

# **EXHIBIT I**

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Alleged Violations of Articles 27 of the  
New York State Environmental Conservation Law and Title 6  
of the Official Compilation of Codes, Rules and Regulations  
of the State of New York,

**AFFIDAVIT OF  
MICHAEL HAGGERTY  
IN SUPPORT OF THE  
PENALTY –  
MOTION FOR ORDER  
WITHOUT HEARING**

- by -

20 REWE STREET LTD.,

**NYSDEC File No's.  
R2-20210416-52**

Respondent.

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STATE OF NEW YORK     )  
                                  ss:  
COUNTY OF ALBANY     )

MICHAEL HAGGERTY, being duly sworn, deposes and says:

1.     My name is Michael Haggerty, and I am a project manager in the Division of Environmental Remediation in the central office of the New York State Department of Environmental Conservation ("NYSDEC" or the "Department"). I have been employed by the Department since 2006.

2.     I submit this affidavit in support of the Department's Motion for Order Without Hearing in the above-captioned enforcement action regarding the penalty and how Department staff arrived at the specific amount requested.

3.     As part of my regular duties at the Department, I manage projects in

various remedial programs, including the remediation of inactive hazardous waste disposal sites (State Superfund Program).

4. This Site (the "Site") is a 0.46-acre parcel located at 171 Lombardy Street, Brooklyn NY 11222. It is listed in the Registry of Inactive Hazardous Waste Disposal Sites as NYSDEC Site Number 224182. The Site is designated as Class 02 because DEC determined it poses a significant threat to the environment and public health.

5. I have worked as the project manager for this Site since 2017.

6. The Site was listed on the Registry as a Class 2 site in 2014 due to ongoing release of PCE into soil and groundwater, and the Site is a threat to public health due to the associated soil vapor and the proximity of occupied structures.

7. For the violations alleged in this motion, Department staff request a total penalty of \$1,657,500. Department staff relied on DEC's Civil Penalty Policy, DEE-1 (June 20, 1990) and DEC's Inactive Hazardous Waste Disposal Sites Enforcement Policy, DEE-11 (December 10, 1984) to calculate this requested penalty.

8. DEC's Civil Penalty Policy, DEE-1 (June 20, 1990) advises that the starting point for any penalty is the statutory maximum. The statutory maximum for each violation of 6 NYCRR Part 375 is \$37,500 per day.

9. DEC's civil penalty policy advises staff to include the economic benefit of noncompliance. Here, Respondent did not conduct a remedial program with DEC oversight. Because of this, Respondent avoided the costs of preparing and submitting work plans to DEC for approval. Respondent also avoided the cost of implementing any measures to protect public health during the remedial investigation, such as community air monitoring. These are not insignificant costs and can be well above \$10,000 and up

to \$100,000.

10. The DEC civil penalty policy also advised staff to consider the gravity component, which reflects the seriousness of the violation and serves a deterrent. Exercising DEC's discretion entails analyzing the two gravity component factors: (i) potential harm caused by violation, and (ii) relative importance to the regulatory scheme.

11. A look at the penalty adjustments from DEC's civil penalty policy show that the penalty here should be high. The first is culpability. Here, DEC tried for years to get this Respondent to enter into an order on consent to cleanup this Site but we were met with denial and refusals. The Respondent would not grant DEC access to the property to investigate. We explained to them many times they had to either enter into an order or let DEC conduct the remedial program. At one point they told us they would stop their investigations, but never did.

12. A second factor is violator cooperation. This Respondent has been highly uncooperative. They spent years ignoring DEC and delaying much needed work.

13. This is a Class 2 Site and, by definition, poses a significant threat to public health and the environment. DEC's penalty policy advises that violations involving toxic substances are on the extreme end of a spectrum of the harm. The chemical of concern here, PCE, causes both acute and long-term human health problems. Most human exposure comes from air inhalation from soil vapors. DEC had no oversight of Respondent's investigations at this site and therefore no assurances that adequate human health protections were in place.

14. The violations here, preventing a remedial program and exposing the

public health to increased harm, are at the core of DER's program and could not be more important to the statutory scheme.

15. Both the potential harm and importance to the statutory scheme make the gravity component here very high.

#### **First Cause of Action**

16. For the first cause of action, violating 6 NYCRR 375-1.11(b)(2)(i) by preventing a remedial program, Department staff could request the maximum penalty for the entire length of time Respondent refused to enter into a consent order to initiate a remedial program and denied DEC access to the site to conduct a Department-led investigation. Respondent first stated it would not enter into a consent order on February 19, 2015. Since that date the Department has requested several times that Respondent enter into an order on consent or grant DEC access to the site, but Respondent has to date refused to do so. There are 2,645 days from February 19, 2015, until May 18, 2022. A penalty of \$37,500 per day results in a total maximum penalty of \$99,187,500.

