STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law ("ECL"), Article 12 of the Navigation Law, and Titles 6 and 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("NYCRR"),

ORDER

DEC File No. R2-20080303-114

- by -

134-15 ROCK MANAGEMENT CORP., S & H AUTO REPAIRS, INC. d/b/a/ PUNJAB AUTO REPAIRS, and SYED K. SHAH,

Respondents.

Staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondents 134-15 Rock Management Corp. ("RMC"), S & H Auto Repairs, Inc. d/b/a Punjab Auto Repairs ("S & H"), and Syed K. Shah by service of a complaint dated July 2, 2008. Respondent RMC received the notice of hearing and complaint on July 3, 2008, and respondents S & H Auto Repairs, Inc. d/b/a Punjab Auto Repairs, and Syed K. Shah received the notice of hearing and complaint on July 8, 2008.

According to staff, respondent RMC owns the property at 134-15 Rockaway Boulevard, Queens, New York which includes a gasoline service station and auto repair shop (the "site"). Respondent S & H is the owner of the petroleum bulk storage ("PBS") facility at the site. Respondent Syed K. Shah is the individual who operates the gasoline service station and the auto repair shop at the site.

The complaint sets forth seven causes of action. The first, second and third causes of action relate to a petroleum spill that occurred on or about October 6, 2001 ("2001 spill"). Department staff alleges that respondents illegally discharged petroleum on or about that date, and failed to contain the discharge or notify the Department of the discharge. The fourth, fifth and sixth causes of action relate to a second spill that occurred on or about November 28, 2003 ("2003 spill"). Department staff similarly alleges that respondents illegally

discharged petroleum on or about that date, and failed to contain the discharge or notify the Department of the discharge. In the seventh cause of action, Department staff alleges that respondents failed to properly register their PBS facility with the Department.

Pursuant to 6 NYCRR 622.4(a), respondents' time to serve an answer to the complaint expired on July 28, 2008, and has not been extended by Department staff. Respondents failed to file any answer to the complaint.

Department staff filed a motion for default judgment, dated September 9, 2008, with the Department's Office of Hearings and Mediation Services. Respondents and respondents' attorney Otis G. Allen, Esq., were each served with a copy of Department staff's motion. The time to respond to Department staff's motion expired on September 19, 2008, and respondents failed to timely respond to Department staff's motion.

On September, 23, 2008, the matter was assigned to Administrative Law Judge ("ALJ") Helene G. Goldberger, who prepared the attached default summary report. I adopt the ALJ's report as my decision in this matter, subject to the following comments.

Department staff, in the complaint, alleges facts sufficient to establish each of the violations alleged in the second (failure to undertake containment of a discharge of petroleum with respect to the 2001 spill), third (failure to notify the Department of the 2001 spill), fifth (failure to undertake containment of a discharge of petroleum with respect to the 2003 spill) and sixth (failure to notify the Department of the 2003 spill) causes of action. Accordingly, respondents' liability for the counts charged is established as a result of their default in answering the complaint.

With respect to the first and fourth causes of action, which relates to violations of ECL 17-0501 and Navigation Law § 173 as a result of the illegal discharge of petroleum in 2001 and 2003, respectively, Department staff alleges facts sufficient to establish violations of the Navigation Law. ECL 17-0501, however, provides that it is unlawful for any person to discharge matter into waters of the State that "shall cause or contribute to a condition in contravention of the standards adopted by the department pursuant to section 17-0301." Department staff, in the complaint, does not allege a specific water quality standard or facts sufficient to establish violations thereof. Accordingly, in this Order respondents are adjudged to have

violated only the cited provision of the Navigation Law with respect to the first and fourth causes of action.

In the seventh cause of action, Department staff alleges that respondents failed to properly register their PBS facility, in violation of 6 NYCRR 612.2. The complaint references specific deficiencies in the PBS registration submitted, on behalf of the facility, in December 2005. Section 612.2 of 6 NYCRR, however, imposes the requirement to register on the "owner" of the facility. Based on staff's papers, the owner of the facility is respondent S & H. Accordingly, in this Order, only respondent S & H is adjudged to have violated the cited regulation.

A defaulting respondent is deemed to admit liability only and, consequently, the appropriate penalty and any remedial measures sought to be imposed must still be proven. As in this case, such proof is provided on a motion for a default judgment by a Department staff's attorney affirmation with supporting documentation (see Matter of Alvin Hunt, d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 8). On a motion for default judgment, the ALJ reviews the proof offered in support of the penalty and remedial relief sought by staff, and makes a recommendation to the Commissioner whether such relief should be approved (see id.). Here, in reviewing Department staff's submission, ALJ Goldberger determined that the penalty sought fell within the potential maximum penalty authorized by law and is consistent with the Department's Civil Penalty Policy (Commissioner Policy DEE-1, June 20, 1990).

