

**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-

35-60 74TH STREET REALTY LLC,

Respondent.

ORDER

DEC File No.
R2-20120927-616

This administrative enforcement proceeding concerns the failure of respondent 35-60 74th Street Realty LLC (respondent) to comply with two terms of consent order R2-20100909-307 that it entered into with the New York State Department of Environmental Conservation (DEC or Department) and which became effective on January 6, 2012 (consent order). The consent order addressed several violations of the Navigation Law and the Environmental Conservation Law (ECL) and their implementing regulations, relating to a 5,000 gallon aboveground fuel oil storage tank located at 35-60 74th Street, Queens, New York (facility).

The consent order required respondent, among other things, to implement a corrective action plan that included converting the facility, within thirty (30) days of the effective date of the consent order, from number six fuel oil to number two fuel oil (see consent order [attached as Exhibit A to the Sept. 28, 2012 Affirmation of John K. Urda in Support of Motion for Order without Hearing (Urda Affirm)], Article II, ¶ B[1]). In addition, the consent order imposed a civil penalty of seventy-five thousand dollars (\$75,000), of which thirty-five thousand dollars (\$35,000) was suspended “contingent on the respondent’s strict compliance with the terms and conditions of” the consent order (id. Article I).¹ The consent order provided further that “[t]he suspended portion of the civil penalty shall become payable immediately upon service of a notice of non-compliance on the respondent” (id.).

Department staff commenced this administrative enforcement proceeding by service on respondent, by certified mail, return receipt requested, a motion for order without hearing in lieu of complaint. The documents served, all of which were dated September 28, 2012, include: (i) notice of motion for an order without hearing; (ii) affirmation of John K. Urda attaching exhibits; and (iii) affidavit of Brian K. Falvey (Falvey Affid) attaching exhibits. Respondent and respondent’s counsel received Department staff’s motion and supporting papers on October 1, 2012 (see October 26, 2012 letter from John K. Urda, attaching affidavit of service, return receipts dated Oct. 1, 2012, and printout from U.S. Postal Service website reflecting such delivery). Accordingly, service was accomplished in accordance with sections 622.12 and 622.3

¹ Respondent paid the forty thousand dollar (\$40,000) portion of the penalty that was not suspended (see Urda Affirm, Ex. B).

of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR).

In its motion for an order without hearing, Department staff requests that I: (i) find respondent liable for violating Article I and Article II, ¶ B(1) of the consent order (see Urda Affirm ¶¶ 15, 16); (ii) order respondent to pay seventy-two thousand five hundred dollars (\$72,500), comprised of the thirty-five thousand dollars (\$35,000) that had been suspended as part of the consent order, and a civil penalty of thirty-seven thousand five hundred dollars (\$37,500) for the two violations of the consent order (see id. ¶¶ 17-25); and (iii) order respondent to convert the facility immediately from number six fuel oil to number two fuel oil, as per the terms of the consent order (see id. ¶ 19; see also id. at 6 [wherefore clause]).

Respondent has failed to respond to Department staff's motion for order without hearing.

The matter was assigned to Administrative Law Judge (ALJ) P. Nicholas Garlick, who prepared the attached summary report. ALJ Garlick recommends that Department staff's unopposed motion for order without hearing be granted, and that the relief requested be granted in its entirety. I adopt the ALJ's summary report as my decision in this matter subject to my comments below.

Liability

Staff brings this motion for an order without hearing pursuant to 6 NYCRR 622.12, which is governed by the same principles that govern summary judgment pursuant to CPLR 3212 (see Matter of Alvin Hunt, d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 7 n 2). Initially, I hold that Department staff has submitted evidence sufficient to demonstrate that the August 1, 2012 inspection of the facility revealed that respondent had failed to comply with the consent order requirement to convert the facility from fuel oil number six to fuel oil number two (see Falvey Affid ¶¶ 5-6). The evidence further reflects that staff served on respondent and respondent's counsel, by certified mail, return receipt requested, a notice of non-compliance dated August 2, 2012, notifying respondent of: (i) its failure to convert the fuel oil at the facility as required under the consent order; and (ii) that, upon receipt by respondent of the notice of non-compliance, the suspended penalty of \$35,000 from the consent order was immediately due and payable (see Urda Affirm ¶¶ 10-11, and Ex. C). The record demonstrates that respondent received the notice of non-compliance on August 3, 2012 (id. ¶ 11 and Ex. D), and that respondent failed to remit the penalty or otherwise respond to the notice of non-compliance (id. ¶ 12).

