

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17 of
the New York State Environmental Conservation Law,

- by -

10 EAST 85TH STREET, INC.,

Respondent.

ORDER

DEC Case No.

R2-20150505-279

This administrative enforcement proceeding addresses the alleged violations by respondent 10 East 85th Street, Inc. (“respondent”) of several terms of order on consent no. R2-20141010-506, effective February 25, 2015 (“2015 order on consent”). The 2015 order on consent addressed several violations relating to respondent’s petroleum bulk storage (“PBS”) facility No. 2-113646, located at 10 East 85th Street, New York, New York (“facility”).

Staff of the New York State Department of Environmental Conservation (“Department”) served respondent, by certified mail on August 26, 2015, with a notice of motion for order without hearing in lieu of complaint, together with (a) a supporting affirmation of counsel for staff, and (b) an affidavit of a staff environmental engineer. Staff submitted proof that respondent received the papers on August 28, 2015. Respondent has not responded to staff’s motion papers.

Department staff’s in its motion for order without hearing in lieu of complaint alleges that respondent failed to comply with various provisions of the 2015 order on consent. Specifically, staff alleges that respondent: (a) failed to pay the civil penalty of eight thousand seven hundred fifty dollars (\$8,750); (b) failed to renew the registration of its PBS facility, which expired on February 3, 2008; (c) failed to correct erroneous information on its PBS facility registration; (d) failed to submit evidence of proper color-coding of the facility fill port; and (e) failed to submit a corrective action report documenting work done in response to NYSDEC Spill No. 1406899. See 2015 Order on Consent, Paragraphs I and II, at 2-3 (setting forth respondent’s obligations).

Staff seeks a Commissioner’s order: (a) noting that respondent has a continuing obligation to comply with the 2015 order on consent; (b) finding that respondent committed the five alleged violations of the 2015 order on consent; (c) imposing on respondent a civil penalty in the amount of forty-five thousand dollars (\$45,000); and (d) granting such other and further relief as may be deemed just, proper and equitable under the circumstances.

The matter was assigned to Administrative Law Judge (“ALJ”) D. Scott Bassinson, who prepared the attached summary report, which I adopt as my decision in this matter, subject to my comments below. I concur with the ALJ’s conclusion that Department staff has submitted

evidence sufficient to establish its entitlement to judgment on the violations alleged in the motion. The evidence submitted by staff demonstrates as a matter of law that respondent has failed to comply with the 2015 order on consent.

Department staff has requested that I impose a civil penalty in the amount of forty-five thousand dollars (\$45,000). To support the requested penalty, Department staff considered (a) ECL 71-1929, which provides for a penalty of up to \$37,500 per day on a person who violates any of the provisions of, or who fails to perform any duty imposed by titles 1 through 11 inclusive and title 19 of article 17 of the ECL, or the rules, regulations, orders or determinations of the commissioner promulgated thereto;¹ (b) the Department's Civil Penalty Policy (DEE-1); (c) the Department's Order on Consent Enforcement Policy (DEE-2); and (d) evidence of staff's extensive efforts to obtain respondent's compliance (see Summary Report, Findings of Fact Nos. 10-16).

Respondent's failure to comply with the order on consent that it previously signed renders it subject to civil penalties under ECL 71-1929. Based on this record, the proposed civil penalty of forty-five thousand dollars (\$45,000) for the multiple violations of the 2015 order on consent, as set forth in the motion for order without hearing, is authorized and appropriate. I hereby direct that respondent is to pay this penalty of forty-five thousand dollars (\$45,000) within thirty (30) days of the service of this order upon it.

Respondent remains obligated to comply with all terms and conditions of the 2015 order on consent, including but not limited to the payment of a civil penalty of eight thousand seven hundred fifty dollars (\$8,750). These obligations are continuing and are in addition to the civil penalty being assessed under this order (see, e.g., Matter of Rraci Real Estate Corp., Order of the Commissioner, November 4, 2014, at 2; Matter of West 63 Empire Associates LLC, Order of the Commissioner, August 9, 2012, at 2).