Based upon staff's complaint and motion papers, the ALJ also recommends that Department staff's request for injunctive relief be granted. This would include directing respondents to comply with the PBS regulation with respect to registration, to investigate the nature and extent of contamination at, and emanating from, the facility, and to cleanup and remove petroleum contamination resulting from the 2001 and 2003 spills.

On or about October 20, 2008, respondents through their counsel Mr. Allen served a "notice of motion [to] vacate [and] stay default judgment and order." Department staff served and filed an affirmation in opposition to respondents' motion on or about October 23, 2008. To the extent that respondents' motion was meant to vacate respondents' default in answering the complaint (see Matter of HCIR Service, Inc., Decision and Order of the Commissioner, October 23, 2006, at 4-5), respondents provide no explanation or excuse for their failure to answer the complaint. Respondents also fail to show that any meritorious defense exists to Department staff's allegations (see id.; 6

NYCRR 622.15[d]). To the extent that the papers constituted respondents' response to Department staff's motion for default judgment, respondents' papers were untimely filed. Accordingly, the ALJ correctly denied the motion.

In this matter, Department staff in its complaint requested a civil penalty in the amount of $75,000. It is a general principle that a default judgment cannot exceed the amount that is demanded in the complaint, absent notice to a respondent that a greater penalty would be sought (see P&K Marble, Inc. v Pearce, 168 AD2d 439, 439-40 [2d Dept 1990]; see also CPLR 3215[b]). Because such notice was not given here, the ALJ correctly declined to consider a higher penalty.

Because of ambiguities relating to the alleged deficiencies in the facility's PBS registration form,[1] I am, in the exercise of my discretion, declining to assess a civil penalty with respect to the seventh cause of action (failure to properly register the facility). This does not, however, warrant or require any reduction in the staff-requested penalty of $75,000. Considering the remaining six causes of action, a $75,000 penalty falls within the statutorily authorized maximum, is consistent with the Department's Civil Penalty Policy, and is fully justified by the circumstances of this case.

I also conclude that the remedial measures requested by Department staff are authorized and warranted, with one modification. With respect to the facility registration, I am, in accordance with 6 NYCRR 612.2, directing respondent owner S & H to file an updated and corrected registration form with the Department rather than imposing this obligation on all respondents as requested by staff.

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

I. Pursuant to 6 NYCRR 622.15, Department staff's motion for a default judgment is granted.

II. Respondents 134-15 Rock Management Corp., S & H Auto Repairs, Inc. d/b/a Punjab Auto Repairs, and Syed K. Shah are adjudged to be in default and to have waived their right to a hearing in this proceeding. Accordingly, the allegations

[1] Pursuant to 6 NYCRR 622.11(a)(5), official notice is taken of the facility's PBS registration form that was submitted to the Department in December 2005.

against respondents, as contained in the complaint, are deemed to have been admitted by respondents.

III. Respondents 134-15 Rock Management Corp., S & H Auto Repairs, Inc. d/b/a Punjab Auto Repairs, and Syed K. Shah are adjudged to have committed the following violations:

A. Respondents violated Navigation Law § 173 by illegally discharging petroleum at the facility from on or about October 6, 2001 through the date of the complaint (July 2, 2008);

B. Respondents violated Navigation Law § 176 and 17 NYCRR 32.5 by failing to immediately undertake the containment of the 2001 spill at the facility from October 6, 2001 through the date of the complaint (July 2, 2008);

C. Respondents violated Navigation Law § 175, 6 NYCRR 613.8, and 17 NYCRR 32.3 by failing to notify the Department of the 2001 spill at the facility from October 6, 2001 through January 28, 2002 (the date of the spill report);

D. Respondents violated Navigation Law § 173 by illegally discharging petroleum at the facility on or about November 28, 2003 through the date of the complaint (July 2, 2008);

E. Respondents violated Navigation Law § 176 and 17 NYCRR 32.5 by failing to immediately undertake containment of the 2003 spill from November 28, 2003 through the date of the complaint (July 2, 2008); and

F. Respondents violated Navigation Law § 175, 6 NYCRR 613.8, and 17 NYCRR 32.3 by failing to notify the Department of the 2003 spill, which spill was reported by an occupant of adjacent property on November 28, 2003.

