STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of Alleged Violations
of Article 12 of the Navigation Law
of the State of New York and
Title 17 of the Official
Compilation of Codes, Rules and
Regulations of the State of New York,

**ORDER**

DEC File No.
R2-20100323-104

-by-

**303 WEST 122nd STREET HOUSING DEVELOPMENT FUND CORPORATION,**

Respondent.

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## Background

In this administrative enforcement proceeding, staff of the New York State Department of Environmental Conservation (Department or DEC) alleges that respondent 303 West 122nd Street Housing Development Fund Corporation violated article 12 of the Navigation Law and title 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York (17 NYCRR) relating to a petroleum spill from an unregistered underground storage tank in the back of property it owns at 303 West 122nd Street, New York, New York. On the property is an apartment building which includes a number of senior citizen residents.

Department staff served on respondent, by certified mail, a cover letter, notice of hearing, and complaint that were received by respondent on August 28, 2014. A verified answer on behalf of respondent dated October 9, 2014 was submitted by Joseph A. Altman, Esq. On October 29, 2014, Department staff served a motion for order without hearing on respondent's counsel.

The matter was assigned to Administrative Law Judge (ALJ) P. Nicholas Garlick on December 1, 2014. On December 17, 2014, the ALJ convened a conference call with the parties to discuss this matter. On this call, respondent's counsel requested an opportunity to submit materials regarding his client's financial condition and ability to pay the civil penalty. The request was granted and respondent's financial submission was received on January 26, 2015. Thereafter, Department staff counsel requested an opportunity to respond, which was granted, and its response was received on January 28, 2015. Respondent's counsel then requested an opportunity to provide a sur-reply which was postmarked March 2, 2015. Although respondent's sur-reply was untimely served, I have, in the exercise of discretion, accepted it as part of the record.

ALJ Garlick prepared the attached summary report (Summary Report) in which he recommends that I issue an order that:

- holds respondent liable for violating Navigation Law § 173, Navigation Law § 176, and 17 NYCRR 32.5;
- requires respondent to pay a civil penalty of fifty thousand dollars ($50,000), of which forty-nine thousand five hundred dollars ($49,500) would be suspended upon the condition that respondent comply with the terms and conditions of this order; and
- requires respondent to investigate and remediate the discharge at the site, pursuant to plans approved by Department staff.

Based on the record, I adopt the findings of fact and the recommendations in the Summary Report, subject to my comments below.

**Discussion**

**--Liability**

In its complaint, Department staff alleges that respondent violated: (1) Navigation Law § 173 by illegally discharging petroleum; and (2) Navigation Law § 176 and 17 NYCRR 32.5 by failing to clean up the petroleum discharge. Department staff attached to its complaint:

-- a copy of the deed to 303 West 122nd Street which shows that respondent owns the property;
-- a copy of respondent's petroleum bulk storage program facility information report and a copy of respondent's petroleum bulk storage certificate; and
-- a copy of a DEC spill report form for Spill No. 0104577, which was reported at respondent's property on July 30, 2001.

The spill was reported to have come from an out-of-service, underground storage tank that is located in the eastern backyard of the property and which has never been properly closed. The record contains documents indicating that the capacity of the tank was either 3,000 gallons or 4,500 gallons (see Affidavit of Raphael Ketani, sworn to October 24, 2014 [Ketani Affidavit], ¶ 5 [4,500 gallons] and Exhibit A [last page][3,000 gallons]).

According to an environmental services contractor working at the site in July and August 2001, the tank still contained petroleum product even though the tank was out-of-service (see Ketani Affidavit, ¶ 5). The field sampling showed petroleum contamination in the soil and on the water table and it appeared that contamination may be extending below the foundations of adjacent buildings (Ketani Affidavit, ¶¶ 6-10 & Exhibit A). The spill remains open and unremediated (see Ketani Affidavit, ¶ 20).

In its answer, respondent raised one defense and four affirmative defenses that the ALJ rejected. I concur in the ALJ's determination. As for the first defense, respondent states that it lacks funds "to be fined." This argument has no bearing on respondent's liability, but I have given it consideration with respect to the civil penalty. Respondent claims in its second

affirmative defense that it is not responsible for the conditions at the site, but that its predecessor in interest, the City of New York, should be held responsible. I reject this claim because respondent took title to the property in 1985 (see Staff Complaint, Exhibit A), and the spill was discovered and reported in 2001. At the time of the spill, respondent was in control of the property. Any claim that respondent may have against the City of New York is outside the scope of this proceeding before me.

