STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 71 of the New York State Environmental Conservation Law and Article 12 of the New York State Navigation Law,

ORDER
DEC File No.
R2-20110120-23

- by -

735 PELHAM LLC,

Respondent.

This administrative enforcement proceeding concerns allegations by staff of the New York State Department of Environmental Conservation (Department) that respondent 735 Pelham LLC (respondent) violated Navigation Law (NL) § 192 and Environmental Conservation Law (ECL) § 71-1929 by failing to comply with the terms of Consent Order No. R2-20080423-216 (2008 consent order) relating to an October 2006 oil spill (Spill) at a multi-family apartment building that respondent owns, located at 735 Pelham Parkway North, Bronx, New York (site or facility).

Department staff commenced this proceeding by serving on respondent and its counsel a motion for order without hearing in lieu of complaint. Staff's papers contain two causes of action, asserting that respondent: (1) violated NL § 192 and ECL 71-1929 by failing to comply with the Corrective Action Plan (CAP) requirements for full investigation and remediation of the Spill as required under the 2008 consent order; and (2) violated ECL 71-1929 by failing to document correction of the following violations as required in the 2008 consent order: (a) failure to properly label an aboveground storage tank, in violation of section 613.3(c)(3)(ii) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR); (b) failure to conduct monthly inspections of the facility, in violation of 6 NYCRR 613.6(a); and (c) failure to maintain monthly inspection reports for the facility and making them available to the Department, in violation of 6 NYCRR 613.6(c) (see Affirmation of John K. Urda in Support of Motion for Order Without a Hearing, dated July 18, 2012 [Urda Aff.], at 7, ¶¶ 33, 36; see also id. Exhibit [Ex.] D [2008 consent order], at ¶¶ 41, 42, 43, respectively).

Department staff seeks an order: (i) finding respondent liable for the violations alleged; (ii) directing respondent "to properly investigate, clean up and remove the subject contamination from the Spill under a Department-approved work plan;" (iii) directing respondent to provide documentation showing full compliance with the 2008 consent order; and (iv) imposing on respondent a civil penalty of "no less than" $150,000 (id. at 13, Wherefore clause ¶¶ 1-3).[1]

[1] Elsewhere in the motion papers, staff requests a civil penalty in the specific amount of $150,000, and provides an extended discussion of the basis for this specific request (see Urda Aff., at 7-8, ¶¶ 39-56, 62-66). Following the service and filing of the motion for order without hearing in lieu of complaint, staff has not submitted a motion or other request seeking to amend its papers to increase the requested penalty above $150,000, and I will therefore treat

In its responding papers, which constitute the answer in this proceeding, respondent requests a hearing, to provide evidence that it has made "good-faith efforts to resolve the pertinent issues" (Affirmation in Opposition to Motion by DEC of Walter A. Ciacci, Esq., dated September 13, 2012 [Ciacci Aff.], ¶ 2), and to demonstrate "the continuous measures that we have undertaken to attempt to remedy the oil spill" (Affidavit of Luigi Perlleshi in Opposition to Motion by Department of Environmental Conservation, dated September 12, 2012 [Perlleshi Aff.], ¶ 2). Respondent also requests an order directing Department staff to provide "an itemization of the specific items which the DEC asserts are 'open items' and/or a list of items with which the DEC claims the respondent has not complied" (Ciacci Aff. ¶ 22; see also Perlleshi Aff. ¶ 18 [requesting a direction to staff "to provide a specific list of what needs to be done so that we can finally conclude this project"]).

The matter was assigned to Administrative Law Judge (ALJ) P. Nicholas Garlick, who prepared the attached summary report (Summary Report) in which he concluded that respondent failed to show that any material questions of fact exist that would warrant a hearing (see Summary Report at 1, 10). The ALJ recommends that I issue an order: (i) granting staff's motion and holding that respondent is liable for the violations alleged in the two causes of action; (ii) "restating the respondent's duty to comply with the terms" of the 2008 consent order, which includes properly investigating and remediating the contamination at the site, pursuant to a work plan approved by Department staff, and providing documentation showing full compliance with the 2008 consent order; and (iii) imposing a total civil penalty in the amount of eighty thousand dollars ($80,000) (see Summary Report at 9-13).

As discussed below, I adopt the ALJ's recommendations to (i) grant the motion for order without hearing, and hold that respondent is liable for the violations alleged in the motion for order without hearing; and (ii) direct respondent to properly investigate and remediate the contamination at the site, pursuant to a work plan approved by Department staff, and provide documentation showing full compliance with the 2008 consent order. As discussed below, I do not adopt the ALJ's recommendation with respect to civil penalty. Finally, I deny respondent's request for a hearing and its request that I direct the Department to provide an "itemization" or a "specific list" of items relating to the remediation (see Ciacci Aff. ¶ 22).

Liability

This contested motion for an order without hearing is governed by the same principles as those governing summary judgment under CPLR 3212 (see 6 NYCRR 622.12 [d], [e]; Matter of Alvin Hunt, d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 7 n 2). The ALJ properly concluded that Department staff satisfied its initial burden to establish entitlement to judgment as a matter of law with respect to the alleged violations (see Summary Report at 6-9). The record demonstrates that respondent executed the 2008 consent order admitting liability for the violations listed therein, and agreed in the 2008 consent order to (i) fully investigate and remediate the contamination, including complying with the Corrective

---

that figure as the specific amount requested by staff (see Matter of Reliable Heating Oil, Inc., Decision and Order of the Commissioner, October 30, 2013, at 2-3).

Action Plan (CAP) attached to the 2008 consent order; and (ii) document correction of the violations relating to its aboveground fuel oil tank (see generally Urda Aff., Exhibit [Ex.] D).

