STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Violations of Article 19 of the New York State Environmental Conservation Law, and Part 201 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,[1]

-by-

636 HOLDING CORP.,

Respondent.

ORDER

DEC File No.
R2-20110208-46

This administrative enforcement proceeding concerns the alleged failure of respondent 636 Holding Corp. (respondent) to comply with article 19 of the New York State Environmental Conservation Law (ECL), and part 201 of title 6 of the Official Compilation of Codes, Rules, and Regulations of the State of New York (6 NYCRR), relating to air emissions sources.

On May 2, 2012, staff of the New York State Department of Environmental Conservation (Department) served respondent with a motion for order without hearing, and a complaint dated April 27, 2012 with supporting affidavit and exhibits. According to the complaint, respondent owns a residential building located at 840 Grand Concourse, Bronx, New York 10451 (Bronx County Block 2459, Lot 1) (facility), and owns and operates three stationary combustion boilers at the facility (complaint ¶ 4). The boilers burn #6 residual fuel oil and collectively have a potential to emit into the atmosphere 34.4 tons per year of oxides of nitrogen (NOx) (id.). Staff alleges that, because the facility is located in a "severe ozone nonattainment area" and has the potential to emit more than 25 tons per year of NOx, the facility is a "major stationary source" and was required to apply for and obtain appropriate approvals to operate.

The complaint alleges two causes of action. The first cause of action alleges that respondent violated ECL article 19, 6 NYCRR 201-1.1(a) and (b), and 6 NYCRR 201-6.3 because it failed to apply for a Title V air permit, or to elect to accept an emissions cap and apply for a State facility air permit or a registration certificate for the major stationary source. Staff alleges that this violation continued from July 7, 1996, the effective date of 6 NYCRR part 201 and subparts, to February 29, 2012 (complaint ¶¶ 7, 8, 13).

[1] The original caption and the two causes of action in staff's complaint referenced alleged violations of ECL article 71 (see complaint, at caption and ¶¶ 7, 8, 13, 17). However, staff cited no specific violations of article 71 in either cause of action, and simply referred to ECL 71-2103 for the purpose of calculating the proposed civil penalty (see id., at ¶¶ 18-20). Accordingly, the caption has been modified to delete the reference to article 71.

The second cause of action alleges that respondent violated ECL article 19, 6 NYCRR 201-1(b), and 6 NYCRR 201-6.1(a) by operating the three boilers for almost sixteen years without obtaining the required permit (complaint ¶¶ 14-16). Staff alleges that this violation also continued from July 7, 1996 to February 29, 2012 (complaint ¶16).

Staff's complaint charges respondent with violating ECL article 19. Article 19, entitled "Air Pollution Control," directs the Department to establish an operating permit program for emission sources subject to Title V of the federal Clean Air Act (see ECL 19-0311). Pursuant to ECL 19-0311, the Department established regulations relating to such emission sources, as well as to "minor" sources of air pollution, at 6 NYCRR part 201. In addition to generally citing ECL article 19, the causes of action allege violations of specific subparts of these regulations promulgated under article 19 (see complaint ¶¶ 7, 8, 13 [alleging violations of 6 NYCRR 201-1.1(a) and (b), and 201-6.3]; id. ¶ 17 [alleging violations of 6 NYCRR 201-6.1(a)(1)]).

Citing the various versions of ECL 71-2103 in effect during the time period for which the violations are alleged (see complaint ¶¶ 18-20), Department staff also requests that respondent be assessed a civil penalty in the amount of $159,195. Staff's penalty calculations are set forth in a document entitled "Penalty Calculations" submitted as part of staff's motion.

This matter was assigned to Administrative Law Judge (ALJ) Daniel P. O'Connell. During a June 22, 2012 conference call with the parties, Department staff acknowledged that, after service of the motion on respondent, respondent had filed an application for, and Department staff had issued, an air registration certificate reflecting that this major stationary source will be subject to an emissions cap.

ALJ O'Connell prepared the attached summary report concerning Department staff's motion for order without hearing (Summary Report), which I adopt as my decision in this matter. As set forth in the Summary Report, respondent failed to respond to the motion for order without hearing, even after ALJ O'Connell granted an extension of time to respond. The ALJ has recommended that staff's motion be granted.

I concur that staff is entitled to judgment pursuant to 6 NYCRR 622.12. Staff satisfied all of the procedural requirements of section 622.12. Staff also met its initial burden on the motion to establish, with evidence in admissible form, material facts sufficient to entitle it to judgment as a matter of law on the two causes of action asserted, the requested civil penalty and remedial relief. By failing to respond to staff's motion, respondent has failed to show the existence of substantive disputes of fact.

Staff requests, and the ALJ recommends, that respondent be assessed a penalty in the amount of $159,195 pursuant to ECL 71-2103. The proposed civil penalty is significantly less that the maximum penalty allowed under section 71-2103, and is authorized and appropriate. Moreover, each cause of action independently supports the recommended civil penalty. Accordingly, it is not necessary for me to reach the question whether the two causes of action asserted in the complaint are distinct and continuous (see Summary Report, at 15-16).