While respondent contends, in its third affirmative defense, that the conditions "have been corrected," respondent offers no proof whatsoever. Respondent claims in its fourth and fifth affirmative defenses that Department staff failed to provide notice of the spill to respondent, and that a two year statute of limitation or the doctrine of laches applies to this matter. Respondent offers no additional information on these defenses and nothing in the record supports them.

I agree with the ALJ that Department staff's motion for an order without hearing should be granted. In its papers, Department staff presented a prima facie case on the merits (see Summary Report at 5), demonstrating that respondent is liable for violating (1) Navigation Law § 173 by illegally discharging petroleum; and (2) Navigation Law § 176 and 17 NYCRR 32.5 by failing to clean up the petroleum discharge. Respondent failed to raise a triable issue of fact regarding liability or make a prima facie showing on its defenses. See 6 NYCRR 622.12.

**--Civil Penalty**

Department staff requests that I assess a payable civil penalty of fifty thousand dollars ($50,000). Navigation Law § 192 states that any person who violates the provisions of, or who fails to perform any duty imposed by, article 12 of the Navigation Law or any rule or regulation promulgated thereto shall be liable for a penalty of up to $25,000 for each violation. If the violation is of a continuing nature, each day during which it continues shall constitute an additional, separate and distinct offense.

Department staff requests that I impose a payable civil penalty for: (1) the first cause of action (the violation of Navigation Law § 173) in the amount of twenty-five thousand dollars ($25,000); and (2) the second cause of action (the violation of Navigation Law § 176 and 17 NYCRR 32.5) in the amount of twenty-five thousand dollars ($25,000). Department staff bases its penalty request on respondent's failure to: maintain the tank from which the spill occurred; cooperate in cleaning up the spill; and investigate and remediate the spill since the time that the spill was reported in 2001. In addition, by not taking actions to address the spill, respondent avoided the costs of investigation and remediation.

Respondent's counsel argues that the apartment building houses only low income people, many of whom are senior citizens on fixed incomes. Respondent has submitted financial statements showing that the corporation which operates the building has been running at a substantial deficit (see Summary Report at 8 [in 2012, the deficit was over $110,000, and in 2013 the deficit was over $127,000]). Respondent's counsel states that the corporation's duty is to provide habitable premises for its occupants, including heat, hot and cold water, and repairs.

These expenses and other financial obligations, he contends, make it impossible for respondent to pay the civil penalty that Department staff requests.

I agree with the ALJ that a civil penalty of fifty thousand dollars ($50,000) should be imposed, but I also agree that, due to the financial circumstances of respondent, a portion of the penalty should be suspended. The ALJ recommends that forty-nine thousand five hundred dollars ($49,500) of the civil penalty be suspended. It is clear, however, that respondent has not been responsive in addressing the spill and cleanup over many years, and it has failed to assist in Department staff's efforts to obtain a satisfactory and environmentally protective cleanup. Notwithstanding the foregoing, I am taking account of respondent's financial situation, as reflected in its submissions in this proceeding and the fact that respondent will incur expenses in the investigation and cleanup of the spill. Accordingly, based on the record before me, I am suspending forty thousand dollars ($40,000) of the fifty thousand dollar ($50,000) civil penalty, contingent upon respondent complying with the terms and conditions of this order. As to the non-suspended portion of the civil penalty (that is, ten thousand dollars [$10,000]), respondent shall pay it within thirty (30) days of the service of this order upon respondent.

**--Remediation**

In addition, Department staff requests that respondent submit a proposed work plan within thirty (30) days of the service of the order and, subsequent to Department approval, that respondent undertake and complete the investigation and remediation of the spill.

I concur that respondent needs to submit a work plan needs that would fully address the investigation and remediation of the spill. Such work plan must be in approvable form, that is, a form which can be approved by Department staff with only minor revision. To facilitate the development of a work plan, I encourage respondent to discuss its preparation with Department staff prior to submitting it to staff for review and approval. Among its components, the work plan must include a timetable by which the investigation and remediation activities will be commenced and completed. Department staff, upon good cause shown, may modify the timetable in the work plan. Respondent shall commence the implementation of the work plan within fifteen (15) calendar days of the notice of Department staff's approval.