The ALJ also properly concluded that respondent's submissions do not raise a question of fact on any of the issues with respect to the alleged violations (see Summary Report at 8-9). Rather than attempt to refute the factual allegations relating to staff's specific claims, respondent's papers simply argue that: (i) respondent did not cause the spill, and has sued the oil company that respondent claims is responsible for the spill;[2] (ii) respondent has been "twarted (sic – probably "thwarted") by incompetent remediation contractors," and was in litigation with at least one of them; (iii) respondent has expended considerable sums of money to address the contamination; and (iv) the Department has not cooperated with respondent (see generally Ciacci Aff. and Perlleshi Aff.). These assertions do not constitute evidence showing the existence of substantive disputes of facts sufficient to require a hearing with respect to the alleged violations (see 6 NYCRR 622.12[e]), and I therefore grant staff's motion for order without hearing, and deny respondent's request for a hearing.

Civil Penalty

ECL 71-1929 provides for the imposition of a civil penalty of up to thirty-seven thousand five hundred dollars ($37,500) per day for each violation of, among other things, any orders or determinations of the Commissioner issued with respect to violations of titles 1-11 and 19 of ECL article 17. Navigation Law § 192 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 continues. Respondent's failure to comply with the consent order that it previously signed renders it subject to civil penalties under ECL 71-1929 and NL § 192. In addition, 6 NYCRR 613.1(f) states that any person who violates any provision of 6 NYCRR part 613 or any order of the Commissioner "shall be liable for the civil, administrative and criminal penalties set forth in" ECL article 71. In the 2008 consent order, respondent admitted to violations of, among other statutes and regulations, ECL 17-0501 and several provisions of 6 NYCRR part 613 (see Urda Aff. Ex. D, ¶¶ 33-46). Respondent also consented to the issuance and entering of the 2008 consent order "pursuant to the provisions of Articles 17 and 71 of the ECL" (id. ¶ 46).

Staff calculates the period of respondent's violations as 1,330 days, running from November 27, 2008 through July 18, 2012, the date of staff's motion for order without hearing (see Urda Aff. ¶¶ 34, 37). Citing ECL 71-1929, Department staff has calculated the maximum statutory penalty for the violations alleged in its first cause of action as $49,875,000,[3] and the maximum statutory penalty for the violations alleged in its second cause of action as $99,750,000 (see Urda Aff. ¶¶ 34-35, 37-38). Staff requests that I assess a total civil penalty of $150,000, comprised of a $75,000 (or two days) penalty for each cause of action (see id. ¶ 40).

[2] In the 2008 consent order, respondent admitted discharging petroleum in violation of ECL 17-0501 and NL § 173 (see Urda Aff. Ex. D, at 4, ¶ 33).

[3] Although staff has also alleged violation of NL § 192 (see Urda Aff. ¶ 33), it did not offer any calculation of penalty under that provision. Section 192 provides for a daily penalty in an amount not to exceed $25,000. Multiplying that figure by the 1,330 days of ongoing violation results in a maximum possible civil penalty under NL § 192 of $33,250,000.

Staff argues that the requested penalty is reasonable, and has considered and provided a discussion of the purposes and objectives of several of the Department's enforcement policies[4] to support the requested penalty (see id. ¶¶ 41-56, 63-66).[5]

The ALJ recommends that I impose a civil penalty of seventy-five thousand dollars ($75,000) with respect to the first cause of action, as requested by staff (see Summary Report at 11). The ALJ disagrees, however, with staff's argument that the second cause of action also warrants a civil penalty of seventy-five thousand dollars ($75,000). The ALJ's penalty recommendation with respect to the second cause of action is based upon applying the recommended penalties in the Penalty Schedule relating to the Department's Petroleum Bulk Storage Inspection Enforcement Policy (DEE-22, May 21, 2003) (see Summary Report at 11-12; see also http://www.dec.ny.gov/regulations/25193.html [DEE-22]; http://www.dec.ny.gov/regulations/25240.html [DEE-22 Penalty Schedule]). The ALJ recommends that I impose a civil penalty of five thousand dollars ($5,000) for the second cause of action.[6]

As discussed below, I am modifying staff's civil penalty request and do not adopt the ALJ's civil penalty recommendation.

The record demonstrates, as a matter of law, that respondent has not yet fully satisfied the requirements of the 2008 consent order that respondent: (1) comply with the CAP and fully investigate and remediate the Spill; and (2) provide documentation of its correction of its violations of 6 NYCRR 613.3(c)(3)(ii), 613.6(a), and 613.6(c). Respondent agreed more than

---

[4] Department staff cites and discusses the following Department enforcement policies: Civil Penalty Policy (DEE-1, June 20, 1990), Order on Consent Enforcement Policy (DEE-2, Aug. 28, 1990), Bulk Storage & Spill Response Enforcement Policy (DEE-4, March 15, 1991), Spill Site Remediation under Departmental Order Enforcement Policy (DEE-18, Dec. 18, 1995), and the Petroleum Bulk Storage Inspection Enforcement Policy (DEE-22, May 21, 2003) (see id. ¶¶ 41-56).

[5] Staff's papers also include allegations that the site has "open violations" of the New York City Housing Maintenance Code and Multiple Dwelling Law, and "open violations with the Department of Buildings and the New York City Environmental Control Board" (id. ¶¶ 57, 58). These matters are not within the jurisdiction of the Department. Staff also refers to websites that characterize respondent's principal Perlleshi as being on a "watch list" of "worst landlords" (id. ¶¶ 59-61). Staff does not explain the purpose of including these allegations. Mr. Perlleshi objects to the inclusion of these allegations and claims that staff's objective in including them "is to impose additional punitive fines" (Perlleshi Aff. ¶ 2). Although staff may have included this material as part of its consideration of "unique factors" under the Department's Civil Penalty Policy (see DEE-1, at 11; see also http://www.dec.ny.gov/regulations/25227.html), staff's papers are unclear in this regard. Accordingly, I have not considered any of the statements in ¶¶ 57-61 of Mr. Urda's affirmation in making the determinations set forth in this order.