Because Department staff has satisfied its burden of proof on the motion for an order without hearing, and respondent has failed to respond, I hold that respondent is liable for both alleged violations of the consent order. The \$35,000 suspended penalty under the consent order has been due and owing since August 3, 2012.

Department staff also requests that I order respondent to comply with the consent order requirement to convert the facility from number six fuel oil to number two fuel oil immediately. As the ALJ correctly stated, however, respondent has a continuing obligation to comply with the

consent order and, therefore, no further order directing compliance with the terms of the consent order is necessary (see Summary Report, at 6; see also Matter of West 63 Empire Associates LLC, Order of the Commissioner, August 9, 2012, at 2).

Penalty

ECL 71-1929 provides for a civil penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation of titles 1 through 11 inclusive and title 19 of article 17, or the rules or regulations, orders or determinations promulgated thereto. Respondent's failure to comply with the consent order that it previously signed renders it subject to civil penalties under ECL 71-1929. Based upon this record, Department staff's request that I assess a civil penalty of thirty-seven thousand five hundred (\$37,500) is appropriate and authorized by the ECL.²

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

- I. Pursuant to 6 NYCRR 622.12, Department staff's motion for order without hearing is granted.
- II. Respondent 35-60 74th Street Realty LLC is adjudged to have violated consent order R2-20100909-307 by: (i) failing to convert the facility from number six fuel oil to number two fuel oil, as set forth in Article II, ¶ B(1) of the consent order; and (ii) failing to remit immediately the suspended penalty of thirty-five thousand dollars (\$35,000) upon being served with a notice of non-compliance, as set forth in Article I of the consent order.
- III. Within thirty (30) days of the service of this order upon respondent, respondent shall submit payment of seventy-two thousand five hundred dollars (\$72,500), comprised of: (A) thirty-five thousand dollars (\$35,000), representing the suspended penalty set forth in the consent order, that became due and owing upon respondent's receipt of the notice of non-compliance on August 3, 2012; and (B) a civil penalty in the amount of thirty-seven thousand five hundred dollars (\$37,500) for the violations of the consent order. Payment shall be made in the form of a cashier's check, certified check or money order payable to the order of the "Environmental Protection and Spill Compensation Fund." The payment shall be mailed or otherwise delivered to the Department at the following address:

² The consent order also cites respondent's violations of the Navigation Law, and refers to Navigation Law § 192, which authorizes a civil penalty of twenty-five thousand dollars (\$25,000) for each day a violation of any duty imposed under Navigation Law article 12 (see Urda Affirm ¶13 [referring to consent order Article III, ¶ B]; see also Urda Affirm Ex. A). Department staff has not requested that I assess a penalty under the Navigation Law.

John K. Urda, Esq.
Assistant Regional Attorney
Region 2, NYSDEC
47-40 21st Street
Long Island City, New York 11101

- IV. All communications from respondent to the Department concerning this order shall be directed to John K. Urda, Esq., at the address referenced in paragraph III of this order.
- V. The terms and conditions of consent order R2-20100909-307 remain in effect, and respondent 35-60 74th Street Realty LLC continues to be responsible for complying with the consent order, including converting the facility so that it uses fuel oil number two rather than fuel oil number six. Within thirty (30) days of service of this order upon respondent, respondent shall provide to Department staff documentation demonstrating that the conversion of fuel oil is complete.
- VI. The provisions, terms and conditions of this order shall bind respondent 35-60 74th Street Realty LLC, and its agents, successors and assigns, in any and all capacities.