IV. Respondent S & H Auto Repairs, Inc. d/b/a Punjab Auto Repairs is adjudged to have violated 6 NYCRR 612.2 by submitting a petroleum bulk storage registration form that failed to properly identify the facility owner and operator and failed to properly provide information on tank spill prevention, pipe secondary containment, and pipe leak detection at the facility.

V. Respondents 134-15 Rock Management Corp., S & H Auto

Repairs, Inc. d/b/a Punjab Auto Repairs, and Syed K. Shah are jointly and severally assessed a civil penalty in the amount of seventy-five thousand dollars ($75,000), which is due and payable within thirty (30) days of service of a copy of this order upon respondents. Payment of this penalty shall be made by cashier's check, certified check or money order drawn to the order of the "New York State Department of Environmental Conservation" and delivered to: John K. Urda, Esq., Assistant Regional Attorney, New York State Department of Environmental Conservation, 47-40 21st Street, Long Island City, New York 11101.

VI. Within thirty (30) days of the date of service of this order, respondent S & H Auto Repairs, Inc. d/b/a Punjab Auto Repairs shall submit to the Department a revised PBS registration form for the facility, which shall include the following:

A. A correct identification of the facility owner and operator;

B. Information, in the appropriate columns on the form, with respect to tank spill prevention, pipe secondary containment, and pipe leak detection at the facility; and

C. Information reflecting any other changes in information since the last form was submitted to the Department in December 2005.

VII. Within thirty (30) days of the date of service of this order upon respondents, respondents shall investigate the nature and extent of contamination at, and emanating from, the facility.

VIII. Within sixty (60) days of the date of service of this order upon respondents, respondents shall provide the Department with an approvable work plan to remediate the contamination at, or emanating from, the facility arising from the 2001 and 2003 spills.

IX. Within thirty (30) days of the Department's approval of the work plan, respondents shall remediate the contamination at, and emanating from, the facility in accordance with the workplan.

X. All communications between the respondents and Department staff concerning this Order shall be made to John K. Urda, Assistant Regional Attorney, NYSDEC Region 2, 47-40 21st Street, Long Island City, New York 11101.

XI. The provisions, terms and conditions of this Order shall bind respondents and their successors and assigns in any and all capacities.

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

/s/

By: _____
Alexander B. Grannis
Commissioner

Dated: Albany, New York
December 10, 2008

STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law, Article 12 of the Navigation Law, and Titles 6 and 17 of the Official Compilation of Codes, Rules and Regulations

DEFAULT SUMMARY REPORT

DEC File No. R2-20080303-114

by:

134-15 ROCK MANAGEMENT CORP., S & H AUTO REPAIRS, INC. d/b/a/ PUNJAB AUTO REPAIRS, and SYED K. SHAH,[1]

Respondents.

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Proceedings

On July 2, 2008, by certified mail, staff of the New York State Department of Environmental Conservation's (DEC or Department) Region 2 office served the respondents 134-15 Rock Management Corp., S & H Auto Repairs, Inc. d/b/a Punjab Auto Repairs, and Syed K. Shah with a notice of hearing and complaint. In the complaint, staff alleged violations of Article 17 of the Environmental Conservation Law (ECL), its implementing regulations, and the Navigation Law (NL) related to two spills at the petroleum bulk storage (PBS) facility owned and operated by the respondents. According to staff, 134-15 Rock Management Corp. owns the property at 134-15 Rockaway Boulevard, Queens, New York upon which a gasoline service station and auto repair shop operate. S & H Auto Repairs, Inc. d/b/a/ Punjab Auto Repairs operates the site. Respondent Syed K. Shah is the individual who operates the gasoline service station and auto repair service and who signed the facility's PBS application as the facility owner or authorized representative.

The respondent 134-15 Rock Management Corp. received the notice of hearing and complaint on July 3, 2008. Respondent S &

[1] In the various papers submitted by the parties, respondent Shah's first name is alternatively spelled as "Sayed" or "Syed." Because the PBS application for the facility has the name as "Syed", that is the spelling I've adopted in this report.

H Auto Repairs, Inc. d/b/a Punjab Auto Repair received the notice of hearing and complaint on July 8, 2008. On that same date, respondent Syed K. Shah received the notice of hearing and complaint. On September 15, 2008, pursuant to CPLR 3215(g), Department staff served an additional copy of the notice of hearing and complaint upon the two corporate respondents by regular mail.