[6] Commissioner's Policy DEE-22 and its associated Penalty Schedule are to be applied in the context of consent order negotiations (see DEE-22, at ¶ V; see http://www.dec.ny.gov/regulations/25193.html). Respondent admitted in the 2008 consent order to twelve violations, many of which are set forth in the DEE-22 Penalty Schedule (compare Urda Aff. Ex. D, at ¶¶ 33-46 with DEE-22 Penalty Schedule, http://www.dec.ny.gov/regulations/25240.html). Such penalties range from $250 to $1,000 (id.). In this case, however, staff's claim addresses violations the 2008 consent order, not simply violations of certain subparagraphs of 6 NYCRR part 613. Accordingly, in determining an appropriate penalty with respect to the second cause of action, I have considered ECL 71-1929 rather than the DEE-22 Penalty Schedule.

five years ago to comply with these provisions of the 2008 consent order, but has to date failed to comply. Respondent's longstanding failure to comply warrants the imposition of a substantial civil penalty. Although respondent has apparently experienced some difficulties with the consultants it has hired with respect to respondent's obligations under the 2008 consent order, such difficulties do not excuse respondent's failure over the past five years to comply with a consent order relating to a spill that occurred more than seven years ago.

Given the foregoing, I therefore impose on respondent a total civil penalty in the amount of one hundred fifty thousand dollars ($150,000), of which eighty thousand dollars ($80,000) is due and payable within thirty (30) days after service of this order upon respondent, and of which seventy thousand dollars ($70,000) is suspended contingent on respondent's compliance with the terms and conditions of this order. Should respondent fail to comply with the terms and conditions of this order, the suspended portion of the assessed civil penalty shall, upon notice by Department staff, become immediately due and payable. The civil penalty imposed here is authorized and appropriate on the record of this proceeding, and is far below the statutory maximum civil penalty authorized in these circumstances.[7]

Remedial Relief

I adopt the ALJ's recommendation that I require respondent to complete the steps necessary to properly investigate, clean up and remove the contamination from the site pursuant to a work plan approved by Department staff (see Summary Report at 12). The 2008 consent order and attached CAP make clear what respondent must do to comply.[8] Department staff alleges, and respondent does not refute, that respondent has never submitted a complete Remedial Action Plan (RAP). In addition, as reflected in a November 30, 2012 email from Department staff to respondent's consultant – which email was submitted by respondent's counsel to ALJ Garlick as a letter attachment (see Letter from W. Ciacci to ALJ Garlick, dated January 21, 2013, with attachments), staff has also clearly identified the deficiencies in a Petroleum Bulk Storage Closure Report submitted by respondent's consultant relating to the remediation.

In light of the evidence, respondent's claims that it does not know what to do to comply with the 2008 consent order and the CAP are not credible. Respondent is directed to complete the following remedial activities no later than forty-five (45) days after service of this order on respondent: (i) correct the deficiencies in the Petroleum Bulk Storage Closure Report and

[7] Although Department staff has styled its complaint as containing two separate causes of action, the first cause of action refers to one alleged violation (see Urda Aff. ¶ 33), and the second cause of action refers to violations of three separate regulations, but characterizes these as "two additional counts" (see id. ¶ 36). The penalty imposed here is reasonable based upon the record, irrespective of how the complaint characterizes the number of violations.

[8] Respondent has a continuing obligation to comply with the consent order and no further order restating respondent's duty to comply with the terms of the 2008 consent order is necessary (see e.g. Matter of West 63 Empire Associates LLC, Order of the Commissioner, August 9, 2012, at 2). Given respondent's claim that it does not know the activities necessary to comply, however, I am providing specific direction to respondent so that there can be no further claimed lack of understanding in that regard.

provide Department staff with the corrected Report;[9] and (ii) provide to Department staff an approvable work plan that will effectuate and complete the investigation, clean up and removal of the contamination at the site, including a detailed schedule for completion of these activities. Respondent is also directed to complete its investigation, clean up and removal of the contamination at the site in accordance with the Department-approved work plan and schedule.

I also adopt the ALJ's recommendation that I require respondent to provide documentation showing correction of the violations relating to its failure to: (i) properly label the tank or gauge on the aboveground storage tank installed by respondent following the spill; (ii) conduct monthly inspections of the facility; and (iii) maintain monthly inspection reports for the facility and make the reports available to Department staff (see Urda Aff. ¶¶ 12, 16, 36; see also 2008 consent order, Urda Aff. Ex. D, at ¶¶ 41-43). I direct respondent to provide the required documentation no later than thirty (30) days after service of this order on respondent, including providing to the Department copies of all monthly inspection reports for the facility for the period from August 1, 2012 through and including the date of service of this order on respondent.

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 an order without hearing is granted.

II. Respondent 735 Pelham LLC is adjudged to have violated Consent Order No. R2-20080423-216 by: (1) failing to comply with the Corrective Action Plan requirements for full investigation and remediation of the October 2006 spill at 735 Pelham Parkway North, Bronx, New York, as required under Consent Order No. R2-20080423-216; and (2) failing to document correction of its violations of 6 NYCRR 613.3(c)(3)(ii), 613.6(a) and 613.6(c), as required by Consent Order No. R2-20080423-216.