For the New York State Department of
Environmental Conservation

By: _____/s/_____
Joseph J. Martens
Commissioner

Dated: June 4, 2013
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

-by-

**DEC File No.
R2-20120927-616**

35-60 74th STREET REALTY LLC,

Respondent.

SUMMARY

This summary report recommends that the Commissioner grant an uncontested motion for order without hearing brought by Staff of the Department of Environmental Conservation (DEC Staff) and find 35-60 74th Street Realty LLC (respondent) liable for failing to comply with two terms of consent order R2-20100909-307 (consent order) relating to the respondent's petroleum bulk storage (PBS) facility located at 35-60 74th Street, Jackson Heights, New York. This report also recommends that the Commissioner include in his order a requirement that the respondent pay a total of \$72,500 (comprised of the suspended penalty of \$35,000 under the consent order and a civil penalty of \$37,500 for the two violations proven).

PROCEEDINGS

By papers dated September 28, 2012, DEC Staff moved for an order without hearing against the respondent. These papers included: (1) a notice of motion for an order without hearing; (2) the affirmation of DEC Staff counsel John K. Urda; (3) the affidavit of DEC Staff member Brian K. Falvey; and (4) an affidavit of service. Attached to Mr. Urda's affirmation were: (1) a copy of consent order R2-20100909-307, effective January 6, 2012; (2) two emails between DEC Staff counsel and respondent's counsel dated June 12, 2012; (3) DEC Staff's notice of non-compliance, dated August 2, 2012, which was sent to the respondent and its counsel; and (3) a copy of the confirmation receipt for the notice of non-compliance. Attached to Mr.

Falvey's affidavit were: (1) a copy of the respondent's petroleum bulk storage certificate; (2) a copy of the respondent's petroleum bulk storage application; and (3) a list of other PBS facilities naming Antonios Feggoudakis as the contact.

DEC Staff's papers were served on the respondent and on respondent's counsel on October 1, 2012.

In his October 26, 2012 letter requesting a ruling in this matter, DEC Staff counsel states that the respondent has neither opposed the motion nor communicated with DEC Staff regarding this action.

FINDINGS OF FACT

1. The respondent, 35-60 74th Street Realty LLC, is a New York State limited liability company with offices at 142-30 Sanford Avenue, Flushing, New York. The respondent owns the property at 35-60 74th Street, Jackson Heights, New York, also known as Queens County block 1273, lot 34. At this location, the respondent owns a state-regulated PBS facility (DEC #2-154970) which consists of one 5,000 gallon fuel oil storage tank installed in 1958.

2. The respondent executed a consent order (DEC R2-20100909-307, effective January 6, 2012) with the DEC Staff to resolve various violations involving the respondent's PBS facility (Urda affirmation, Exh. A). In the consent order, the respondent agreed to a \$75,000 total civil penalty, of which \$40,000 was payable and \$35,000 was suspended pending the respondent's compliance with a corrective action plan that was included in the consent order. The corrective action plan required, among other things, that the facility be converted from number six fuel oil to number two fuel oil within 30 days of the effective date of the consent order. The consent order also provided that the suspended portion of the civil penalty would become payable immediately upon service on the respondent of a notice of non-compliance.

3. On August 1, 2012, DEC Staff member Brian K. Falvey inspected the facility and found that the facility had not been converted from number six fuel oil to number two fuel oil (Falvey affidavit, ¶ 6).

4. On August 3, 2012, DEC Staff served the respondent with a notice of non-compliance by certified mail, return receipt requested, with a copy mailed to its counsel (Urda affirmation, Exh. C).

DISCUSSION

In his affirmation, DEC Staff counsel Urda requests a Commissioner's order finding the respondent liable for two causes of action (violations of two articles of the consent order), requiring the respondent to pay a total of \$72,500 (comprised of the suspended penalty of \$35,000 under the consent order and a civil penalty of \$37,500 for the two violations proven), and requiring the respondent to comply with the terms of the consent order.