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

I. Department staff's motion for an order without hearing pursuant to 6 NYCRR 622.12 is granted. Department staff carried its burden of establishing that respondent 303 West 122nd Street Housing Development Fund Corporation violated: (1) Navigation Law § 173 by illegally discharging petroleum; and (2) Navigation Law § 176 and 17 NYCRR 32.5 by failing to clean up the petroleum discharge.

II. Within thirty (30) days of the service of this order upon respondent 303 West 122nd Street Housing Development Fund Corporation, respondent shall submit a work plan to Department staff for its review and approval to address the investigation and remediation of the spill. Such work plan shall be in approvable form, that is, a form which can be approved by Department staff with only minor revision. The work plan shall include a timetable by which the investigation and remediation activities shall be commenced and completed. Respondent shall commence the implementation of the work plan within fifteen (15) calendar days of the notice of Department staff's approval. Department staff, upon good cause shown, may modify the timetable in the work plan.

III. I hereby assess a civil penalty of fifty thousand dollars ($50,000) upon respondent 303 West 122nd Street Housing Development Fund Corporation, of which forty thousand dollars ($40,000) shall be suspended, contingent upon respondent's compliance with the terms and conditions of this order. Within thirty (30) days of the service of this order upon respondent, the payable portion of the civil penalty (that is, ten thousand dollars [$10,000]) shall be paid to the Department by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation.

Should respondent fail to satisfy the terms and conditions of this order, the suspended portion of the penalty (that is forty thousand dollars [$40,000]) shall become due and payable upon notice by the Department. The forty thousand dollars ($40,000) shall then be submitted in the same form and to the same address as the ten thousand dollar ($10,000) payable portion of the penalty referenced in this paragraph.

IV. The proposed work plan and the civil penalty shall be sent to the following address:

John K. Urda, Esq.
Office of General Counsel
NYS Department of Environmental Conservation
Region 2
One Hunter's Point Plaza
47-40 21st Street
Long Island City, New York 11101.

V. Any questions or other correspondence regarding this order shall be directed to John K. Urda, Esq., at the address referenced in paragraph IV of this order.

VI. The provisions, terms and conditions of this order shall bind respondent 303 West 122nd Street Housing Development Fund Corporation, and its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Basil Seggos
Commissioner

Dated: June 1, 2017
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of Alleged Violations
of Article 12 of the Navigation Law
of the State of New York and
Title 17 of the Official
Compilation of Codes, Rules and
Regulations of the State of New York,

**SUMMARY REPORT**

DEC File No.
R2-20100323-104

-by-

**303 WEST 122nd STREET HOUSING DEVELOPMENT FUND CORPORATION,**

Respondent.

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## SUMMARY

This report addresses a motion for order without hearing brought by the staff of the New York State Department of Environmental Conservation (DEC Staff) relating to a petroleum spill from an unregistered underground storage tank located at 303 West 122nd Street, New York, New York. The motion requests a Commissioner's order: (1) finding respondent 303 West 122nd Street Housing Development Fund Corporation liable for two causes of action relating to the spill and respondent's failure to take actions to clean it up; (2) imposing a payable civil penalty of fifty thousand dollars ($50,000); and (3) directing respondent to investigate and remediate the spill. Respondent does not contest its liability for the alleged violations or the need to remediate the spill, but seeks a lower civil penalty based on its inability to pay the requested civil penalty. Based on the information in the record, as discussed, this report recommends that the Commissioner issue an order: (1) finding respondent liable for the alleged violations; (2) imposing a civil penalty of fifty thousand dollars ($50,000) of which forty-nine thousand five hundred dollars ($49,500) should be suspended upon respondent's compliance with the requirements to investigate and clean up the site; and (3) requiring respondent to investigate the contamination at the site and remediate it, pursuant to a DEC Staff approved work plan.

**PROCEEDINGS**

DEC Staff initiated this proceeding by service of a notice of hearing and complaint by certified mail that was received by respondent on August 28, 2014 (Urda affirm. ¶ 2). DEC Staff's papers included: (1) a notice of hearing and complaint; and (2) three exhibits, which are described in the attached exhibit list.

A verified answer on behalf of respondent dated October 9, 2014 was submitted by Joseph A. Altman, Esq. The answer contained a general denial of the allegations in the complaint and five affirmative defenses (which are discussed below).