III. Respondent 735 Pelham LLC is assessed a civil penalty in the amount of one hundred fifty thousand dollars ($150,000), of which seventy thousand dollars ($70,000) is suspended contingent on respondent's compliance with the terms and conditions of this order. The non-suspended portion of the penalty (eighty thousand dollars [$80,000]) shall be due and payable within thirty (30) days after service of this order on respondent. Payment shall be made in the form of a cashier's check, certified check, or money order

[9] In his January 21, 2013 letter, counsel for respondent states that respondent's most recent consultant has taken the position that the additional work is outside of its scope of work. This does not provide a reasonable basis to further delay respondent's compliance.

made payable to the order of the Environmental Protection and Spill Compensation Fund, and mailed or hand-delivered to:

John K. Urda, Esq.
Assistant Regional Attorney
NYS Department of Environmental Conservation, Region 2
47-40 21st Street
Long Island City, NY 11101

Should respondent fail to satisfy any of the terms and conditions of this order, the suspended portion of the penalty (seventy thousand dollars [$70,000]) shall become immediately due and payable upon notice by Department staff and is to be submitted in the same form and to the same address as the non-suspended portion of the penalty.

IV. Respondent 735 Pelham LLC is directed to complete the following remedial activities:

A. No later than forty-five (45) days after service of this order on respondent, respondent shall: (i) correct the deficiencies in the Petroleum Bulk Storage Closure Report, as described in the November 30, 2012 email from Department staff, and provide Department staff with a corrected Report; and (ii) provide to Department staff an approvable work plan that will effectuate and complete the investigation, clean up and removal of the contamination at the site, including a detailed schedule for completion of these activities.

B. No later than thirty (30) days after service of this order on respondent, respondent shall provide to Department staff documentation reflecting correction of the violations relating to respondent's failure to:

1. Properly label the tank or gauge on the aboveground storage tank installed by respondent following the October 2006 spill;

2. Conduct monthly inspections of the facility; and

3. Maintain monthly inspection reports for the facility and make the reports available to Department staff.

C. No later than thirty (30) days after service of this order on respondent, respondent shall provide to Department staff copies of all monthly inspection reports for the facility for the period from August 1, 2012 through and including the date of service of this order on respondent.

D. Respondent shall effectuate and complete its investigation, clean up and removal of the contamination at the site in accordance with the Department-approved work plan and schedule required under this order.

V. 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.

VI. The provisions, terms and conditions of this order shall bind respondent 735 Pelham 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: December 18, 2013
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 71 of the Environmental Conservation Law of the State of New York and Article 12 of the Navigation Law of the State of New York,

SUMMARY REPORT

DEC File No. R2-20110120-23

-by-

735 PELHAM LLC,

Respondent.

SUMMARY

This summary report addresses a contested motion for order without hearing brought by the staff of the New York State Department of Environmental Conservation (DEC Staff). The motion requested a Commissioner's order finding respondent 735 Pelham LLC (respondent) liable for two causes of action related to the respondent's alleged failure to comply with a consent order (R2-20080423-216) (2008 consent order) involving an oil spill (DEC Spill # 0608022) at a multi-family residential building located at 735 Pelham Parkway North, Bronx, New York (the site). DEC Staff also requested the Commissioner to impose a payable civil penalty of $150,000 and require the respondent to: (1) properly investigate, clean up and remove the petroleum contamination from the site pursuant to a DEC Staff approved work plan; and (2) provide documentation showing full compliance with the 2008 consent order. Respondent has failed to show that any material questions of fact exist that would warrant a hearing. Consequently, the Commissioner should issue an order granting DEC Staff's motion. However, DEC Staff has failed to justify the $150,000 payable civil penalty sought in this case, and the Commissioner should reduce the penalty to $80,000.

PROCEEDINGS

By papers dated July 18, 2012, DEC Staff moved for an order without hearing pursuant to section 622.12 of title 6 of the Official Compilation of Codes, Rules and Regulations of the

State of New York (6 NYCRR). DEC Staff's papers consisted of: (1) a cover letter; (2) a notice of motion for an order without hearing; (3) an affirmation in support by DEC Staff counsel John K. Urda with six exhibits; and (5) an affidavit in support by DEC Staff member Hiralkumar Patel with seven exhibits.

By fax dated August 31, 2012, DEC Staff counsel agreed to an extension, until September 14, 2012, of time for the respondent to reply.

By papers dated September 14, 2012, respondent's counsel filed its response. These papers included: (1) a cover letter; (2) an affidavit by Luigi Perlleshi, a member of the respondent, with thirteen exhibits attached; and (3) the affirmation of respondent's counsel, Walter A. Ciacci, Esq.

By letter dated September 19, 2012, DEC Staff counsel requested leave to file supplemental papers pursuant to 6 NYCRR 622.6(c)(3).

On October 10, 2012, this matter was assigned to me.

A conference call was convened on October 18, 2012 with the attorneys representing the parties. During this call, respondent's counsel disclosed that he had recently settled litigation with one of its contractors, Northeast Environmental, Inc., and as part of the settlement additional relevant information regarding work at the site would be sent to DEC Staff. On this call, I denied DEC Staff's motion to file supplemental papers, reasoning that the parties' time would be better spent attempting to settle this matter. The call concluded with the parties agreeing to review the newly disclosed information and attempting to settle the matter through negotiations.

By letter dated December 12, 2012, DEC Staff informed me that settlement discussions had been unsuccessful and requested a ruling on its motion for order without hearing.

By letter dated January 21, 2013, respondent's counsel sent me a letter regarding respondent's ongoing disputes with DEC Staff and Northeast Environmental, Inc. Attached to this letter were: (1) a copy of a November 30, 2012 email between DEC Staff and Northeast Environmental, Inc.; (2) a copy of December 3, 2012 letter from DEC staff's counsel to respondent's counsel; (3) a copy of a January 21, 2013 letter from respondent's counsel to DEC Staff counsel; and (4) a copy of a January 21,

2013 letter from respondent's counsel to the attorney representing Northeast Environmental, Inc.