NOW, THEREFORE, having considered this matter and being duly advised, it is **ORDERED** that:

- I. Department staff's motion for order without hearing is granted. Respondent 10 East 85th Street, Inc. is adjudged to have violated Order on Consent No. R2-20141010-506 by:
 - A. failing to pay the civil penalty of eight thousand seven hundred fifty dollars (\$8,750);
 - B. failing to renew the registration of PBS Facility No. 2-113646, located at 10 East 85th Street, New York, New York, which registration expired on February 3, 2008;
 - C. failing to correct erroneous information on its PBS Facility No. 2-113646 registration;
 - D. failing to submit evidence of proper color-coding of the facility fill port; and

¹ The violations cited in the 2015 order on consent relate to regulations promulgated pursuant to title 10 of article 17 of the ECL.

- E. failing to submit a corrective action report documenting work done in response to NYSDEC Spill No. 1406899.
- II. Within fifteen (15) days of the service of this order upon respondent 10 East 85th Street, Inc., respondent shall submit to the Department:
- A. a complete and accurate petroleum bulk storage registration application for the facility, plus applicable registration fees;
 - B. evidence of proper color-coding of the facility fill port in a form and manner acceptable to Department staff;
 - C. a corrective action report documenting work done in response to NYSDEC Spill No. 1406899. Such report shall be in a form and manner acceptable to Department staff; and
 - D. a check or money order made payable to the New York State Department of Environmental Conservation in the amount of eight thousand seven hundred fifty dollars (\$8,750) for the civil penalty assessed by Order on Consent No. R2-20141010-506. The payment shall be mailed or otherwise delivered to the address set forth in paragraph III of this order.
- III. In addition, within thirty (30) days of the service of this order upon respondent 10 East 85th Street, Inc., respondent shall pay a further civil penalty in the amount of forty-five thousand dollars (\$45,000). Payment shall be made in the form of a certified check, cashier's check, or money order payable to the New York State Department of Environmental Conservation. The payment shall be mailed or otherwise delivered to the following address:
- John K. Urda, Esq.
Assistant Regional Attorney
NYS Department of Environmental Conservation, Region 2
47-40 21st Street
Long Island City, New York 11101-5401
- IV. All questions and correspondence regarding this order shall be addressed to John K. Urda, Esq., at the address referenced in paragraph III of this order.

- V. The provisions, terms and conditions of this order shall bind respondent 10 East 85th Street, Inc., and its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By:

Basil Seggos
Acting Commissioner

Dated: February 22, 2016
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17 of
the New York State Environmental Conservation Law,

SUMMARY REPORT

DEC Case No.
R2-20150505-279

- by -

10 EAST 85TH STREET, INC.,

Respondent.

I. Background

By notice of motion for order without hearing in lieu of complaint dated August 26, 2015, staff of the New York State Department of Environmental Conservation (“Department”) commenced this enforcement proceeding against respondent 10 East 85th Street, Inc. (“respondent”) alleging that respondent committed five violations of Order on Consent No. R2-20141010-506 (“Consent Order”). Staff served the notice of motion with supporting papers on respondent by certified mail on August 26, 2015, and respondent received the papers on August 28, 2015.

Staff’s papers consist of a notice of motion dated August 26, 2015, the Affirmation of John K. Urda, Esq. dated August 26, 2015 (“Urda Affirm.”), attaching eleven exhibits, and the Affidavit of Hiralkumar Patel dated August 26, 2015 (“Patel Aff.”), attaching three exhibits. See Appendix A attached hereto. Staff alleges generally that respondent entered into the Consent Order to resolve several violations relating to its petroleum bulk storage (“PBS”) facility, comprised of a 3,000 gallon fuel oil tank, and has failed to comply with the terms of the Consent Order. The PBS facility is located at 10 East 85th Street, New York, New York.

Respondent has not responded to staff’s motion papers, although a response was due by September 17, 2015. See Section 622.12(c) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”).

Staff requests that the Commissioner issue an order: (i) noting that respondent has a continuing obligation to comply with the Consent Order; (ii) finding that respondent committed the five alleged violations; (iii) imposing on respondent a civil penalty in the amount of \$45,000; and (iv) granting such other and further relief as may be deemed just, proper and equitable under the circumstances. See Urda Affirm. at 9, Wherefore Clause.