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 636 Holding Corp. is adjudged to have violated:

A. ECL article 19 and 6 NYCRR 201-1.1, from July 7, 1996 until February 29, 2012, by failing to file a permit or registration application with the Department consistent with the requirements of 6 NYCRR 201-6.3 with respect to its facility located at 840 Grand Concourse, Bronx, New York; and

B. ECL article 19 and 6 NYCRR 201-6.1(a)(1), from July 7, 1996 until February 29, 2012, for its operation of three stationary combustion boilers at its facility located at 840 Grand Concourse, Bronx, New York without having obtained the required Title V permit, state facility permit or registration certificate.

III. Respondent 636 Holding Corp. is hereby assessed a civil penalty in the amount of one hundred fifty nine thousand one hundred ninety five dollars ($159,195). The civil penalty shall be due and payable within thirty (30) days of the service of this order upon respondent. Payment shall be made in the form of a cashier's check, certified check or money order payable to the order of the "New York State Department of Environmental Conservation" and mailed or otherwise delivered to the Department at the following address:

New York State Department of Environmental Conservation
Region 2 office
47-40 21st Street
Long Island City, NY 11101
Attention: John F. Byrne, Esq., Assistant Regional Attorney

IV. All communications from respondent concerning this order shall be directed to John F. Byrne, Esq. at the address referenced in paragraph III of this order.

V. The provisions, terms and conditions of this order shall bind respondent 636 Holding Corp., 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: March 20, 2013
Albany, New York

NEW YORK STATE:
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of Environmental Conservation Law (ECL) Articles 19 and 71 and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) Part 201 by	Summary Report concerning Department Staff's Motion for Order without Hearing
636 Holding Corp., Respondent.	DEC Case No. R2-20110208-46
840 Grand Concourse Building Bronx County (DEC ID 2600400398) Facility	October 12, 2012

Proceedings

On May 2, 2012, Staff from the Department's Region 2 office (Department staff) personally served Ira Mack with a copy of a notice of motion, motion for order without hearing, complaint, and penalty calculation all dated April 27, 2012, an affidavit in support of the motion dated April 26, 2012 and sworn to by Robert G. Bolt, P.E., and Exhibits A through J (*see* Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York [6 NYCRR] § 622.12). Mr. Mack is the manager of 636 Holding Corp. (Respondent), which is located at 2388 Valentine Avenue, Bronx, New York 10458. Attached to this ruling as Appendix A is a list of the documents included with Department staff's April 27, 2012 motion for order without hearing.

According to the April 27, 2012 complaint (¶ 3), Respondent owns a residential building located at 840 Grand Concourse in the Bronx. Department staff asserts (complaint ¶ 11) that the facility is a major stationary source[1] (*see* 6 NYCRR 201-2.1[b][21]). This major stationary source consists of three stationary combustion boilers (Rockmills MP-125); each is rated at 5.6 mmBtu/hr. The boilers burn #6 residual fuel oil, and

[1] The terms "major stationary source," "major source," and "major facility" are interchangeable within the context of 6 NYCRR Part 200 and related Subparts. The definition of these terms is provided at 6 NYCRR 201-2.1(b)(21). For the reasons outlined below, the residential building located at 840 Grand Concourse in the Bronx is a major stationary source.

have a total potential to emit 34.4 tons per year of oxides of nitrogen (NOx). (complaint ¶ 4.)

In the first cause of action, Department staff alleges that Respondent violated 6 NYCRR 201-1.1(a) and (b), 6 NYCRR 201-6.3, and Environmental Conservation Law (ECL) Articles 19[2] and 71 because Respondent did not obtain a Title V facility permit, a State facility permit, or a registration certificate for the major stationary source. This violation is alleged to have continued from July 7, 1996, the effective date of 6 NYCRR Part 201 and Subparts, to February 29, 2012. (complaint ¶¶ 7, 8, 13.)

As the second cause of action, Department staff alleges that Respondent violated ECL Article 19 and 6 NYCRR Part 201 from July 7, 1996 to February 29, 2012 by operating the major stationary source for 16 years without the required permit or registration (complaint ¶ 16).

For these two causes of action, Department staff seeks a total civil penalty of $159,195. Department staff included a detailed penalty calculation with the April 27, 2012 motion for order without hearing. Department staff also requests an Order from the Commissioner directing Respondents to file an application for either the required permit or a registration certificate.

With a cover letter dated May 8, 2012, Department staff provided the Chief Administrative Law Judge (ALJ) with a copy of the April 27, 2012 motion and supporting papers. Subsequently, the matter was assigned to the undersigned ALJ.

A telephone conference call was held on June 22, 2012 to discuss the captioned matter. For the call, Respondent was represented by Jack Jaffa from Jack Jaffa and Associates (Brooklyn, New York). Assistant Regional Attorney John F. Byrne, Esq., represented Department staff.

During the June 22, 2012 telephone conference call, Department staff acknowledged that Jack Jaffa and Associates had

---

[2] Other than generally referring to the statute in the motion papers, Department staff does not identify a specific provision of ECL Article 19 that 636 Holding Corp. allegedly violated. ECL 19-0311 authorizes the Department to establish a permit program for air emission sources that are subject to Title V (*see* 42 USC §§ 7661-7661e) of the federal Clean Air Act.

filed an application for an air registration certificate for the major stationary source after service of the April 27, 2012 motion, and that Department staff issued the requested certificate before the June 2012 telephone conference call.