By letter dated January 29, 2013, respondent's counsel sent me a copy of DEC Staff's January 25, 2013 letter declining respondent's counsel's request for a meeting.

FINDINGS OF FACT

1. 735 Pelham LLC is an active domestic limited liability company licensed to do business in the State of New York (Urda affirmation, Exh. A).

2. 735 Pelham LLC owns property and a multiple-family apartment building located at 735 Pelham Parkway North, Bronx, New York (the site) (Urda affirmation, Exh. B). The respondent also owns a petroleum bulk storage facility (#2-610824) which is located at the site. The facility was registered on May 14, 2008 (Urda affirmation, Exh. C).

3. On October 13, 2006, DEC Staff was notified of a petroleum spill at the site which resulted in a site visit where DEC Staff observed approximately 200-300 gallons of heating oil in the building's boiler room and an unregistered 10,000 gallon underground storage tank (Patel affidavit, ¶5, Exh. A).

4. On October 28, 2008, a consent order (2008 consent order) was executed regarding the spill (Urda affirmation, Exh. D). Under the terms of the 2008 consent order, the respondent admitted to several violations (¶33 - ¶46), agreed to pay a $30,000 civil penalty (¶I.A.), and agreed to complete a series of steps to close the matter (¶II.A.), as set forth in the Corrective Action Plan (2008 consent order, at p. 9).

5. The Corrective Action Plan, attached to the consent order, required the respondent to submit an Investigation Work Plan (IWP), an Investigation Summary Report (ISR) and a Remedial Action Plan (RAP). The IWP and the ISR were both submitted late, and approved by DEC Staff. However, only a partial RAP was submitted and approved. The respondent failed to submit a complete RAP and failed to implement the approved portions of the RAP (Patel affidavit, ¶39 - ¶40).

6. Paragraph II.B. of the consent order required the respondent to document that all violations referenced in the consent order had been remedied within 30 days of the effective date of the order. The respondent failed to timely document

that it had: (1) properly labeled the tank at the site, as required by 6 NYCRR 613.3(e)(3)(ii); and (2) inspected the PBS facility at least monthly as required by 6 NYCRR 613.6(a) and properly maintained monthly inspection reports for the facility as required by 6 NYCRR 613.6(c).

DISCUSSION

In its motion for order without hearing, DEC Staff requests that the Commissioner issue an order: (1) finding the respondent liable for two causes of action involving the alleged violation of consent order R2-20080423-216; (2) imposing a payable civil penalty of $150,000; and (3) directing the respondent to properly investigate, cleanup and remove contamination from the site pursuant to a DEC Staff approved work plan and provide documentation showing full compliance with the consent order. DEC Staff argues that there are no triable issues of material fact, and that it is entitled to judgment as a matter of law.

The respondent asserts that there are substantive disputes of fact that require a hearing. The respondent's papers do not directly address the issue of its liability for the alleged violations. Rather, respondent portrays itself as innocent with respect to the circumstances surrounding the oil spill and argues that it has been diligently trying to comply with DEC Staff's demands.

Background

The following is a brief summary of the information found in the papers submitted by the parties involving the facts preceding the instant motion. On October 13, 2006, a truck operated by East Coast Petroleum, Inc. spilled several hundred gallons of oil during a delivery at respondent's building (Perlleshi affidavit, ¶ 3, Patel affidavit, Exh. A). The delivery was made to a 10,000 gallon unregistered tank located at the facility.[1] DEC Staff arrived at the scene shortly after the spill occurred and respondent hired Northeast Environmental, Inc. to contain and remediate the oil (Perlleshi affidavit, Exh. G). There were numerous contacts between respondent, its agents

[1] A dispute exists regarding whether the contamination at the site occurred due to overfilling of the tank, or as a result of a hole found in the tank, or both. However, this dispute is not relevant to the instant motion. The respondent and East Coast Petroleum, Inc. are involved in litigation regarding the spill (Perlleshi affidavit, Exhs. B & C).

and attorney, and DEC Staff over the next two years regarding the cleanup of the spill, the removal of the tank and the required investigations (Patel affidavit, Exhs. B, C, D, E). On March 24, 2008, DEC Staff member Patel inspected the site and issued a notice of violation (Patel affidavit, Exh. F).

Respondent entered into a consent order (R2-20080423-216) with DEC Staff in which it admitted to several violations. This consent order became effective on October 28, 2008. In this consent order respondent admitted to twelve violations, including: (1) failing to properly label the tank or gauge, in violation of 6 NYCRR 613.3(e)(3)(ii); (2) failing to inspect the facility at least monthly in violation of 6 NYCRR 613.6(a); and (3) failing to properly maintain monthly inspection reports for the facility in violation of 6 NYCRR 613.6(c). The consent order also required respondent to pay a $30,000 civil penalty as well as carry out the obligations set forth in the corrective action plan (attached to the order) and document the curing of all the violations within 30 days of the consent order.

Following execution of the consent order, work continued at the site, however, disputes with Northeast Environmental, Inc. involving the scope of the work to be done at the site resulted in litigation between respondent and Northeast Environmental, Inc. (Perlleshi affidavit, ¶ 7 - ¶ 17, Exhs. F & L, Exh. L; Ciacci affirmation, ¶ 16 – ¶ 18). During this litigation Northeast Environmental, Inc. refused to release information it had generated about the site to DEC Staff (Perlleshi affidavit, ¶ 13). It also stalled progress on completing work at the site. On an October 18, 2012 conference call, respondent’s counsel informed DEC Staff and me that this litigation had been settled. Following the call additional information produced by Northeast Environmental, Inc. was disclosed to DEC Staff in an attempt to settle the matter. Consideration of the instant motion was suspended while DEC Staff reviewed the new information. Settlement discussions held during this time period were unsuccessful and by letter dated December 12, 2012, DEC Staff requested a ruling on its motion for order without hearing.