II. Findings of Fact

1. Respondent 10 East 85th Street, Inc. is an active domestic business corporation. See Urda Affirm. ¶ 3; see also id. Exhibit (“Ex.”) A (Entity Information Sheet, New York State Department of State, dated August 25, 2015).
2. Respondent 10 East 85th Street, Inc. owns a petroleum bulk storage (“PBS”) facility (“facility”), comprised of a 3,000 gallon tank used to store fuel oil, located at 10 East 85th Street, New York, New York 10028. See Urda Affirm. ¶¶ 4-5; see also id. Exs. B (deed) and C (Facility Information Report and PBS Certificate, PBS No. 2-113646).
3. On September 30, 2014, a contractor notified the Department of a tank test failure at the facility. See Urda Affirm. ¶ 6; see also Patel Aff. ¶ 4, and Ex. A thereto (Spill Report, Spill No. 1406899, created on September 30, 2014).
4. On October 1, 2014, Department staff sent respondent a letter, requiring respondent to submit within a month a corrective action report documenting an investigation of the tank test failure. See Patel Aff. ¶ 5, and Ex. B thereto.
5. As of August 26, 2015, respondent had not submitted a corrective action report for the tank test failure, or any evidence of actual corrective action. See Patel Aff. ¶¶ 7, 12, 13.
6. On October 1, 2014, Department staff determined that respondent’s PBS registration had expired on February 3, 2008, and that the registration contained inaccurate contact information. See Urda Affirm. ¶ 7, and Ex. C thereto; see also Patel Aff. ¶ 5.
7. As of August 26, 2015, respondent had not renewed its PBS registration or corrected the errors in its registration. See Patel Aff. ¶¶ 8, 12, 13.
8. Following an October 3, 2014 inspection of the facility, Department staff served a notice of violation on personnel at the facility, citing several violations of PBS regulations. See Patel Aff. ¶ 6, and Ex. C thereto.
9. On December 1, 2014, counsel for Department staff sent to respondent an email attaching an order on consent, with instructions to execute the order and return it with a check for a civil penalty by December 15, 2014. See Urda Affirm. ¶ 12, and Ex. D thereto.
10. On December 16, 2014, respondent requested, and was granted, an extension until January 5, 2015 to return an executed order on consent and pay the civil penalty. Respondent failed to meet the extended deadline. See Urda Affirm. ¶ 13, and Ex. E thereto.

11. On February 9, 2015, counsel for Department staff extended until February 17, 2015 the deadline for respondent's submissions, but respondent again failed to meet the extended deadline. See Urda Affirm. ¶¶ 13, 14, and Ex. E thereto.
12. Respondent signed the Consent Order on February 17, 2015, and the Consent Order became effective on February 25, 2015, upon the signature of the Regional Director for Region 2. See Urda Affirm. ¶ 14, and Ex. F thereto.
13. In the Consent Order, respondent:
 - a. Admitted the following violations:
 - i. Violation of 6 NYCRR § 612.2(a)(1) by failing to properly register the facility, and having incorrect information regarding all of the following: contact information, tank location, installation date, product type, tank overfill protection, tank spill prevention, tank dispensing method, pipe secondary containment and pipe leak detection;
 - ii. Violation of 6 NYCRR § 612.2(a)(2) by failing to renew the facility registration, which expired on February 3, 2008;
 - iii. Violation of 6 NYCRR § 613.3(b) by failing to color-code or mark one fill port; and
 - iv. Violation of 6 NYCRR § 613.6(d) by failing to submit a corrective action report following the failure of a tank tightness test. See Consent Order, Urda Affirm. Ex. F, at 2, ¶¶ 9-11.
 - b. Agreed to pay a civil penalty in the amount of eight thousand seven hundred and fifty dollars (\$8,750). See id. at 2, ¶ I.A.
 - c. Agreed that, within 15 days of the effective date of the Consent Order, it would properly register the facility, submit evidence of correction of all outstanding violations, and submit a corrective action report documenting work done in response to Spill No. 1406899. See id. at 3, ¶ II.
14. On March 3, 2015, counsel for Department staff sent to respondent a copy of the fully-executed Consent Order, and requested confirmation that payment was forthcoming. Respondent replied by email stating "[c]onfirmed payment is being mailed shortly." See Urda Affirm. ¶ 14, and Ex. F (copy of email exchange at end of exhibit).
15. During the course of several subsequent email communications between counsel for Department staff and respondent, respondent made several representations regarding compliance with the terms of the Consent Order, including that:
 - Payment had been issued on March 9, 2015, see Urda Affirm. Ex. G (March 17, 2015 email);