With reference to 6 NYCRR 622.12(b), Department staff's motion provided notice that a response was due within twenty days from receipt of the April 27, 2012 motion. Respondent did not file the required response, in part, because the parties were engaged in settlement discussions.

During the June 22, 2012 telephone conference call, Department staff consented to a brief extension of the time to respond. I set July 13, 2012 as the return date for the response. As of October 2012, the Office of Hearings and Mediation Services did not receive any response from 636 Holding Corp. to Department staff's April 27, 2012 motion. I recommend, therefore, that the Commissioner grant Department staff's April 27, 2012 unopposed motion for order without hearing.

Findings of Fact

The findings of fact determinable as a matter of law on this motion, and established for all purposes concerning this matter (*see* 6 NYCRR 622.12[e]), are as follows.

1. Ira Mack is the vice president who manages 636 Holding Corp. (*see* Exhibit G) -- an active domestic business corporation with an office at 2388 Valentine Avenue, Bronx, New York. The purpose of the corporation is to purchase, operate, and otherwise manage real estate. (Bolt Affidavit ¶ 5 and Exhibit E).

2. On May 2, 2012, Environmental Conservation Officer (ECO) Nathan Favreau personally served Ira Mack at 636 Holding Corp. with a copy of Department staff's April 27, 2012 motion for order without hearing and supporting papers (Affidavit of Service dated May 2, 2012).

3. In February 1982, 636 Holding Corp. purchased the residential building located at 840 Grand Concourse in the Bronx (Bolt Affidavit ¶ 7 and Exhibit F). Since February 1982, 636 Holding Corp. has owned and managed the building

located at 840 Grand Concourse (Bolt Affidavit ¶¶ 6, 7 and Exhibit G).

4. Robert Bolt is a professional engineer and is currently employed in the Department's Region 2 office, Division of Air Resources, as an Environmental Engineer III. Mr. Bolt maintains the Department's records related to air emission sources and supervises Harmandeep Sekhon, among other members of Department staff. (Bolt Affidavi ¶¶ 1, 3, 4.)

5. On January 14, 2010, Mr. Sekhon visited 840 Grand Concourse, and observed three boilers (Rockmills-MP-125). The boilers were installed in 1990, and burn #6 fuel oil. The capacity of each boiler is 5.6 mmBtu/hr. (Bolt Affidavit ¶¶ 3, 8 and Exhibit H.)

6. Since 1990, 636 Holding Corp. uses the three Rockmills-MP-125 boilers at 840 Grand Concourse as part of the building's heating system.

7. On January 27, 2010, Department staff sent a notice of inspection results to 636 Holding Corp. by certified mail, return receipt requested. 636 Holding Corp. received the January 27, 2010 notice of inspection on February 1, 2010. (Bolt Affidavit ¶¶ 8, 9 and Exhibit I.)

8. Department staff's January 27, 2010 notice of inspection advised that collectively the three boilers at 840 Grand Concourse constitute a major stationary source as defined at 6 NYCRR 201-2.1(b)(21). Referring to 6 NYCRR 201-1.1(b), the January 27, 2010 notice further advised 636 Holding Corp. that the owner and operator of a major stationary source must obtain a Title V facility permit pursuant to 6 NYCRR Subpart 201-6. (Bolt Affidavit ¶¶ 8, 9 and Exhibit I.)

9. The January 27, 2010 notice of inspection directed 636 Holding Corp. to file an application for a Title V facility permit for 840 Grand Concourse within 180 days. The notice also explained that if the annual fuel usage at 840 Grand Concourse is less than 333,000 gallons, the facility may be eligible for a registration certificate rather than the Title V facility permit. (Bolt Affidavit ¶ 10 and Exhibit I.)

10. On January 31, 2011, Department staff sent 636 Holding Corp. a notice of violation because Department staff had not received a permit application for a Title V facility permit for 840 Grand Concourse as directed by the January 27, 2010 notice of inspection results. (Bolt Affidavit ¶ 11 and Exhibit J.)

11. Prior to June 2012, 840 Grand Concourse did not have a Title V facility permit, a State facility permit, or a registration certificate (Bolt Affidavit ¶ 10).

12. After service of the April 27, 2012 motion, Jack Jaffa and Associates filed an application for an air registration certificate (*see* 6 NYCRR Subpart 201-3 and 6 NYCRR 201-7.3[h]) for the major stationary source. Subsequently, Department staff issued the requested certificate to 636 Holding Corp. for 840 Grand Concourse before the June 22, 2012 telephone conference call.

13. The current total market value of 636 Holding Corp.'s residential building located at 840 Grand Concourse is $3,560,000 (Penalty Calculations at 20 and Exhibit B).

Discussion

I. Commencement of Proceedings

In lieu of, or in addition to, a notice of hearing and complaint, Department staff may serve a motion for order without hearing. With service of the motion upon a respondent, Department staff must also send a copy of the motion papers to the Chief ALJ with proof of service of the motion upon respondent. (*See* 6 NYCRR 622.3[b][1] and 622.12[a].)