In its papers, respondent claims to have spent approximately $300,000 in an attempt to remedy the situation (Perlleshi affidavit, Exh. C). In addition to hiring Northeast Environmental, Inc. (Perlleshi affidavit, Exh. K), respondent also hired: AL Eastmond and Sons to prepare a spill closure report (Perlleshi affidavit, Exh. H); Eastmond and Sons Boiler Repair and Welding Service, Inc. to seal and abandon the old tank and install a new one (Perlleshi affidavit, Exh. I); and

ESPL Environmental Consultants Corporation to perform soil and water investigations (Perlleshi affidavit, Exh. J).

Both DEC Staff and respondent complain in their papers about the uncooperativeness of the other in resolving this matter. Respondent claims DEC Staff has been unresponsive to requests for information regarding what work needs to be completed (Ciacci affirmation, ¶ 9 - ¶ 17, Perlleshi affidavit, ¶ 6, Exh. L); while DEC Staff alleges that respondent has been unresponsive to its requests for information and late in providing required reports (Patel affidavit, ¶ 9 - ¶ 41).

The Standard

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 under 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, Department 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]). 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.). 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 Department 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

In its papers, DEC Staff alleges that respondent violated two terms of the 2008 consent order. Specifically, DEC Staff alleges that respondent: (1) failed to comply with the corrective action plan requirements for full investigation and remediation of the spill, as required by the consent order; and (2) failed to document correction of two violations at the site as required by the consent order.

First cause of action. In this cause of action, DEC Staff alleges that respondent failed to comply with the corrective action plan's (CAP) requirements for full investigation and remediation of the spill as required by the 2008 consent order (Urda affirmation, ¶ 33).

The CAP is a four paragraph document attached to the consent order (Urda affirmation, Exh. D, p. 9). The first paragraph of the CAP requires respondent to submit an Investigation Work Plan (IWP), which DEC Staff must either approve or disapprove; if the plan is disapproved this paragraph requires the submission of a revision. The second paragraph of the CAP requires that after the IWP is approved, the respondent must submit an Investigation Summary Report (ISR). If hydrocarbons are found during the investigation, the third paragraph of the CAP requires weekly gauging and recovery visits until a permanent remediation system is operational. The fourth paragraph of the CAP requires the submission of a Remediation Action Plan (RAP) for DEC Staff approval or disapproval; if the plan is disapproved this paragraph requires the submission of a revision. The RAP shall detail the work proposed to remediate all contaminated media.

In his affidavit, DEC Staff member Patel states that the IWP was due November 27, 2008, but was submitted on March 6, 2009 (Patel affidavit, ¶ 31 - ¶ 33). Mr. Patel states that he approved the plan the next day (Patel affidavit, ¶ 34, Exh. G). He further states that the ISR was due April 10, 2009 but was submitted on May 29, 2009 (Patel affidavit, ¶ 34 - ¶ 35). In a

June 2, 2009 email to the respondent, Mr. Patel approved the ISR and noted that the RAP was due July 2, 2009 (Patel affidavit, ¶36). The RAP was submitted on July 9, 2009 and was incomplete (Patel affidavit, ¶ 38). Mr. Patel states that on July 14, 2009, DEC Staff approved a portion of the incomplete RAP providing for excavation of contaminated soil, collection of endpoint samples and removal of free petroleum product from the present wells (Patel affidavit, ¶ 39). According to Mr. Patel, the work required was never done and over the next three years he repeatedly attempted to contact the respondent and its consultants to no avail (Patel affidavit, ¶ 39 - ¶ 40).

The respondent's papers do not address the specifics of this cause of action, and respondent does not deny it or offer any proof in its defense. Rather, the respondent insists that its failure to fully address the spill is due to incompetent contractors and DEC Staff, specifically Mr. Patel (Perlleshi affidavit, ¶ 6).

As discussed above, in this cause of action, DEC Staff alleges that the respondent failed to comply with the CAP requirements for full investigation and remediation of the spill as required by the 2008 consent order. The CAP required the submission of an IWP, an ISR and a RAP. The record shows that the IWP and the ISR were both late, and approved by DEC Staff. However, only a partial RAP was submitted and approved, but never implemented. Had a complete RAP been submitted and fully implemented by the respondent, as required by the CAP, it would have resulted in the full investigation and remediation of the spill. Based on this, it is reasonable for the Commissioner to conclude that DEC Staff has met its burden of proof that the respondent is liable for this cause of action.

Second cause of action. In its second cause of action, DEC Staff alleges that the respondent failed to document the correction of two violations as required by the consent order. Specifically, DEC Staff claims that the respondent violated paragraph II.B of the consent order which required the respondent to document that all violations identified by November 30, 2008, (within 30 days of the order's effective date, October 28, 2008) had been corrected. In its motion for order without hearing, DEC Staff identifies two violations that the respondent failed to provide documentation of correction for, namely: (1) failing to properly label the tank or gauge in violation of 6 NYCRR 613.3(c)(3)(ii) as required by paragraph 41 of the consent order; and (2) failing to inspect the facility at least monthly and failing to maintain monthly inspection reports

in violation of 6 NYCRR 613.6(a) and (c) as required by paragraphs 42 and 43 of the consent order.

