o]f particular concern" to him; so, too, was the presence of solid waste within a wetland buffer zone, since uncontrolled runoff from precipitation could carry leachate from the solid waste to the wetland. Johnson's experience was that sites such as this one pose environmental threats. The Department's concerns were consistent with the well-established principle that dumped refuse is a public health threat (citation omitted).
>
> Johnson's testimony also shows that he found the base penalty amounts appropriate because the trust did not comply with the February 6, 1995 NON and because when he reinspected the site in November, 1996, he observed solid waste "in essentially the same locations and quantities" as he had observed during previous inspections. He considered and found particularly relevant, thus, steps to prevent failure to comply, steps taken to come into compliance and steps taken to remedy and mitigate harm—penalty factors 3, 4 and 5, respectively—and concluded that no such steps had been taken. In addition, by taking the prior NON into account, Johnson considered a previous failure to comply—penalty factor 6. Johnson also testified that he considered the penalty amount sufficient to deter future noncompliance, which shows that he considered penalty factors 8 and 9.
>
> The record also shows that Johnson considered the trust's financial condition—penalty factor 10—to be potentially relevant to the penalty amount. As he had no information about the trust's financial condition, however, he did not adjust the penalty on account of it.

Matt; 5 DEPR at 167-68 (footnotes omitted).

In Matt, DEP's witness demonstrated that he considered the penalty factors for which he had information through a combination of site observations, experience with similar sites and the environmental, safety and health impacts they posed, and he described how he applied this knowledge

to the penalty calculation. It was not the stated intent of Matt to craft a one-size-fits-all template for discerning in every case whether penalty factor consideration sufficed. However, the decision suggests at least that there must have been a thought process that a witness can describe, and that the description must amount to more than a barebones assertion that the factors were considered.

b.

The Alossos' assertion that DEP did not in fact consider the penalty factors listed at 310 CMR 5.25 focused primarily upon two of these factors. One of them was "[t]he actual and potential impact on public health, safety, and welfare, and the environment" of the Alossos' use of their new subsurface sewage disposal system without first obtaining a certificate of Compliance from the Oak Bluffs Board of Health. See 310 CMR 5.25(1). The other was whether the Alossos "took steps to promptly come into compliance" after they used the new subsurface sewage disposal system without a certificate of compliance. See 310 CMR 5.25(4).

i.

DEP was not without information to consider regarding these two penalty factors. It investigated the Alossos' alleged Title 5 violations for eight months before assessing a $28,310 civil administrative penalty against them on October 15, 2004. This investigation began in February 2004, when Environmental Engineer Ronald J. White learned of alleged Title 5 violations at the Alosso property from a DEP inspector.[20] White inspected the Alosso property on March 9, 2004[21] and "then

[20]/ Prefiled direct testimony of Ronald J. White, sworn-to September 29, 2005 (White PFT), at 3, top para.. DEP offered no testimony by the inspector from whom White learned of the alleged violations (Cathy Kiley of DEP's Southeast Regional Office; see White PFT, at 3, next-to-last para.).

[21]/ Id., at 3, last para.

proceeded to review the Oak Bluffs Board of Health files for the Site," including the approved plans for the new subsurface sewage disposal system prepared by Schofield, Barbini & Hoehn, Inc., dated July 28, 2003, and the July 30, 2003 application for a disposal system construction permit.[22] White also reviewed Oak Bluffs Building Department records pertaining to the Alossos' original and replacement home, including the temporary occupancy permit issued on December 12, 2003 and the occupancy permit issued on February 6, 2004,[23] and obtained a copy of the certificate of compliance for the Alossos' new subsurface sewage disposal system that the Oak Bluffs Board of Health issued on April 29, 2004.[24]

By the time it assessed the penalty in October 2004, DEP had, thus, sufficient information allowing it to consider "[t]he actual and potential impact on public health, safety, and welfare, and the environment" of using the Alossos' new subsurface sewage disposal system without first obtaining a certificate of compliance from the Oak Bluffs Board of Health, and, as well, the steps that the Alossos took "to promptly come into compliance" after they began using the new subsurface sewage disposal system without a certificate of compliance. This information showed that less than 90 days after moving into their new house, the Alossos had arranged for the new subsurface sewage disposal system to be uncovered and inspected by the Oak Bluffs Board of Health, which then issued a Title 5 certificate of compliance allowing the same discharge to the same system that had begun when the Alossos moved into their new home. The system had not been modified between the move-in date, in early February 2004, and April 29, 2004, when the Board of Health issued a certificate of

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[22]/ Id., at 4, first para.

[23]/ Id., at 5, last two paras.

[24]/ Id., at 4, last para.

occupancy. Neither the type of discharge to the new system nor the discharge volume had changed during this time.