- “All submittals were mailed” on March 26, 2015, id. Ex. H (March 27, 2015 email);
- Respondent had been “informed by the contractor and engineer that all work is complete and they have submitted the necessary paperwork. I will get this form signed and notarized and will send back to you as requested,” id. Ex. I (May 5, 2015 email); and
- “I will have all paperwork and forms to you prior to the end of next week,” id. Ex. J (July 7, 2015 email).

16. As of the August 26, 2015 commencement of this proceeding, respondent had failed to pay the civil penalty, properly register the facility, submit evidence of correction of all outstanding violations, or comply with the corrective action plan under the Consent Order. See Patel Aff. ¶¶ 7, 8, 12, 13.

III. Discussion

A. Liability – Conclusions of Law

A motion for order without hearing is governed by the same standards as are applicable to motions for summary judgment under the CPLR. See 6 NYCRR § 622.12(d). On an unopposed motion for order without hearing, the issue is whether Department staff has established its entitlement to summary judgment on the violations alleged in the motion. See Matter of Edelstein, Order of the Commissioner, July 18, 2014, at 2; see also Matter of Hunt, Decision and Order of the Commissioner, July 25, 2006, at 7 n2.

Department staff has asserted five causes of action, all relating to violations of the Consent Order: (i) failure to pay the civil penalty of eight thousand seven hundred fifty dollars (\$8,750); (ii) failure to renew the PBS facility registration within 15 days of the effective date of the Consent Order; (iii) failing to correct erroneous information on the PBS facility registration within 15 days of the effective date of the Consent Order; (iv) failure to submit evidence of proper color-coding of facility fill port within 15 days of the effective date of the Consent Order; and (v) failure to submit a corrective action report.

Department staff’s submissions establish entitlement to judgment on all five causes of action. Staff has submitted a copy of the fully executed Consent Order requiring respondent to take certain actions and to pay a civil penalty. Staff has submitted an affirmation of counsel for staff, who communicated directly with respondent’s representative regarding compliance with the Consent Order, and an affidavit of a staff environmental engineer assigned to Spill No. 1406899. Staff has submitted correspondence in which respondent’s representative makes certain representations that are not supported by the evidence submitted in this matter. Respondent has failed to respond to staff’s motion or otherwise appear in this proceeding, even though served properly with the motion for order without hearing.

I conclude that Department staff has established that respondent committed the violations alleged in the motion for order without hearing. I therefore recommend that the Commissioner

grant staff's unopposed motion for order without hearing, and hold respondent liable on all five causes of action.¹

B. Civil Penalty

Pursuant to Environmental Conservation Law ("ECL") § 71-1929, the Commissioner may impose a penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day on any person "who violates any of the provisions of, or who fails to perform any duty imposed by titles 1 through 11 inclusive and title 19 of article 17, or the ... orders ... of the commissioner promulgated thereto." In its motion for order without hearing, Department staff calculated a combined total maximum statutory penalty for the alleged violations as \$32,062,500. See Urda Affirm. at 7, ¶ 44.²

Department staff requests that the Commissioner impose a civil penalty in the amount of \$45,000. See id. ¶ 53. To support the requested penalty, staff discussed several factors consistent with the Department's Civil Penalty Policy (DEE-1) and the Order on Consent Enforcement Policy (DEE-2), and recounted the extensive efforts of staff to obtain respondent's compliance with the Consent Order. See id. ¶¶ 45-52. Staff has also submitted a consent order in another matter, in which a respondent agreed to enter into a second consent order and to pay a civil penalty of \$40,000 for failing to comply with the payment and correction action requirements of a consent order. See id. ¶ 54, and Ex. K thereto.

Staff has submitted a copy of the fully executed Consent Order in this matter, as well as many email exchanges with respondent's representative over the course of several months regarding respondent's failure to comply with the terms of the Consent Order, including failure to pay the civil penalty and failure to implement the corrective action plan. See id. Exs. E-J.