In his affidavit, DEC Staff member Patel states that he was the lead technical staff member assigned to direct and manage the investigation and remediation of the spill at the facility (¶ 3). He further states that the respondent never documented correction of its violations including failing to properly label its current tank and failing to inspect its current tank monthly and maintain inspection reports (Patel affidavit, ¶ 30).

The respondent's papers do not address the specifics of this cause of action, and respondent does not deny the allegations or offer any proof in its defense.

Based on the above, it is reasonable for the Commissioner to conclude that DEC Staff has met its burden of proof that the respondent is liable for the two violations alleged in this cause of action.

CIVIL PENALTY AND REMEDIATION

In its papers, DEC Staff requests a payable civil penalty of $150,000. DEC Staff also requests the Commissioner include in his order language: (1) directing the respondent to properly investigate, clean up and remove the petroleum contamination from the site pursuant to a DEC Staff approved work plan; and (2) requiring the respondent to provide documentation showing full compliance with the 2008 consent order.

Civil Penalty. The basis for DEC Staff's civil penalty request is a $75,000 penalty request for the first cause of action and a similar amount for the second. DEC Staff notes that these amounts reflect the equivalent of four times the maximum daily penalty of $37,500 per day (as authorized by ECL 71-1729). DEC Staff calculates that the maximum penalty that could be assessed for these two violations is in excess of $149,000,000.

DEC Staff argues that the requested civil penalty is reasonable and cites the Department's: (1) Civil Penalty Policy (DEE-1, issued June 20, 1990); (2) Order on Consent Policy (DEE-2, August 28, 1990); (3) Bulk Storage and Spill Response Enforcement Policy (DEE-4, March 15, 1991); and (4) Spill Site Remediation under Departmental Order Enforcement Policy (DEE-18, December 18, 1995). DEC Staff claims that the delays in investigating and remediating the spill have increased the

gravity of the violation because the site is an occupied residential building that is surrounded by residential and commercial sensitive receptors. The fact that the spill occurred from an unregistered and untested tank subverted the intent of the petroleum bulk storage regulations to prevent spills. DEC Staff argues that the respondent's failure to promptly abate and remediate the spill is the result of chronic neglect on the part of the respondent. DEC Staff also cites numerous other alleged violations at the site involving New York City agencies. The respondent's non-cooperation in this matter is also cited as an aggravating factor in DEC Staff's penalty recommendation. Finally, DEC Staff notes that the respondent has avoided economic expenses by failing to address the spill.

In its papers, the respondent argues that it has done everything possible to address the spill, including spending in excess of $300,000 to try to comply with DEC Staff's requirements (Perlleshi affidavit, ¶ 17). The respondent requests that DEC Staff provide a specific list of what needs to be done to conclude this matter (Perlleshi affidavit, ¶ 18). Respondent's counsel argues that the fines requested are not appropriate in this case given the lack of cooperation by DEC Staff (Ciacci affirmation, ¶ 21). The respondent claims that DEC Staff member Patel would not work with the respondent to cure the problems at the site but was more interested in massive fines and finger pointing (Ciacci affirmation, ¶ 3 & Perlleshi affidavit, ¶ 6).

As "proof" of the alleged misconduct of DEC Staff member Patel, respondent's counsel points to several letters he sent to Mr. Patel which were unanswered (Perlleshi affidavit, Exh. L). Respondent's counsel complains that he requested "copies of all reports and related materials on file with DEC" in late January 2009 and never received them (Ciacci affirmation, ¶ 9); however, these reports are the ones submitted by or on behalf of the respondent. In March 2009, he requested a copy of the approved plan from DEC Staff (Ciacci affirmation, ¶ 10), and again, this approved plan was submitted by or on behalf of the respondent. In mid-November 2009, respondent's counsel requested a meeting with Mr. Patel and Mr. Patel responded that no meeting was necessary (Ciacci affirmation, ¶ 12). Respondent's counsel also points to several entries in DEC Staff's spill report form, which he claims show Mr. Patel's lack of cooperation (Perlleshi affidavit, Exh. M); however, these entries do not show what the respondent's counsel claims. Respondent's attorney also claims that DEC Staff counsel refused to meet him regarding this matter (Ciacci affirmation, ¶ 17).

According to the respondent, the reason the spill was not completely investigated and remediated was due to the billing dispute between the respondent and its consultant, Northeast Environmental, Inc. which refused to release its work to DEC Staff until the dispute was resolved. Respondent's counsel states that his client was being held hostage and victimized by Northeast Environmental, Inc.

The respondent requests a hearing regarding the measures that have been undertaken to attempt to remedy the oil spill (Perlleshi affidavit, ¶ 2). As discussed above, the respondent has included with its papers numerous exhibits regarding the work done to date at the site. The question of what steps the respondent has taken to date is not relevant to the alleged violations, which involve specific violations of the consent order.

Upon review of the respondent's papers, I conclude that no hearing is required regarding civil penalty because no material issue of fact exists. Respondent's claim that it did not have access to the reports submitted to DEC Staff by it or its contactors speaks to a lack of coordination between the respondent, its contractors, and its attorney. This lack of coordination was entirely under the control of the respondent. Respondent's counsel's requests for information were not in the form of a freedom of information law request and DEC Staff was not required to respond. Nor is it clear why respondent was not copied on the reports submitted by the various contractors. In sum, there are no material questions of fact that warrant a hearing regarding the civil penalty amount in this case.