In an affidavit of service dated May 2, 2012, ECO Favreau affirms that he personally served Ira Mack on May 2, 2012 at 636 Holding Corp.'s office located at 2388 Valentine Avenue, Bronx, New York, with a copy of Department staff's April 27, 2012 motion for order without hearing and supporting papers. Mr. Mack is a vice president and manager at 636 Holding Corp. (Bolt Affidavit ¶ 7 and Exhibit G).

Department staff may commence an administrative enforcement proceeding, such as a motion for order without hearing, by personally serving the motion papers consistent with the CPLR (*see* 6 NYCRR 622.3[a][3] and 622.3[b]). Based on ECO Favreau's May 2, 2012 affidavit of service, I conclude that Department staff duly commenced the captioned administrative enforcement proceeding in a manner consistent with 6 NYCRR 622.3(a)(3).

II. Motion for Order without Hearing

A motion for order without hearing pursuant to 6 NYCRR 622.12 is the Departmental equivalent of a motion for summary judgment under Civil Practice Law and Rules (CPLR) § 3212 (*see* 6 NYCRR 622.12[d]; *Matter of Locaparra*, Decision and Order of the Commissioner, June 16, 2003, at 3-4). 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 facts sufficient to require a hearing (*see* 6 NYCRR 622.12[e]). Moreover, the existence of a triable issue of fact regarding the amount of civil penalties will not bar granting a motion for order without hearing on the issue of liability (*see* 6 NYCRR 622.12[f]). If a triable issue of fact is presented only on the issue of penalty, the ALJ will convene a hearing to assess the amount of penalties to be recommended to the Commissioner (*see id*.).

On the motion, Department staff carries the initial burden of establishing its entitlement to judgment as a matter of law on the claims asserted, and the requested civil penalty and remedial relief (*see Locaparra*, at 4). Staff must support the motion with evidence in admissible form establishing the material facts supporting the claims (*see id*.).

Once Department staff makes a *prima facie* showing, the burden shifts to respondent to raise substantive disputes of fact requiring a hearing (*see* 6 NYCRR 622.12[e]; *Locaparra*, at 4). To carry its burden, a respondent must lay bare its proof (*see id*.). Conclusory assertions and unsupported allegations are insufficient to avoid summary judgment (*see id*.; *see also Matter of Mustang Bulk Carriers, Inc.*, Chief ALJ Ruling and Summary Report, at 6-7 [feigned issues of fact will not defeat

summary judgment], *adopted by* Order of the Acting Commissioner, Nov. 10, 2010).

Department staff has made the required *prima facie* showing. By not opposing Department staff's motion, 636 Holding Corp. failed to raise any substantive disputes of fact. Therefore, no hearing is required.

III. Liability

In the April 27, 2012 complaint, served in addition to the motion for order without hearing (*see* 6 NYCRR 622.12[a]), Department staff alleged two causes of action. They are discussed below.

A. First Cause of Action

In the first cause of action, Department staff alleges that 636 Holding Corp. violated 6 NYCRR 201-1.1(a) and (b), 6 NYCRR 201-6.3, and ECL Articles 19 and 71 because Respondent did not obtain a Title V facility permit, a State facility permit, or a registration certificate to operate the major stationary source. This violation is alleged to have continued from July 7, 1996, the effective date of 6 NYCRR Part 201 and Subparts, to February 29, 2012.[3] (complaint ¶¶ 7, 8, 13.)

Based on Mr. Sekhon's January 14, 2010 inspection of 840 Grand Concourse, Department staff learned that 636 Holding Corp. installed three Rockmills-MP-125 boilers in 1990. Furthermore, each boiler burns #6 fuel oil and has a capacity of 5.6 mmBtu/hr. The total capacity, therefore, is 16.8 mmBtu/hr. With respect to NOx emissions from the boilers, the total potential to emit (*see* 6 NYCRR 200.1[bl]) is 34.4 tons per year. (Bolt Affidavit ¶¶ 3, 8 and Exhibit H).

The New York City metropolitan area, which includes the Bronx (*see* 6 NYCRR 200.1[au]), is classified as in "severe" non-attainment for the 1-hour ozone national ambient air quality standard (NAAQS)(*see* 6 NYCRR 200.1[av][3][*i*][*a*]).

[3] With respect to the first cause of action, February 29, 2012 is the date identified in ¶ 8 of the April 27, 2012 complaint.

Pursuant to 6 NYCRR 201-2.1(b)(21), a major stationary source may be a group of emission sources located on one property that are under common control (*see also* 6 NYCRR 200.1[f]). For areas classified as severe ozone non-attainment, such as the Bronx, a facility is considered a major stationary source when its potential to emit is 25 tons per year or more of NOx (*see* 6 NYCRR 201-2.1[b][21][*iv*][*b*]). The total potential to emit NOx from the three boilers at 840 Grand Concourse is 34.4 tons per year. The potential to emit from the three boilers at 840 Grand Concourse exceeds the minimum threshold of 25 tons per year. Therefore, I conclude that 840 Grand Concourse is a major stationary source.