17. After review of the Civil Penalty Policy and the facts and circumstances of this matter, Department staff decided not to count the entire length of time Respondent refused to enter into a remedial program or allow the Department access. Instead, Department staff decided to count only the two times Respondent expressly refused to enter into an order on consent (February 19, 2015, and May 24, 2019)<sup>1</sup>, the three times DEC expressly requested Site access (March 27, 2015, January 30, 2018, and April 19,

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<sup>1</sup> See Affirmation of Jonathan Agosta in Support of Motion for Order Without Hearing, June 7, 2022, at ¶¶ 6 and 12. There were other times Department staff requested Respondent enter an order on consent or grant access, such as the in-person meeting on August 29, 2019, but Respondent never answered these requests.

2019)<sup>2</sup>, and the time period from the date Respondent stated it ceased further investigation work (August 29, 2019) until the day the investigation actually stopped (February 9, 2021). Department staff feel it's reasonable to count those days of express requests and refusal individually, but to count the entire range of time when Respondent wasn't truthful with the Department. For the first five (5) days the Department requests the maximum penalty of \$37,500 per day, based on an application of the factors above. For the time period Respondent asserted it stopped its investigation but did not (530 days), Department staff seek a penalty of \$1,500 per day per violation. The Department used its enforcement discretion for this figure, given the long time period, but also considering the gravity of the violation, economic benefit, lack of cooperation, the substance involved, and Respondent's culpability. This results in a total of \$187,500 (\$37,500 x 5 days) plus \$795,000 (\$1,500 x 530 days) for a total requested penalty of \$982,500 for the First Cause of Action.

### **Second Cause of Action**

18. For the second cause of action, violating 6 NYCRR 375-1.11(b)(2)(ii) by engaging in activity that is reasonably foreseeable to expose the public health or the environment to a significantly increased threat of harm, Department staff could have requested the maximum for the entire span of Respondent's unauthorized investigation. This totaled at least 537 days from (i) October 29, 2015, to November 3, 2015; and (ii) August 27, 2019, through February 9, 2021. A penalty of \$37,500 per day results in a total maximum penalty of \$20,137,500.

19. After review of the Civil Penalty Policy and the facts and circumstances of

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<sup>2</sup> See Affidavit of Michael Haggerty in Support of Motion for Order Without Hearing, March 29, 2022, at ¶¶ 8 (Exhibit C), 9 (Exhibit D), and 16 (Exhibit K).

this matter, Department staff decided not to count the entire length of time of Respondent's unauthorized investigation. Instead, Department Staff counted only those specific days for which the Department has evidence Respondent conducted intrusive activities. These days are: (i) four days from October 29, 2015, to November 3, 2015, and (ii) at least eleven (11) days between August 27, 2019, and February 3, 2021. Based on the potential harm, importance to the regulatory scheme, economic benefit, culpability, and lack of cooperation, Staff requests the maximum penalty for these specific days. Based on my experience I know that other site work related to the sampling must have occurred on additional days, such as site preparation and clean up, but Department Staff feel limiting to these specific dates is a fair resolution. This results in a requested penalty of \$562,500 ( $\$37,500 \times 15$  days) for the Second Cause of Action.

### **Third Cause of Action**

20. For the third cause of action, violating 6 NYCRR 375-1.11(d)(1) by failing to provide the 60-day change of use notification, Department staff again could have requested the maximum for the entire span of Respondent's unauthorized investigation. This totaled at least 537 days from (i) October 29, 2015, to November 3, 2015; and (iii) August 27, 2019, through February 9, 2021. A penalty of \$37,500 per day results in a total maximum of \$20,137,500.

21. However, Staff chose to penalize for only three (3) specific violations for which Respondent itself described as investigations: (i) October 29 to November 3, 2015; (ii) August-September 2019; and (iii) February 2021. note that Fuss & O'Neil's Supplemental Subsurface Investigation Report (September 2021) documents several distinct "investigations" from August 2019 to February 2021, but we decided to only



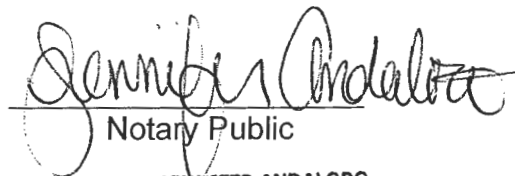
penalize Respondent for two of them. See Affidavit of Michael Haggerty in Support of Motion for Order Without Hearing, March 29, 2022, at ¶¶ 22-24. The enforcement team looked at the harm, importance to the regulatory scheme, economic benefit, culpability, and lack of cooperation, and decided to request the maximum penalty for these three violations. This results in a requested penalty of \$112,500 (\$37,500 x 3 days) for the Third Cause of Action.

22. Department staff therefore request a total penalty of \$1,657,500 (\$982,500 + \$562,500 + \$112,500) for the three above causes of action.

23. I make this affidavit upon my personal knowledge except as otherwise stated, and as to the matters, I have reason to believe them to be true.

  
MICHAEL HAGGERTY

Sworn to before me this  
21<sup>st</sup> day of June 2022

  
Notary Public

JENNIFER ANDALORO  
Notary Public, State of New York  
No. 02AN6098246  
Qualified in Albany County  
Commission Expires January 14, 2024