Pursuant to § 622.15 of Title 6 of the New York Compilation of Codes, Rules and Regulations (6 NYCRR), on September 9, 2008, by certified mail, Region 2 staff served the respondents and Otis G. Allen, Esq. with a notice of motion for default judgment and filed a copy of this motion with the Department's Office of Hearings and Mediation Services (OHMS). The respondent 134-15 Rock Management Corp. received this motion on September 12, 2008; respondent S & H Auto Repairs, Inc. d/b/a Punjab Auto Repairs, Mr. Shah, and counsel Otis Allen, Esq. received the motion on September 11, 2008. On September 23, 2008, the Chief Administrative Law Judge James T. McClymonds assigned this matter to me.

On October 23, 2008, I received an electronic mail message from Mr. Urda transmitting his affirmation in opposition to the respondents' motion to vacate and stay default judgment and order. However, I had not at that time received the motion to which staff was responding. Accordingly, I asked Mr. Urda to send me a copy of the respondents' motion.

The respondents' motion to vacate and stay default judgment and order consists of a notice of motion dated October 9, 2008, an attorney's affirmation by Mr. Otis Allen, Esq. dated October 9, 2008 to which is annexed staff's motion papers for default judgment, and an affidavit by Mr. Israel Rivera, paralegal for Mr. Allen, dated October 6, 2008. In Mr. Allen's affirmation, counsel seeks to vacate "the default issued against the respondent(s) on September 9, 2008." Allen Aff., ¶2. However, the documents to which Mr. Allen refers are the staff's motion papers seeking a default judgment. No default has been issued yet.

In Mr. Allen's affirmation, he states that he could not appear at the prehearing conference because he was on vacation. Id., ¶ 4. Mr. Rivera's affidavit provides that he made attempts to call Mr. Urda to explain that Mr. Allen "was unable to make the hearing date because he was on vacation." Rivera Aff., ¶ 3. Mr. Allen requests that the August 18, 2008 prehearing conference be rescheduled and the default be vacated. Allen Aff., ¶ 7, et seq.

In response to Mr. Allen's submissions, Assistant Regional Attorney John K. Urda submitted an affirmation dated October 23, 2008. In his affirmation in opposition (Opp. Aff.), Mr. Urda notes that while the respondent's notice of motion is dated October 9, 2008, it was postmarked on October 20, 2008 and received by Department staff on October 22, 2008. Urda Opp. Aff., ¶ 2. Mr. Urda states that the respondents' response/motion to staff's motion for default is not timely. Urda Opp. Aff., ¶ 4. With respect to the default, Mr. Urda states that the respondents' papers fail to address staff's basis for the motion which was not the failure to appear at the prehearing conference but the failure to answer the complaint. Id., ¶ 5. Mr. Urda acknowledges that he and Mr. Rivera traded telephone messages on several occasions but there were never any discussions between the parties. Id., ¶¶ 6-7. Mr. Urda stresses that the respondents have failed to provide a meritorious defense and/or good cause for the default in accordance with 6 NYCRR § 622.15(d) (staff incorrectly cited this provision as § 612.12[1][d]).

Discussion

According to the Department's regulations, a respondent's failure to file a timely answer to a complaint constitutes a default and waiver of respondent's right to a hearing. 6 NYCRR § 622.15(a). In these circumstances, Department staff may move for a default judgment, such motion to contain:

(1) proof of service of the notice of hearing and complaint or motion for order without hearing;
(2) proof of the respondent's failure to file a timely answer; and
(3) a proposed order. 6 NYCRR § 622.15(b).

Attached to the affirmation of John K. Urda, Assistant Regional Attorney, are Scott K. Maxwell's affidavit of service of the notice of hearing and complaint dated July 2, 2008 as well as copies of the certified mail receipts and United State Postal Service "track & confirm" indicating that the respondents received the pleadings on July 3 and 8, 2008, respectively. See, Exhibit B in support of motion for default judgment and order. In his affirmation, Mr. Urda states that staff has not received an answer to the complaint from any of the respondents and the time to file one has passed (July 28, 2008). See, Urda Affirmation (Aff.), ¶ 6; 6 NYCRR § 622.4(a).

Staff has also submitted a proposed order annexed as Exhibit C to Mr. Urda's affirmation.

Section 622.6(c)(3) of 6 NYCRR provides that "[a]ll parties have five days after a motion is served to serve a response." Rule 2103 of the CPLR, which governs service of papers pursuant to 6 NYCRR § 622.6(a)(1), provides for an additional five days if service is by mail. Rule 2103(b)(2). Thus, the respondents' response to staff's motion for default was due on September 19, 2008.