The owner and operator of a major stationary source, such as 636 Holding Corp., must either obtain a permit or registration certificate from the Department (*see* 6 NYCRR 201-1.1[a]), or demonstrate that the major stationary source is exempt (*see* 6 NYCRR 201-3). The owner and operator of a major stationary source must obtain one of the following: (1) a Title V permit pursuant to 6 NYCRR Subpart 201-6; (2) a State facility permit pursuant to 6 NYCRR Subpart 201-5; or (3) a registration certificate pursuant to 6 NYCRR Subpart 201-4 (*see* 6 NYCRR 201-1.1[b]). An exemption pursuant to 6 NYCRR Subpart 201-3 does not apply here.

No person may operate a major stationary source without obtaining a Title V permit (*see* 6 NYCRR 201-6.1[a][1]). The requirements for a Title V permit application are outlined at 6 NYCRR 201-6.3 in five subdivisions. An owner or operator must file an application within certain time frames (*see* 6 NYCRR 201-6.3[a]) using a standard application form and providing the information specified in the regulations (*see* 6 NYCRR 201-6.3[d]). Subsequently, Department staff must review applications for completeness (*see* 6 NYCRR 201-6.3[b]), and issue a final determination (*see* 6 NYCRR 201-6.3[c]). Upon request, Department staff may determine whether trade secret information presented in the Title V permit application should be kept confidential (*see* 6 NYCRR 201-6.3[e]).

In the alternative, the Department staff may issue a State facility permit pursuant to 6 NYCRR 201-5.1(a)(1), if the owner or operator of the major stationary source will agree to an emission cap consistent with the requirements outlined at 6 NYCRR 201-7.2. Finally, an owner or operator may register a major stationary source pursuant to 6 NYCRR 201-4.1(a)(5) when

the annual actual emissions of any regulated air contaminant do not exceed the appropriate threshold outlined at 6 NYCRR 201-7.3(e), regardless of the major stationary source's potential to emit for that contaminant (*see also* 6 NYCRR 201-7.3[h][1]).

Prior to service of Department staff's April 27, 2012 motion for order without hearing, 636 Holding Corp. had not filed an application for a Title V permit with Department staff consistent with the requirements outlined at 6 NYCRR 201-6.3 (Bolt Affidavit ¶ 10) in violation of 6 NYCRR 201-1.1. This violation has continued from July 7, 1996 until February 29, 2012.

B. Second Cause of Action

In the second cause of action, Department staff asserts that 6 NYCRR 201-1.1(a) requires owners and operators of air contamination sources to obtain either a permit or a registration certificate to operate such sources. Department staff asserts further that 6 NYCRR 201-1.1(b) requires the owner and operator of a major stationary source, subject to Subpart 201-6, to obtain a Title V permit, and that, pursuant to 6 NYCRR 201-6.1(a)(1), no person shall operate a major stationary source without first obtaining a Title V permit. (complaint ¶ 15.)

Department staff alleges that Respondent violated ECL Article 19 and 6 NYCRR Part 201 from July 7, 1996 to February 29, 2012[4] by operating the major stationary source for 16 years without the required permit or registration (complaint ¶ 16). Department staff also alleges that each day that Respondent operated the major stationary source without any authorization from the Department constitutes a continuing violation of 6 NYCRR 201-6.1(a)(1) and ECL Articles 19 and 71 (complaint ¶ 17).

As outlined in the discussion concerning the first cause of action, 840 Grand Concourse is a major stationary source (*see* 6 NYCRR 201-2.1[b][21][*iv*][*b*]) subject to the permitting requirements (*see* 6 NYCRR 201-1.1[b]) outlined in one of the following subparts: (1) 6 NYCRR Subpart 201-6 (Title V facility permits), (2) 6 NYCRR Subpart 201-5 (State facility permits), or (3) 6 NYCRR Subpart 201-4 (Minor facility registration).

[4] With respect to the second cause of action, February 29, 2012 is the date identified in ¶ 16 of the April 27, 2012 complaint.

In the April 27, 2012 complaint (¶¶ 15 and 17), Department staff specifically refers to 6 NYCRR 201-6.1(a)(1). This provision prohibits the operation of any major stationary source without obtaining a Title V permit from the Department.

With the April 27, 2012 motion for order without hearing, Department staff produced evidence in admissible form establishing the material facts to support the claim asserted in the second cause of action. Therefore, I conclude that 636 Holding Corp., as the owner and operator of 840 Grand Concourse, a major stationary source, did not obtain the required Title V permit subsequent to the effective date of 6 NYCRR Subpart 201-6 (*i.e.*, July 7, 1996) in violation of the permitting requirement outlined at 6 NYCRR 201-6.1(a)(1). In addition, I conclude that this violation continued until February 29, 2012.

IV. Relief

In the April 27, 2012 complaint, Department staff requests an order from the Commissioner that assesses a total civil penalty of $159,195, and directs Respondent to file an application for either the required permit or a registration certificate. Each component of the requested relief is addressed below.

A. Civil Penalty

To support the civil penalty request, Department staff included a document with the April 27, 2012 motion entitled, *Penalty Calculations*. First, Department staff calculates the potential statutory maximum for the alleged violations. Second, Department staff explains how the total requested civil penalty of $159,195 should be apportioned between the two violations. With respect to the first cause of action, the requested civil penalty is $101,355. For the second cause of action, Department staff requests $57,840.