On October 29, 2014, DEC Staff served a motion for order without hearing on respondent's counsel. DEC Staff's papers included: (1) a notice of motion; (2) the affirmation of DEC Staff counsel John K. Urda, Esq.; and (3) the affidavit of DEC Staff member Raphael Ketani with five exhibits, which are described in the attached exhibit list. No response was received from respondent.

The matter was assigned to me on December 1, 2014. By letter dated December 6, 2014, respondent's counsel requested a settlement conference or, in the alternative, additional time to respond to the motion. By letter dated December 15, 2014, DEC Staff responded stating that a settlement offer had been made on December 9, 2014 and that such offer had not been accepted. DEC Staff requested the proposed extension be denied.

On December 17, 2014, a conference call was convened with counsel to discuss this matter. On this call, respondent's counsel requested an opportunity to submit materials regarding his client's financial condition and ability to pay the civil penalty that DEC Staff had requested. The request was granted and the submission was due to be postmarked no later than January 20, 2015. In e-mails to respondent's counsel later that day, I provided a copy of the Department's Civil Penalty Policy (DEE-1, issued June 20, 1990) and DEC Staff counsel provided a copy of the Department's corporate financial disclosure form.

Respondent's financial submission was timely postmarked and I received it on January 26, 2015. The submission I received consisted of thirteen documents, described in the attached exhibit list.

DEC Staff counsel requested an opportunity to respond, which I granted. Staff's response was received on January 28, 2015. In its response, DEC Staff noted that it had received two different packages of information from respondent, however, the one I received (as detailed in the exhibit list) is the one in the record of this proceeding.

Respondent's counsel then requested an opportunity to provide a sur-reply to DEC Staff's submission. This request was granted and a deadline of February 6, 2015 was set. No sur-reply was received. On February 17, 2015, I emailed the parties stating that the record was closed. Later that day, respondent's counsel emailed that he had thought his request had been denied and renewed his request to provide a sur-reply. I granted this request and required it be postmarked no later than February 25, 2015. Respondent's submission was not timely submitted and was postmarked March 2, 2015. This submission is in the record.

**FINDINGS OF FACT**

1. Respondent 303 West 122nd Street Housing Development Fund Corporation is an active domestic business corporation registered with the New York State Department of State, Division of Corporations (respondent's submission postmarked January 20, 2015, Exh. 13).

2. Respondent 303 West 122nd Street Housing Development Fund Corporation owns real property located at 303 West 122nd Street, New York, New York, which is also where its offices are located (complaint, Exh. A). A large 6 story apartment building constructed in 1913 is located on the property (complaint, Exh. C at 2). The apartment building has 42 residential units (Respondent's submission postmarked January 20, 2015, Exh. 2 at 6).

3. At this location, respondent owns and operates a petroleum bulk storage facility #2-607133. The only registered tank is a 3,000 gallon above-ground storage tank installed in 1913 (complaint, Exh. B).

4. On July 30, 2001, an environmental contractor working at respondent's site notified DEC Staff of the discovery of a discharge of petroleum (DEC spill #0104577) (complaint, Exh. C). A subsurface investigation conducted the following month concluded that soil and groundwater

contamination existed at the site and that such contamination extended under the foundations of existing buildings (Ketani affidavit, Exh. A at 4). The spill originated in an unregistered, out-of-service 4,500 gallon underground storage tank at the site which, at that time, still contained petroleum product (Ketani affidavit, ¶ 5).

5. By letter dated July 13, 2005, DEC Staff attempted to contact respondent to request an update on the status of the spill and efforts to remediate it (Ketani affidavit, Exh. B). This letter was mailed to the respondent at two different addresses and at least one of the letters was returned undelivered (Ketani affidavit, ¶ 11).

6. In October 2005, DEC Staff contacted respondent's building manager requesting information on the status of the spill and efforts to remediate it (Ketani affidavit, Exh. C). In November 2005, representatives of respondent informed DEC Staff that due to financial hardship, it would not be able to remediate the spill (complaint, Exh. C at 2).

7. In December 2009, DEC Staff members conducted an inspection of the site and met with a member of the board of directors of respondent and the building manager (Ketani affidavit, ¶ 16). At least two letters were sent to respondent's board requesting action be taken to investigate and remediate the spill (Ketani affidavit, Exhs. D & E). These letters went unanswered (complaint, Exh. C at 3).