Because no hearing is required, I recommend the Commissioner impose a payable civil penalty in his order. However, I recommend that he conclude that the record does not support DEC Staff's request for a payable civil penalty of $150,000. With respect to the first cause of action, failing to comply with the corrective action plan's (CAP) requirements for full investigation and remediation of the spill as required under the 2008 consent order, the record supports the imposition of a $75,000 payable civil penalty. This is due to the nature of the violation, its duration, and seriousness. However, the record does not support the imposition of a payable civil penalty of $75,000 for the second cause of action and DEC Staff's request is not consistent with DEC Staff guidance, specifically DEC's Petroleum Bulk Storage Enforcement Policy Penalty Schedule (DEE-22, May 21 2003). DEE-22 sets forth the

average penalty to be assessed for the two violations proven in this matter. These average penalties are those to be imposed if a consent order is executed and higher penalties are warranted in adjudicated cases and for repeat violations, as is the case here. DEE-22 recommends average penalties of: $100 per tank for violations of 6 NYCRR 613.3(c)(3)(ii); $500 per tank for violations of 6 NYCRR 613.6(a); and $250 per tank for violations of 6 NYCRR 613.6(c). Given the relatively minor nature of these violations, a payable civil penalty for the two violations proven is excessive. However, given the fact that these are continuing violations and the respondent has failed to correct them in a timely fashion as required by the 2008 order, I recommend the Commissioner impose a payable civil penalty of $5,000 for the second cause of action.

Remediation. As mentioned above, DEC Staff requests that the Commissioner include in his order language: (1) directing the respondent to properly investigate, clean up and remove the petroleum contamination from the site pursuant to a DEC Staff approved work plan; and (2) requiring the respondent to provide documentation showing full compliance with the 2008 consent order. DEC Staff does not elaborate on its request or explain why requiring the respondent to comply with the 2008 consent order is not adequate.

In its papers, the respondent expresses a desire to complete the cleanup and bring the matter to a close. Respondent does not dispute that the consent order was not complied with or that the spill has not been fully investigated or remediated.

Based on the above, the Commissioner should include in his order language restating the respondent’s duty to comply with the terms of consent order (R2-20080423-216). Specifically, the respondent should complete the steps set forth in the consent order to properly investigate, clean up and remove the petroleum contamination from the site pursuant to a DEC Staff approved work plan; and (2) provide documentation showing full compliance with the 2008 consent order.

CONCLUSIONS OF LAW

1. 735 Pelham LLC violated the corrective action plan of consent order R2-20080423-216 by failing to submit a complete remedial action plan and failing to implement the approved portions of the partial remedial action plan.

2. 735 Pelham LLC violated paragraph II.B. of consent order R2-20080423-216 by failing to document that all violations identified in the consent order had been cured within 30 days of the effective date of the order. These violations are: (1) failing to properly label the tank or gauge in violation of 6 NYCRR.3(c)(3)(ii) as required by paragraph 41 of the consent order; and (2) failing to inspect the facility at least monthly and failing to maintain monthly inspection reports in violation of 6 NYCRR 613.6(a) and (c) as required by paragraphs 42 and 43 of the consent order.

RULING

Because no material questions of fact exist regarding the respondent's liability for both the first and second causes of action alleged in DEC Staff's motion for order without hearing, the respondent should be held liable. The respondent has also not raised material issues of fact regarding either the appropriate amount of civil penalty or what remediation should be required. However, DEC Staff's request payable civil penalty of $150,000 should be reduced to $80,000 for the reasons set forth above.

_____/s/_____
Albany, New York P. Nicholas Garlick
Administrative Law Judge

EXHIBIT LIST

Attached to Mr. Urda'a affirmation

Exh. A – Printout from NYSDOS's Division of Corporations' website regarding 735 Pelham LLC's status, dated July 13, 2012.
Exh. B – Deed for 735 Pelham Parkway North, Bronx, NY.
Exh. C – PBS Certificate for facility located at 735 Pelham Parkway North, Bronx, NY issued on 5/14/08.
Exh. D – Order on Consent R2-20080423-216, effective 10/28/08.
Exh. E – Letter from Urda to respondent dated 9/22/11.
Exh. F – Letter from respondent's counsel to Urda dated 10/19/11.

Attached to Mr. Patel's affidavit

Exh. A – DEC Oil Spill Report 0608022.
Exh. B – Letter from Patel to Perlleshi dated 10/17/06.
Exh. C – Letter from Patel to Perlleshi dated 11/20/06.
Exh. D – Letter from Patel to Perlleshi dated 6/8/07.
Exh. E – Letter from Patel to Perlleshi dated 3/24/08.
Exh. F – Notice of Violation dated 3/24/08.
Exh. G – Letter from Patel to Perlleshi dated 3/10/09.

Attached to Mr. Perlleshi's affidavit

Exh. A – DEC Oil Spill Report 0608022 (partial).
Exh. B – Pleadings for litigation between respondent and East Coast Petroleum, Inc. and insurer.
Exh. C – Verified bill of particulars for litigation between respondent and East Coast Petroleum, Inc. and insurer.
Exh. D – CV of Michael P. Walsh, P.E., attaching 9/15/2011 letter from Levine Forensic Consultants, Inc. to counsel for respondent.
Exh. E – Letter from respondent to respondent's counsel dated 12/22/10, with attachments.
Exh. F – Pleadings for litigation between respondent and Northeast Environmental, Inc.
Exh. G – Spill cleanup contract between respondent and Northeast Environmental, Inc.
Exh. H – Spill closure report by Eastmond & Sons Boiler Repair and Welding Service, Inc..
Exh. I – Scope of Work/Proposal by Eastmond & Sons Boiler Repair and Welding Service, Inc.
Exh. J – Soil and Groundwater Investigation Report dated 6/08.
Exh. K – Monitoring Well Sampling Report dated 1/11/10.

Exh. L – Series of letters from respondent’s counsel to DEC Staff.
Exh. M – DEC Oil Spill Report 0608022 (partial).