LIABILITY

In this case, DEC Staff has moved for an order without hearing. A motion for order without hearing pursuant to 6 NYCRR 622.12 is the equivalent of a motion for summary judgment, and is governed by the standards and principles applicable to CPLR 3212 motions (see 6 NYCRR 622.12[d]). On the motion, Department staff bears the burden of establishing its entitlement to judgment as a matter of law on the violation charged (see Matter of Locaparra, Final Decision and Order of the Commissioner, June 16, 2003, at 4 [and cases cited therein]). Department 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.).

In this case, respondent has not appeared or in any way contested DEC Staff's motion. The record contains a copy of consent order R2-20100909-307 (Urda affirmation, Exh. A). Paragraph II, B, 1, of the consent order required respondent, within 30 days of the effective date of the order (January 6, 2012), to convert the facility from number six fuel oil to number two fuel oil. DEC Staff member Falvey states in his affidavit that during an August 1, 2012 inspection, he confirmed that the facility had not converted from fuel oil grade number six to fuel oil grade number 2 (Falvey Affidavit, ¶ 6). Based on this, the Commissioner should conclude that DEC Staff has met its burden of proof with respect to proving the first violation that the respondent failed to convert the facility from number six fuel oil to number two fuel oil.

Regarding the second alleged violation, the respondent's failure to submit the suspended penalty immediately upon service of the notice on non-compliance, paragraph I of consent order R2-20100909-307 states that the suspended portion of the civil penalty shall become payable immediately upon service of a notice of non-compliance on the respondent. DEC Staff served a notice of non-compliance (Urda affirmation, Exh. C) on the respondent on August 3, 2012 (Urda affirmation, Exh. D). Mr. Urda states that as of September 28, 2012 the respondent has failed to submit the suspended penalty or otherwise respond to the notice on non-compliance (Urda affirmation, ¶ 12). Based on this, the Commissioner should conclude that DEC Staff has met its burden of proof with respect to proving the second violation.

Based on the above discussion, the Commissioner should conclude that respondent is liable for the two violations alleged.

CIVIL PENALTY

In addition to a finding of liability, DEC Staff seeks an order directing respondent to pay \$72,500, comprised of payment of the \$35,000 suspended penalty in the consent order and an additional penalty of \$37,500 for the two violations of the consent order. DEC Staff supports its request by citing ECL 71-1929 which is applicable in this case. DEC Staff states that ECL 71-1929 authorizes a civil penalty not to exceed thirty seven thousand five hundred dollars (\$37,500) per day for each violation.

DEC Staff cites the Department's Civil Penalty Policy (DEE-1, issued June 20, 1990) and its Order on Consent Enforcement Policy (DEE-2, issued August 28, 1990). DEC's Civil Penalty Policy sets forth a framework for calculating the appropriate amount of the civil penalty. DEC's Order on Consent Enforcement Policy sets forth the background, policy, and procedures for DEC consent orders.

DEE-1 states that the starting point for calculating the appropriate civil penalty is establishing the statutory maximum. DEC Staff does not provide a calculation of the statutory maximum penalty in its papers. However, a calculation is possible based on the facts of this case. Under the terms of the consent order, the respondent was required to convert its facility to number two fuel oil on or before February 5, 2012. Thus the first violation began on February 6, 2012 and continued

until at least August 1, 2012, the date of DEC Staff's inspection of the facility, or 175 days. The respondent was required to pay the suspended portion of the civil penalty upon service of the notice of non-compliance which the respondent received on August 3, 2012. Thus the second violation began on August 4, 2012 and continued until at least the date of DEC Staff's papers, September 28, 2012, or 55 days. Multiplying the number of days of violation by the maximum penalty results in a statutory maximum penalty that is in excess of eight million dollars.

The next step under DEE-1 is an analysis of the benefit component or an estimate of the economic benefit enjoyed by respondent as a result of delayed compliance. The Civil Penalty Policy states that every effort should be made to calculate and recover the economic benefit of non-compliance (Civil Penalty Policy, § IV.3). DEC Staff offers nothing in its papers regarding respondent's economic benefit from the alleged violation. While it is likely that respondent did enjoy some economic benefit from its failure to comply with the consent order, it is impossible to quantify this amount based on this record.