Department staff's recommendation is based on two guidance documents. The first is Appendix B from the US EPA *Clean Air Act Stationary Source Civil Penalty Policy*, issued on October 25, 1991, and clarified on January 17, 1992 (EPA Appendix B).

The second guidance document is the Commissioner's Civil Penalty Policy, issued on June 20, 1990 (DEE-1).

As part of the civil penalty calculation, Department staff identifies a legal issue whether the violations alleged in the April 27, 2012 complaint are distinct. Department staff concludes that the violations asserted in the first and second causes of action are distinct, and argues that the Commissioner should assess separate civil penalties for each of the two violations. (Penalty Calculations at 21.)

1. ECL 71-2103

ECL Article 71, Title 21 provides for the enforcement of ECL Article 19 (Air Pollution Control) and its implementing regulations. For the period at issue in this proceeding, ECL 71-2103 was amended three times as follows.

As amended and effective on August 4, 1993, ECL 71-2103 provided for a maximum civil penalty of $10,000 for any violation of ECL Article 19 and its implementing regulations. An additional maximum civil penalty of $10,000 could be assessed for each day that a violation continued.

Effective May 15, 2003, ECL 71-2103 provided for a maximum civil penalty of $15,000 for any violation of ECL Article 19 and its implementing regulations. An additional maximum civil penalty of $15,000 could be assessed for each day that a violation continued.

Effective May 28, 2010, ECL 71-2103 provides for a maximum civil penalty of $18,000 for any violation of ECL Article 19 and its implementing regulations. An additional maximum civil penalty of $15,000 may be assessed for each day that a violation continues.

According to Department staff's *Penalty Calculations* (at 15-17), the potential maximum civil penalty for a violation from July 7, 1996 to May 14, 2003 (2,501 days at $10,000 per day) would be $25,010,000.[5] The potential maximum civil penalty for a violation from May 15, 2003 to May 27, 2010 (2,569 days at

[5] Department staff's total civil penalty request of $159,195 is about 0.64% of the potential maximum civil penalty ($25,010,000) for the first seven years of the violation (*i.e.*, July 7, 1996 to May 14, 2003).

$15,000 per day) would be $38,535,000. The potential maximum civil penalty for a violation from May 28, 2010 to February 29, 2012 (643 days at $15,000 per day) would be $9,645,000. Therefore, over the 16 years that each violation allegedly occurred, the potential maximum civil penalty for each violation would be the sum, which is $73,190,000.

2. EPA Appendix B

Attached as Exhibit A to Department staff's April 27, 2012 motion is a copy of EPA Appendix B. Department staff argues that the guidance outlined in EPA Appendix B should be applied to the civil penalty calculation for the violation alleged in the first cause of action for the period from February 28, 2007 to February 29, 2012. Department staff explains there is a statute of limitations of five years with respect to violations of the federal code, but no limit with respect to violations of ECL Article 19 and its implementing regulations when enforced administratively (Penalty Calculations at 13-14). To support this position, Department staff cites several administrative decisions and State case law (*Matter of Solow Management Corporation*, Order, dated December 22, 2006 [Exhibit C]; *Matter of David Hansen*, Order, dated January 3, 2000, and *upheld* in *Hansen v NY State Dep't. of Envtl. Conservation*, 288 AD2d 473 [2d Dept 2001]; *Giambrone v Grannis*, 88 AD3d 1272, 1273 [4th Dept 2011]), as well as a US Supreme Court case (*BP Am. Pro. Co. v Burton*, 549 US 84 [2006]).

With respect to the first cause of action, Department staff seeks a civil penalty of $65,000 for the period from February 28, 2007 to February 29, 2012 (Penalty Calculations at 14-15). For this portion of the requested civil penalty, Department staff relies on the guidance outlined in EPA Appendix B (pages B-9 to B-11). Department staff states that the requested civil penalty of $101,355 is a hybrid of the guidance outlined in EPA Appendix B and the Civil Penalty Policy (Penalty Calculations at 15). Department staff does not rely on EPA Appendix B as the basis for its civil penalty calculation concerning the violation alleged in the second cause of action.

3. Civil Penalty Policy

According to the Commissioner's Civil Penalty Policy, dated June 20, 1990 (DEE-1), determining the maximum potential civil penalty for all provable violations is the starting point of any civil penalty calculation (*see* DEE-1 § IV.B). The maximum potential civil penalty sets the ceiling for any amount that is ultimately assessed. With reference to DEE-1, Department staff correctly notes that the appropriate civil penalty is derived from a number of factors, including the economic benefit of noncompliance, the gravity of the violations, and the culpability of Respondent's conduct (Penalty Calculations at 18). Each factor is discussed below.

Department staff asserts that Respondent benefited from avoiding the costs associated with obtaining the required permit or registration certificate. However, Department staff does not quantify the economic benefit derived from Respondent's non-compliance (*see* DEE-1 § IV.C.1). Department staff argues, nonetheless, that the requested civil penalty would adequately recover any economic benefit (Penalty Calculations at 18).