The respondents served their response/motion on Department staff on or about October 20, 2008 according to Mr. Urda. Urda Opp. Aff., ¶ 2. In terms of the substance of the respondents' motion/response, as noted by Department staff, there is no reason provided for the failure to file an answer. And other than Mr. Rivera's conclusory statement in his affidavit that the respondents have a "meritorious defense", there is no defense presented to staff's complaint. Rivera Aff., ¶ 3. Accordingly, the motion to vacate and stay default judgment and order is denied.

Based upon the staff's submissions and the respondents' failure to respond timely and to provide any basis for their failure to answer, the staff has met the requirements for a default.

Penalty

In its complaint, staff requests a penalty of $75,000 and whatever other relief is appropriate. Staff's proposed order requires that the respondents properly register their facility, investigate the contamination emanating from the facility, and remediate the contamination in accordance with a Department-approved work plan. Staff calculated the statutory maximum for the penalties as $297,887,500.

ECL § 71-1929 provides for a penalty of up to $37,500 per day for each violation of Titles 1 through 11 inclusive and Title 19 of Article 17 or the rules and regulations implementing these laws. In addition, NL § 192 provides that any person who violates any provision of NL Article 12 is liable for penalties of up to $25,000 per day for each violation. As noted above, staff's request for a penalty of $75,000 is significantly less than the maximum calculated penalty under these laws.

The 1990 Civil Penalty Policy requires that the gravity of the violations and the economic benefits of the non-compliance be assessed. The factors to consider with respect to gravity are (1) potential harm and actual damage caused by the violations and (2) relative importance of the type of violations in the context

of the Department's overall regulatory scheme.

The violations established by staff are very serious. Respondents permitted a spill that occurred on or about October 6, 2001 to go unreported and unremediated. In addition, Mr. Urda stated that staff made efforts to obtain further information regarding the 2001 spill and the respondents did not cooperate by providing this information. Urda Aff., ¶ 7. In November 2003, the DEC spills hotline was notified of petroleum seeping into a well and through the basement of property immediately adjacent to this facility. Id., ¶ 8. Yet, the respondents still failed to report this second spill although a DEC staff inspection revealed that the secondary containment area of an aboveground waste oil tank was full of oil and leaking into the surrounding asphalt. Id., ¶ 9. On October 22, 2007, the Department staff sent a stipulation agreement to respondent S & H Auto Repairs, Inc. d/b/a/ Punjab Auto Repairs to the attention of Mr. Shah and received no response. Id., ¶ 11. To date, the respondents have not taken action to address the spill(s). Nor have they submitted accurate information to the Department regarding this PBS facility. Id., ¶¶ 12-13.

The respondents have not only ignored basic registration requirements but have allowed their facility to deteriorate resulting in the two spills that caused contamination. To further compound the violations, the respondents have done nothing to address these spills allowing the contamination to spread and potentially cause much greater harm to the environment.

While staff has not included information as to the amount of money the respondents saved by not complying with the applicable regulations, it is clear that by ignoring the requirements and failing to address the spills, the respondents have saved a great deal of money.

The Civil Penalty Policy also provides additional factors to adjust the gravity component. These are: (a) culpability; (b) violator cooperation; (c) history of non-compliance; (d) ability to pay; and (e) unique factors. The accepted facts put forward by staff indicate that the respondents are liable for the violations by discharging petroleum illegally on two occasions, by failing to undertake any actions to contain the spills, by failing to notify the Department of the spills, and by failing to provide the appropriate information in the PBS registration. In addition, as noted above, there has been no cooperation with Department staff. Because the respondents have not responded to the complaint, there is no evidence of a lack of

ability to pay or any unique factors that would mitigate the relief staff seeks.

Recommendation and Conclusion

Staff's motion for a default judgment meets the requirements of 6 NYCRR § 622.15(b). I find that staff's request for a payable penalty of $75,000 should be increased. However, because the complaint limits the penalty to that amount, I am not free to recommend increasing it. See Matter of Alvin Hunt d/b/a Our Cleaners, Commissioner's Decision (7/25/06). Accordingly, I recommend that the Commissioner's order direct a payable penalty of $75,000. In addition, the staff's request for the specified injunctive relief is appropriate. Therefore, in accordance with 6 NYCRR § 622.15(c), this summary report is hereby submitted to the Commissioner, accompanied by a proposed order.

/s/

Dated: Albany, New York
December 2, 2008

Helene G. Goldberger
Administrative Law Judge

TO: 134-15 Rock Management Corp.
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