Discharge to the new subsurface sewage disposal system without a certificate of compliance had violated 310 CMR 15.021(1), but the information DEP had suggested strongly that the discharge had not adversely affected public health, public safety or the environment. It also suggested strongly that the same system would have passed an earlier inspection and received an earlier certificate of occupancy if these steps had been completed before the Alossos moved into their new home, particularly since the system was inspected and issued a Title 5 certificate of compliance without any modification. Neither of DEP's witnesses testified to having discovered, whether in local Health or Building Department records or anywhere else, any information even suggesting that the new system had generated such adverse impacts, and neither of them attested to having discovered such impacts in the course of their own investigation. The information DEP had also showed that the Alossos had corrected the lack of a prior Health Department inspection and Title 5 certificate of compliance within 90 days after moving into their new home.

ii.

DEP needed to show that it actually thought about this information when it "considered" the penalty factors listed at 310 CMR 5.25(1) (actual and potential impact on public health, safety and the environment) and 310 CMR 5.25(4) (steps taken to promptly come into compliance). It did not make this showing.

As does every other penalty assessment notice that DEP issues, the penalty assessment notice issued to the Alossos stated that the agency "considered" each of the factors listed at 310 CMR 5.25

in determining the penalty amount, but it did not state what this consideration comprised.[25] DEP's prefiled direct testimony also did not state how any of these factors were considered; nor did either of the affidavits supporting DEP's motion for summary decision

As the live portion of the hearing began, thus, the record showed "only that the $8,625 penalty assessed" for discharging to the new system without a Title 5 certificate of compliance reflected a "base penalty" of $5,750, adjusted upward 50% for lack of good faith because Joseph Alosso "was a member of the Board of Health and knew of the requirement prior to commission of the violation." Partial Summary Decision; 14 DEPR at 206. The record also showed, thus, that DEP had made no downward adjustment for any of the penalty factors listed at 310 CMR 5.25, including (1) "the actual and potential impact on public health, safety, and welfare, and the environment" of discharging to the new system without a Title 5 certificate of compliance, or (2) post-violation steps taken to promptly come into compliance. The record also did not show whether DEP had actually thought about any of these factors before deciding that they merited no penalty adjustment.

iii.

Live testimony during the hearing furnished no evidence that DEP had in fact thought about these factors.

DEP witness David Ferris testified on cross-examination, during the March 4, 2008 hearing, that he did not prepare the penalty assessment notice, and while he "may" have reviewed it, he recalled nothing specific about reviewing the penalty factors.

DEP witness Ronald J. White prepared the penalty assessment notice and testified, on cross

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[25]/ Administrative penalty notice, at 5, para. 8.

examination, that in doing so he "considered" efforts by the Alossos to come into compliance. However, he went no further than to state that this factor was "considered" and "did not affect" the penalty—meaning, as he explained it, that the penalty was not adjusted downward on account of compliance efforts. However, although he was asked to do so several times, White was unable to state how this penalty factor was considered or what information was taken into account in considering it. Nor was he able to recall whether any of the penalty factors were considered separately in computing each of the penalty components, such as the $8,625 penalty assessed for discharging to the new subsurface sewage disposal system without first receiving a certificate of compliance, or whether the penalty factors had been considered relative to the total penalty amount that DEP assessed against the Alossos ($28,310).

In contrast, White was able to explain succinctly that an upward adjustment of the penalty assessed for violating the certificate of compliance requirement by 50%—from the base penalty of $5,750 to $8,625—was warranted because Joseph Alosso was a member of the Oak Bluffs Board of Health and by virtue of that position either knew the Title 5 regulations or had been "exposed" to them on a regular basis during Board of Health meetings. He was also able to explain the consideration of penalty factors when this tended to support the amount assessed for discharging to the new subsurface sewer disposal system without first obtaining a certificate of compliance—for example, by noting that the amount assessed exceeded the cost of obtaining the certificate, relative to "[m]aking compliance less costly than the failure to comply," see 310 CMR 5.25(7), and by noting that both of the Alossos worked and owned a home, relative to considering the Alossos' financial

condition, see 310 CMR 5.25(10).[26]

White did not explain why he was able to recall what his consideration comprised in adjusting the base penalty amount upward, but was unable to recall what it comprised as to penalty factors that suggested a downward penalty adjustment. In view of this unexplained disparity in recollection, I do not find credible White's insistence that he considered the "actual and potential impact" of discharge to the new system without a certificate of compliance, or the steps that the Alossos took to promptly correct this violation.

I also do not find credible White's assertion, on cross-examination, that he considered "actual and potential impact" by noting that a system installed incorrectly (meaning contrary to Title 5 requirements) had the potential to generate adverse public health and environmental effects.

White conceded on cross-examination at the hearing that the Alossos' new subsurface sewage disposal system passed inspection in April 2004 and was issued a certificate of compliance. This signified to him "in effect" (White's words) that the new system was not installed incorrectly and had not generated, thus, any of the adverse effects associated with an improperly-installed subsurface sewage disposal system. He knew, as well, that the system's designer (Schofield, Barbini & Hoehn, Inc.) had certified to the Oak Bluffs Board of Health on November 23, 2003 that it had inspected the system and found that it met Title 5 requirements (see above, at 13). This was additional evidence that the new system had been designed and installed in accordance with Title 5 requirements and had, therefore, no genuine potential to generate adverse public health and environmental effects associated

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[26]/ In view of the outcome here, I do not weigh the reasonableness of what White (and, thus, DEP) concluded in considering compliance cost or the Alossos' financial condition relative to the amount of the penalty assessed against them. I would have done so to determine whether any of the penalty factors supported a downward adjustment of the penalty amount (Issue 3; see above, at 6) if the record had showed that DEP had in fact considered all of the penalty factors.

with improper installation.