With respect to the gravity component, Department staff notes that activities such as permitting and registering major facilities are critical to determining the total number of regulated emission sources. Department staff notes further that where, as here, undertaking any regulated activity without the proper authorization is not a mere "technical" or "paper work" violation. (*See* DEE-1 § IV.D.2). The record of this matter shows that Respondent failed to timely obtain the required permit or registration certificate, and then continued to operate a major stationary source for over 15 years. (Penalty Calculations at 18-19.)

Referring to Mr. Bolt's supporting affidavit, Department staff contends that Respondent's culpability should be considered a significant aggravating factor that justifies a substantial civil penalty (*see* DEE-1 § IV.E.1). In his affidavit (¶¶ 8, 10), Mr. Bolt states that Department staff sent a notice of inspection dated January 27, 2010 (Exhibit I) to Respondent after Mr. Sekhon visited 840 Grand Concourse on January 14, 2010. The January 27, 2010 notice advised Respondent of its obligation to file a permit application with

Department staff within 180 days from receipt of the notice. When Department staff did not receive the required permit application from Respondent, Department staff sent a notice of violation dated January 31, 2011 (Bolt Affidavit ¶ 11 and Exhibit J). Department staff notes that Respondent's business is to acquire, improve, manage, and operate residential properties (Exhibit E), such as 840 Grand Concourse. Department staff argues that the nature of Respondent's business would require familiarity with the regulations related the operation of boilers as air emission sources. (Penalty Calculations at 19.)

A respondent's level of cooperation may be considered when determining the appropriate civil penalty (*see* DEE-1 § IV.E.2). Department staff argues that Respondent has been uncooperative. Even though Respondent hired an outside consultant to assist with the permitting process, Department staff also argues that Respondent was not relieved of its obligation to assure that it obtained the required authorization from the Department. (Penalty Calculations at 20).

I also observe that Respondent ignored the requests to file a permit application or registration certificate, as outlined in the January 27, 2010 notice of inspection, and the subsequent notice of violation dated January 31, 2011. As noted above, Department staff issued a registration certificate in June 2012. Respondent, however, made no effort to register the facility until after Department staff commenced the captioned matter. Such circumstances demonstrate an unwillingness to cooperate and comply with the applicable permitting and registration requirements.

With respect to Respondent's history of compliance (*see* DEE-1 § IV.E.3), Department staff states there is no history of Respondent's previous non-compliance with statutes and regulations administered by the Department (Penalty Calculations at 20). I note, however, that Respondent has not complied with the applicable air regulations for over 15 years. I find that Respondent's compliance history with respect to 840 Grand Concourse is very poor.

Finally, DEE-1 states that the Commissioner may consider the ability of a violator to pay a civil penalty in arriving at the method or structure for payment of final penalties (*see* DEE-1 § IV.E.4.). In this case, Respondent offered no evidence that

it could not afford to pay a civil penalty. Department staff provides credible information that the current total market value of 840 Grand Concourse is $3,560,000 (Exhibit E). In the absence of financial information, no conclusions may be drawn about Respondent's ability to pay any civil penalty the Commissioner may assess. I note that the requested civil penalty of $159,195 is substantially less (4.5%) than the current total market value of the building.

4. Multiplicity of Charges

Department staff's civil penalty calculation is based on the presumption that the violations alleged in the two causes of action in the April 27, 2012 complaint are distinct. Department staff explains that the violations alleged in the captioned matter are the same as those considered by the Commissioner in the *Matter of Solow*, Order, dated December 22, 2006 (*see* Exhibit C). Department staff notes, however, that in *Solow* (at 2), the Commissioner did not decide the question whether respondent's failure, pursuant to 6 NYCRR 201-6.3, to timely inform the Department of its election either to obtain an emissions cap, or to file a Title V air permit application, is a continuous violation. Rather, the Commissioner determined in *Solow* (at 2), that the civil penalty imposed was authorized by the ECL, regardless of whether the violation of 6 NYCRR 201-6.3 was continuous.

In the captioned matter, Department staff seeks a determination by the Commissioner that the violations asserted in the April 27, 2012 complaint are distinct and continuous in nature and that, as a result, the Commissioner may assess the requested civil penalty in the manner outlined in the penalty calculations. With reference to *Blockburger v United States*, 284 US 299 (1932), Department staff identifies the elements of a violation of 6 NYCRR 201-6.3 (*i.e.*, the first cause of action) and a violation of 201-6.1(a)(1) (*i.e.*, the second cause of action). Based on this analysis, Department staff argues that none of the elements of the two violations are the same, and concludes that multiple violations may be presumed, which would authorize the Commissioner to assess multiple penalties here. (Penalty Calculations at 20-22.)

Within the context of this proceeding, the Commissioner does not need to consider Department staff's issue concerning

the multiplicity of violations. In *Solow*, respondent raised this issue and, once joined, the parties had the opportunity to develop a full and complete record about it. Here, Department staff appropriately anticipated the question of how to apportion the requested civil penalty among the demonstrated violations. However, Respondent did not respond to Department staff's April 27, 2012 motion, in general, and to the issue concerning the multiplicity of violations, in particular. Because the recommended civil penalty is supported by the ECL regardless of whether the causes of action are separate and distinct, I recommend that the Commissioner reserve on the issue concerning multiplicity of violations.