Consent orders are a "vital enforcement tool" that "avoid time-consuming and resource-intensive administrative hearings." DEE-2, §§ III and IV. In this matter, the evidence submitted reflects respondent's abuse of the process and repeated efforts to delay, and ultimately avoid, compliance with the terms of Consent Order that it had executed. Respondent's failure to comply caused staff to expend additional time, effort and resources – first in an effort to obtain compliance with the Consent Order and, second, to prepare and serve the pleadings commencing this proceeding. These aggravating factors support the imposition of a significant civil penalty.

Given respondent's failure to honor the commitments that it made in the Consent Order, and failure to appear in this proceeding or provide any basis for its failure to comply with the

¹ I do not, however, recommend that the Commissioner grant staff's request to "note" respondent's continuing obligation to comply with the Consent Order. See Urda Affirm. at 9, Wherefore clause ¶ 1. Respondent's continuing obligation to comply with all requirements set forth in the Consent Order is self-evident.

² Staff multiplied the daily maximum of \$37,500 by the number of days between the date the violation commenced and the date this proceeding was commenced. See Urda Affirm. ¶¶ 26-27 (first cause of action: 183 days x \$37,500 = \$6,862,500; id. ¶¶ 30-31 (second cause of action: 168 days x \$37,500 = \$6,300,000); id. ¶¶ 34-35 (third cause of action: 168 days x \$37,500 = \$6,300,000); id. ¶¶ 38-39 (fourth cause of action: 168 days x \$37,500 = \$6,300,000); id. ¶¶ 42-43 (fifth cause of action: 168 days x \$37,500 = \$6,300,000).

Consent Order, I find that staff's request for the imposition of a civil penalty of \$45,000 is authorized and appropriate in this matter.

IV. Recommendations

Based on the foregoing, I recommend that the Commissioner issue an order:

- A. Holding that respondent 10 East 85th Street, Inc. committed the five violations of Order on Consent No. R2-20141010-506, as alleged in the motion for order without hearing in lieu of complaint; and
- B. Imposing on respondent 10 East 85th Street, Inc. a civil penalty in the amount of forty-five thousand dollars (\$45,000).

/s/

D. Scott Bassinson
Administrative Law Judge

Dated: December 3, 2015
Albany, New York

APPENDIX A

Matter of 10 East 85th Street, Inc.
DEC File No. R2-20150505-279
Motion for Order Without Hearing

1. Notice of Motion for an Order Without a Hearing, dated August 26, 2015
2. Affirmation of John K. Urda in Support of Motion for Order Without a Hearing, dated August 26, 2015, attaching the following exhibits:
 - A. NYS Department of State Entity Information Sheet regarding 10 East 85th Street, Inc., reflecting information through August 25, 2015
 - B. Deed dated April 15, 1969
 - C. Facility Information Report for PBS Facility No. 2-113646, printed May 5, 2015; PBS Certificate, PBS Facility No. 2-113646
 - D. Email from John K. Urda, Esq. dated December 1, 2014
 - E. Email exchanges between John K. Urda, Esq. and Greg Bazhdari between December 16, 2014 and February 9, 2015
 - F. Fully executed Order on Consent No. R2-20141010-506
 - G. Email exchange between John K. Urda, Esq. and Greg Bazhdari dated March 17, 2015
 - H. Email exchanges between John K. Urda, Esq. and Greg Bazhdari between March 27, 2015 and April 20, 2015
 - I. Email exchange between John K. Urda, Esq. and Greg Bazhdari dated May 5, 2015
 - J. Email exchange between John K. Urda, Esq. and Greg Bazhdari dated July 7, 2015
 - K. Order on Consent No. R2-20110728-288, in *Matter of KYBC Realty LLC*
3. Affidavit of Hiralkumar Patel in Support of Motion for Order Without a Hearing, dated August 26, 2015, attaching the following exhibits:
 - A. NYSDEC Spill Report Form, Spill No. 1406899

B. October 1, 2014 Letter from DEC Environmental Engineer 1 Timothy DeMeo to New Bedford Management Corp, attention Greg Bazhdari

C. Notice of Violation dated October 3, 2014

4. Affirmation of Service of John K. Urda, dated October 2, 2015