8. In September 2011, DEC Staff mailed a draft order on consent to respondent, who did not sign it or return it. A second consent order was sent to respondent in March 2014. This draft consent order was also not signed or returned and this proceeding was then commenced (complaint, Exh. C at 3).

**DISCUSSION**

In its complaint, DEC Staff requests that the Commissioner issue an order finding respondent liable for two causes of action related to a fuel oil discharge at the respondent's building that was reported on July 30, 2001. In addition to a finding of liability, DEC Staff requests that the Commissioner include in his order a requirement that respondent complete the

investigation and remediation of the discharge pursuant to a Department-approved work plan (which should be submitted by respondent within 30 days of service of the Commissioner's order on respondent). Finally, DEC Staff requests the imposition of a fifty thousand dollar ($50,000) civil penalty. In its answer, respondent generally denies DEC Staff's allegations.

In its motion of order without hearing, DEC Staff argues that there are no triable issues of material fact, and that it is entitled to judgment as a matter of law. During the December 17, 2014 conference call and in its subsequent submissions, the respondent did not challenge DEC Staff's allegations of liability or the need to remediate the spill, but asserts that it does not have the financial resources to pay the civil penalty sought by DEC Staff in its motion papers or even the compromise amount offered in negotiations between the parties.

Motions for order without hearing pursuant to 6 NYCRR 622.12 are the equivalent of summary judgment, and are governed by the standards and principles applicable to CPLR 3212 (see 6 NYCRR 622.12[d]). A contested motion for order without hearing will be granted if, upon all the papers and proof filed, the cause of action is established sufficiently to warrant granting summary judgment under the CPLR (see id.). The motion must be denied if any party shows the existence of substantive disputes of fact sufficient to require a hearing (see 6 NYCRR 622.12[e]).

On the motion, DEC Staff bears the initial burden of establishing its entitlement to judgment as a matter of law on the violations charged (see Matter of Locaparra, Final Decision and Order of the Commissioner, June 16, 2003, at 4 [and cases cited therein]). DEC Staff carries its burden by producing evidence sufficient to demonstrate the absence of any material issue of fact with respect to each element of the causes of action that are the subject of the motion (see id.). Because hearsay is admissible in administrative hearings, staff may support its motion with hearsay evidence, provided that the evidence is sufficiently relevant, reliable, and probative (see Matter of Tractor Supply Co., Decision and Order of the Commissioner, Aug. 8, 2008, at 2-3).

Once DEC Staff has carried its initial burden of establishing a prima facie case justifying summary judgment, the burden shifts to respondent to produce evidence sufficient to raise a triable issue of fact warranting a hearing (see Matter of Locaparra, at 4). As with the proponent of summary judgment, a party opposing summary judgment may not merely rely on

conclusory statements or denials, but must lay bare its proof (see id. [and cases cited therein]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (see Zuckerman v New York City Tr. Auth., 49 NY2d 557, 562-563 [1980]; Drug Guild Distribs. v 3-9 Drugs, Inc., 277 AD2d 197, 198 [2d Dept 2000], lv denied 96 NY2d 710 [2001] [conclusory denial of transactions by company president insufficient to counter facts established by plaintiff's documentary evidence]).

***LIABILITY***

DEC Staff alleges that the respondent violated: (1) Navigation Law § 173 by illegally discharging petroleum; and (2) Navigation Law § 176 and 17 NYCRR 32.5 by failing to clean up the petroleum discharge. As proof of these violations, DEC Staff attached to its complaint: (1) a copy of the deed to 303 West 122nd Street which shows respondent as owner of the property (complaint, Exh. A); (2) a copy of the respondent's petroleum bulk storage program facility information report and a copy of the respondent's petroleum bulk storage certificate (complaint, Exh. B); and (3) a copy of a NYSDEC spill report form for spill #0104577 which was reported at the respondent's property on July 30, 2001 (complaint, Exh. C). The spill was reported to have come from an out-of-service, 4,500 gallon[1] underground storage tank on the property (complaint, Exh. C at 1-2). According to an environmental services contractor working on the site in July and August 2001, though out-of-service, this tank still contained petroleum product (Ketani affidavit, ¶ 5). In addition, the results of analysis done at the site showed petroleum contamination in the soil and water table and that contamination may extend below the foundations of adjacent buildings (Ketani affidavit, Exh. A). The spill remains open and unremediated (Ketani affidavit, ¶ 20).