Although White could not say whether this letter had helped prompt the Health Department to "sign off" on the Alossos' new system subsequently, he did not dispute the letter's representations and conceded that before the Board of Health acted, it would have first wanted the system's designer to confirm that the system was designed and installed in accordance with Title 5 requirements. That is precisely what the November 26, 2003 certification did in this case. As a consequence, it also provided assurance that the Alossos' new house was not connected to an incorrectly-installed system with a potential to generate adverse public health and environmental effects. So, too, did the Board of Health's subsequent inspection and certification of the new system at the end of April 2004. White did not dispute his awareness of the system designer's letter or of the Health Department's inspection and certification of the Alossos' new system. However, although White was aware of this information and did not deny its relevance to "actual and potential impact," he did not state in either his prefiled testimony or on cross or redirect examination that he considered any of this information when the penalty was assessed.

When DEP assessed the penalty in October 2004 it had, thus, uncontradicted information showing that the Alossos' new subsurface sewage disposal system was properly designed and installed and had been found during two inspections (by the civil engineering firm that designed the new system, and later by the Board of Health) to meet Title 5 requirements as to design and installation. There was also no evidence that the Alossos' new system had actually failed, leaked or otherwise generated any adverse health, safety or environmental impacts at any time before or after the Board of Health issued the required Title 5 certificate of compliance for this system. There is no evidence in the record that DEP actually took any of this information into account in assessing the

penalty. The evidence shows, instead, that DEP considered no more than the potential impact of improperly-installed subsurface sewage disposal systems.

This deficiency in consideration was not merely one of thinking incompletely about a penalty factor, or of choosing to give more weight to some facts and less to others, neither of which would demonstrate a failure to "give some thought" to, or thus to consider, the penalty factors as 310 CMR 5.25 requires. See above, at 22-26. It was, instead, a choice to disregard all of the known, material facts about the Alossos' subsurface sewage disposal system in favor of generalizations about improperly-installed systems that clearly did not apply. This was prejudgment rather than thought.

c.

I conclude that in assessing the penalty component for discharging to the new subsurface sewage disposal system without first obtaining a certificate of compliance in violation of 310 CMR 15.021(1), DEP did not think about or take into account, and therefore did not "consider," two of the penalty factors listed at 310 CMR 5.25:

> (1) "the actual and potential impact" of the violation "on public health, safety, and welfare, and the environment...", see 310 CMR 5.25(1), of which impacts there is no evidence in the record whatsoever, and
>
> (2) steps taken by the Alossos "to promptly come into compliance," see 310 CMR 5.25(4), by having the new system uncovered and inspected preparatory to obtaining a certificate of compliance that the Board of Health issued on April 29, 2004, less than 90 days after they moved into the new house.

Because consideration of all of the penalty factors listed at 310 CMR 5.25 is mandatory (see above, at 22-23), DEP's failure to consider at least two of these factors requires that I vacate the remaining penalty component. If this component had survived thus far as to both petitioners, I would now vacate it as to both of them. However, I have already vacated the remaining penalty component

(for discharging to the new system without first obtaining a certificate of compliance) as to Evelyn Alosso because DEP did not show that her violation was not the result of error and therefore did not establish a required predicate for assessing a penalty against her without first issuing a notice of noncompliance. Only the penalty component assessed against Joseph Alosso remains to be vacated for failure to consider all of the penalty factors, consequently, and I do so now.

Recommended Disposition

The partial summary decision issued on October 3, 2007, which vacated the enforcement order and components totaling $19,685 of the $28,310 civil administrative penalty assessed against the Alossos, is confirmed. The remaining penalty component—$8,625 assessed for discharging to the new subsurface sewage disposal system before the local Board of Health issued a Title 5 certificate of compliance, in violation of 310 CMR 15.021(1)—is vacated (a) as to Evelyn Alosso, because DEP did not show that her violation was not the result of error or, thus, that it properly assessed a penalty against her, per 310 CMR 5.14, without first issuing to her a notice of noncompliance, and (b) as to Joseph Alosso because DEP did not prove that it considered all of the factors listed at 310 CMR 5.25 in determining the penalty amount, as this regulation requires.

Notice

This decision is a recommended final decision of the Administrative Magistrate. It has been transmitted to the Commissioner of the Department of Environmental Protection for her final decision in this matter, including the issuance of a final order of conditions for the project at issue. This decision is therefore not a final decision subject to reconsideration, and may not be appealed to the

Superior Court pursuant to M.G.L. c. 30A. The Commissioner's decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

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

Mark L. Silverstein
Administrative Magistrate