5. Civil Penalty Recommendation

Department staff's April 27, 2012 motion for order without hearing is uncontested. The total requested civil penalty of $159,195 is a fraction of the potential maximum that may be assessed for even one violation let alone for two. As discussed above, Department staff has provided a rational basis for the requested amount, and it is supported by the ECL. Therefore, the Commissioner should assess the full amount requested.

B. Certificate of Registration

When Department staff duly served the April 27, 2012 motion for order without hearing and supporting papers, Respondent had yet to file either an application for a Title V or State facility permit, or a registration certificate. In the April 27, 2012 complaint, Department staff requests an Order from the Commissioner directing Respondent to file the required permit application or registration certificate for 840 Grand Concourse.

During the June 22, 2012 telephone conference call, Department staff confirmed that subsequent to service of the April 27, 2012 complaint, 636 Holding Corp. received a registration certificate for 840 Grand Concourse before the telephone conference call. Consequently, the Commissioner does not need to order this relief.

Conclusions

1. To commence an administrative enforcement proceeding, such as a motion for order without hearing, Department staff may personally serve the notice of motion and additional documents in a manner consistent with the CPLR (*see* 6 NYCRR 622.3[a][3] and 622.3[b]). Based on ECO Favreau's May 2, 2012 affidavit of service, I conclude that Department staff duly commenced the captioned administrative enforcement proceeding in a manner consistent with 6 NYCRR 622.3(a)(3).

2. Department staff made the required *prima facie* showing and, therefore, established its entitlement to summary judgment as a matter of law on the claims asserted and the requested civil penalty. By not opposing Department staff's motion, 636 Holding Corp. failed to raise any substantive disputes of fact. Consequently, no hearing is required.

3. 840 Grand Concourse is a major stationary source, as defined at 6 NYCRR 201-2.1(b)(21)(*iv*)(*b*) and, therefore, is subject to the permitting requirements (*see* 6 NYCRR 201-1.1[b]) outlined in one of the following subparts: (1) 6 NYCRR Subpart 201-6 (Title V permit); (2) 6 NYCRR Subpart 201-5 (State facility permit); or (3) 6 NYCRR Subpart 201-4 (Minor facility registration).

4. As of April 27, 2012, 636 Holding Corp., the owner and operator of 840 Grand Concourse, had not filed an application for a Title V permit with the Department consistent with the requirements outlined at 6 NYCRR 201-6.3, which is a violation of 6 NYCRR 201-1.1. This violation has continued from July 7, 1996, when the regulations became effective, until February 29, 2012.

5. 636 Holding Corp., as the owner and operator of 840 Grand Concourse, a major stationary source, did not obtain the required Title V permit subsequent to the effective date of 6 NYCRR Subpart 201-6 in violation of the permitting requirement outlined at 6 NYCRR 201-

6.1(a)(1). This violation of 6 NYCRR 201-6.1(a)(1) continued from July 7, 1996 until February 29, 2012.

Recommendations

1. The Commissioner should grant Department staff's unopposed motion for order without hearing dated April 27, 2012.

2. The Commissioner should assess 636 Holding Corp. a total civil penalty of $159,195.

_____/s/_____
Daniel P. O'Connell
Administrative Law Judge

Dated: Albany, New York
October 12, 2012

Appendix A: Motion papers

Appendix A

Matter of 636 Holding Corp.
Motion for Order without Hearing
DEC Case No. R2-20110208-46

1. Notice of motion for order without hearing dated April 27, 2012.

2. Motion for order without hearing dated April 27, 2012.

3. Complaint dated April 27, 2012.

4. Penalty Calculations.

5. Affidavit in support of motion sworn to April 26, 2012 by Robert G. Bolt, P.E.

6. Affidavit of service affirmed on May 2, 2012 by Environmental Conservation Officer Nathan Favreau.

7. Civil Penalty Policy dated June 20, 1990 (DEE-1).

8. Exhibits:

Exhibit A	Appendix B: Clean Air Act Stationary Source Civil Penalty Policy. Issued: October 25, 1991; Clarified: January 17, 1992.
Exhibit B	NYC Property Values (840 Grand Concourse, Bronx); Assessment Record for Bronx County, Estimated Roll Certification Date: 03/01/2010.
Exhibit C	*Matter of Solow*, Order, dated December 22, 2006.
Exhibit D	Resume of Robert G. Bolt, P.E.
Exhibit E	New York State, Department of State Division of Corporations 636 Holding Corp. Certificate of Incorporation Certificate of Change

Exhibit F Deed dated February 10, 1982
840 Grand Concourse
Bronx, New York
Reel 470, pages 242-245

Exhibit G New York City – HPD Building Information
840 Grand Concourse, Bronx, NY
Building Registration Summary Report.
Property Registration Forms – CY
Dated: 03-31-11; 03-31-10; 05-09-09; 03-31-08;
04-09-07; and 03-31-06.

Exhibit H Inspection Checklist dated January 14, 2010
by Inspector Harmandeep Sekhon.
840 Grand Concourse, Bronx, NY.
ID# 2-6004-00398

Exhibit I Notice of Inspection Results
dated January 27, 2010.
Domestic Return Receipt
signed February 1, 2010.

Exhibit J Notice of Violation dated January 31, 2011.