As stated above, respondent did generally deny DEC Staff's allegations in its answer, but has not addressed the issue of liability either during our conference call or in its submissions.

Navigation Law § 173 prohibits the discharge of petroleum. In its first cause of action, DEC Staff alleges that respondent violated this provision by allowing the release of petroleum

[1] The record is not clear regarding the exact size of this tank. Laboratory results estimate the size of the tank at 3,000 gallons (Ketani affidavit, Exh. A at 4).

from the unregistered tank at the site. Based on the evidence in the record, the Commissioner should determine that DEC Staff has met its burden of proof and should hold the respondent liable for the first cause of action.

Navigation Law § 176 and 17 NYCRR 32.5 require that any person responsible for a prohibited discharge of petroleum to immediately undertake to clean up and remove such discharge. In its second cause of action, DEC Staff alleges that the respondent failed to clean up the spill.[2] Based on the evidence in the record, the Commissioner should determine that DEC Staff has met its burden of proof and hold respondent liable for the second cause of action.

In its answer, respondent claims in its second affirmative defense that it is not responsible for the conditions at the site, but rather its predecessor in interest, the City of New York should be held responsible. The Commissioner should reject this claim because respondent took title to the property in 1985 (complaint, Exh. A), and the spill was discovered and reported in 2001, demonstrating that at the time of the spill, respondent was in control of the property. Respondent also claims in its fourth and fifth affirmative defenses that DEC Staff had failed to provide notice of the spill to respondent, and that a two year statute of limitation or the doctrine of laches applies to this case. Respondent offers no additional information on these claims in its submissions and nothing in the record supports these affirmative defenses. Accordingly, the Commissioner should reject them.

***CIVIL PENALTY***

In its papers, DEC Staff seeks a payable civil penalty of fifty thousand dollars ($50,000). DEC Staff cites Navigation Law § 192 as authority to impose a civil penalty in this case. This section states that any person who violates the provisions of, or who fails to perform any duty imposed by, article 12 of the Navigation Law or any rule or regulation promulgated thereto shall be liable for a penalty of up to $25,000 for each violation. DEC Staff requests the Commissioner impose a payable civil penalty for: (1) the first cause of action (the continuing

[2] In its complaint, DEC Staff identifies the spill as #0403835, and #0104577. The record however indicates it is correctly identified as spill #0104577. Because the spill report was attached to the complaint, respondent was on notice of the spill and the correct spill number.

violation of Navigation Law § 173) of twenty-five thousand dollars ($25,000); and (2) the second cause of action (the continuing violation of Navigation Law § 176 and 17 NYCRR 32.5) of twenty five thousand dollars ($25,000).

In its papers DEC Staff argues that the requested penalty is based on Department enforcement guidance and relevant administrative case precedents. Specifically, DEC Staff cites three relevant guidance documents: (1) the Department's Civil Penalty Policy (DEE-1); (2) the Department's Bulk Storage and Spill Response Enforcement Policy (DEE-4); and (3) the Department's Spill Site Remediation under Departmental Order Enforcement Policy (DEE-18). Among the factors cited by DEC Staff warranting the requested penalty are respondent's: (1) failure to maintain the tank that spilled; (2) failure to cooperate in cleaning up the spill; (3) failure to investigate and remediate the spill in the more than thirteen years since it occurred, which has allowed the spill to continue to migrate onto neighboring properties; and (4) financial benefit the respondent enjoyed by not taking actions relating to the spill.

As discussed above, respondent has contested the amount of the civil penalty sought by DEC Staff. In its answer it raises the issue of ability to pay as its first affirmative defense. In its submissions, postmarked January 20, 2015 and February 25, 2015, respondent argues that the building houses only low income people, many of whom are senior citizens on fixed incomes. The attached financial statements show that the corporation runs at a deficit (in 2012, the deficit was over $110,000 and in 2013 the deficit was over $127,000). Respondent's counsel argues that the corporation's duty is to provide habitable premises for its occupants, including heat, hot and cold water, and repairs. These expenses make it impossible to pay any civil penalty DEC Staff requests. DEC Staff counsel argues that this analysis ignores the value of the building itself, but respondent's counsel replies that because the corporation runs a deficit, it would be impossible to get a mortgage or other loan against the property. Based on the evidence in the record, respondent has shown that it does not possess the ability to pay the fifty thousand dollar ($50,000) civil penalty requested by DEC Staff, even though the factors cited by DEC Staff would warrant such a penalty if the respondent had the means to pay.