The next step required is an analysis of the gravity component, which reflects the seriousness of the violation. Two factors are identified as relevant to this analysis: (1) the potential harm and actual damage caused by the violation; and (2) the relative importance of the type of violation in the regulatory scheme (Civil Penalty Policy, § IV.4). In his affirmation, DEC Staff counsel Urda states that the respondent's agreement to convert the facility to cleaner-burning number two fuel oil made the original settlement possible (Urda affirmation, ¶ 22) and that by failing to comply with the consent order, the respondent has subverted a vital enforcement tool of DEC Staff (Urda affirmation, ¶ 23). Based on the record, the Commissioner should conclude that respondent's failure to comply with the terms of the consent order is a serious violation.

Once the economic benefit and gravity components of a potential civil penalty are analyzed, the civil penalty amount should be adjusted using the following five factors: (1) the respondent's culpability; (2) violator cooperation; (3) history of non-compliance; (4) ability to pay; and (5) any unique factors that exist. In this case, DEC Staff argues that the facility has a history of non-compliance, based on the violations listed in the consent order (Urda affirmation, ¶ 25);

however, DEC Staff counsel does note that other terms of the consent order, including payment of the payable portion of the civil penalty and work regarding the spill at the facility, were complied with (Urda affirmation, Exh. B, p. 1). According to DEC Staff, respondent has failed to communicate with DEC Staff since the execution of the consent order, despite attempts by DEC Staff members to reach respondent. Based on the information in the record, the Commissioner should conclude that the respondent has not cooperated with DEC Staff regarding the conversion of the facility and has a history of non-compliance. Therefore, he should require the respondent to pay a total of \$72,500 comprised of: (1) the suspended penalty of \$35,000 under the consent order; and (2) a civil penalty of \$37,500, the one day maximum statutory penalty for a single violation, for the two violations proven.

COMPLIANCE WITH CONSENT ORDER

In addition to a finding of liability and the imposition of a civil penalty, DEC Staff also asks the Commissioner to require respondent to comply with the terms of the consent order. This relief is unnecessary because the requirements in the consent order remain in effect and respondent is obligated to comply with the consent order.

CONCLUSIONS OF LAW

1. Respondent 35-60 74th Street Realty LLC violated paragraph II, B, 1 of consent order R2-20100909-307 by failing, within 30 days of the effective date of the order, to convert the facility from number six fuel oil to number two fuel oil.
2. Respondent 35-60 74th Street Realty LLC violated paragraph I of consent order R2-20100909-307 by failing to submit payment of the suspended portion of the civil penalty immediately upon service of a notice of non-compliance on the respondent on August 3, 2012.

RECOMMENDATION

Based on the record in this matter and the analysis above, the Commissioner should issue an order that finds that respondent, 35-60 74th Street Realty LLC, violated paragraphs II,

B, 1 and I, 2 of consent order R2-20100909-307. The order should also require payment of seventy-two thousand five hundred dollars (\$72,500) comprised of: (1) the suspended penalty of \$35,000 under the consent order; and (2) a civil penalty of \$37,500, the one day maximum statutory penalty for a single violation, for the two violations proven.

Albany, New York

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

Exhibit List

Notice of Motion for an Order Without Hearing

Attached to Mr. Urda's affirmation:

- Exh. A - Order on Consent #R2-20100909-307
- Exh. B - Email from Urda to respondent's counsel 6/12/12
Email from Urda to respondent's counsel 6/12/12
- Exh. C - Notice of non-compliance, dated August 2, 2012
- Exh. D - Confirmation of delivery of the notice of non-compliance on August 3, 2012

Attached to the Affidavit of Brian Falvey

- Exh. A - respondent's PBS certificate (#2-154970);
- Exh. B - respondent's PBS application 2/9/12;
- Exh. C - a search of DEC's PBS database for facilities under Mr. Feggoudakis' control.