In conclusion, DEC Staff's civil penalty request of fifty thousand dollars ($50,000) is justified under the circumstances of this case. However, respondent's financial condition warrants the suspension of a significant amount of this penalty,

conditioned upon respondent's investigation and cleanup of the spill, as required by law and approved by DEC Staff, discussed more fully below. Under these circumstances, the Commissioner should suspend forty nine thousand five hundred dollars ($49,500) of the civil penalty, conditioned on respondent's compliance with the terms and conditions of this order. Respondent should be required to pay a civil penalty of five hundred dollars ($500).

***REMEDIATION***

In addition to a finding of liability and the imposition of a civil penalty, DEC Staff also requests that the Commissioner include language in his order requiring respondent to complete the investigation and remediation of the spill pursuant to a DEC Staff approved work plan, which must be submitted within 30 days of the effective date of the order. While respondent claims in its third affirmative defense that the spill has been corrected, it offers no proof of this claim. On the conference call, respondent's counsel did not challenge the need to investigate or remediate the spill. Based on the evidence in the record, it is reasonable for the Commissioner to include such language in his order in this matter. However, given the discussion above, it not clear how respondent will be able to pay the costs of such investigation and remediation.

**CONCLUSIONS OF LAW**

1. Respondent 303 West 122nd Street Housing Development Fund Corporation violated Navigation Law § 173 by allowing the release of petroleum from the unregistered tank on its property.

2. Respondent 303 West 122nd Street Housing Development Fund Corporation violated Navigation Law § 176 and 17 NYCRR 32.5 by failing to immediately undertake to clean up and remove the petroleum release.

**RECOMMENDATION**

Because no material questions of fact exist, the Commissioner should issue an order that holds respondent liable for violating: (1) Navigation Law § 173; and (2) Navigation Law § 176 and 17 NYCRR 32.5. The Commissioner's order should also require the payment of a civil penalty of fifty thousand dollars ($50,000), of which forty nine thousand five hundred dollars

($49,500) should be suspended upon the condition that respondent comply with the terms and conditions of this order. In addition, the Commissioner should require the respondent to investigate and remediate the discharge at the site, pursuant to plans approved by DEC Staff.

_____/s/_____
P. Nicholas Garlick
Administrative Law Judge

Albany, New York
May 18, 2017

# EXHIBIT LIST

Matter of 303 West 122nd Street Housing Development Fund Corporation
DEC File No. R2-20100323-104

**DEC STAFF**

Attached to the notice of hearing and complaint (dated August 18, 2014):

Exhibit A – Deed for 303 West 122nd Street.
Exhibit B – PBS Program Facility Information Report and PBS Certificate for the respondent.
Exhibit C – Spill Report Form for spill #0104577 reported on July 30, 2001.

Attached to the affidavit of Raphael Ketani (dated October 24, 2014):

Exhibit A – Laboratory results for spill at site dated August 21, 2001.
Exhibit B – Request for additional information about the spill from DEC Staff dated July 13, 2005.
Exhibit C – Fax cover sheet regarding the spill dated October 19, 2005.
Exhibit D – Letter from DEC Staff to respondent dated January 6, 2010.
Exhibit E – Letter from DEC Staff to respondent dated February 17, 2010.

**RESPONDENT**

Submission postmarked January 20, 2015.

1. Email from ALJ to parties dated December 17, 2014.
2. Respondent's financial statements dated December 31, 2012.
3. Respondent's financial statements dated December 31, 2013.
4. Respondent's IRS form 1120 (U.S. Corporation Income Tax Return) for 2013.
5. Respondent's IRS form 4562 (Depreciation and Amortization) for 2013.
6. Respondent's IRS form 7004 (Application for Extension of Time to File).

7. Respondent’s Federal Supporting Statements.
8. Respondent’s Taxes and Licenses Attachment for 2013.
9. Respondent’s Form 1120 line 29a NOL Deduction for 2013.
10. Respondent’s 1120 Overflow Statement for 2013.
11. Respondent’s Depreciation Detail Listing for 2013.
12. Respondent’s Certificate of Incorporation.
13. Printout from NYS Department of State’s website, Division of Corporations, regarding respondent’s status.

Attached to Respondent’s counsel’s February 24, 2015 letter.

1. Deed for 303 West 122nd Street.