

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

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

ORDER

DEC Case No.
R2-20080626-323

- by -

**AMERICO PETROLEUM, INC. and 1264
RANDALL AVENUE HOLDING CORP.,**

Respondents.

Staff of the New York State Department of Environmental Conservation ("Department" or "DEC") commenced this administrative enforcement proceeding against respondents Americo Petroleum, Inc. ("Americo") and 1264 Randall Avenue Holding Corp. ("Randall"), by service of a notice of motion for order without hearing dated October 6, 2008, together with supporting papers and other documentary evidence.

Randall owns a gasoline service station at 1264 Randall Avenue, Bronx, New York (the "site"). Americo is the operator of the site. On or about February 24, 2005, Americo reported a discharge of petroleum at the site (the "spill"). On December 15, 2005, respondents Randall and Americo signed an order on consent which required, among other things, the investigation and remediation of the spill (DEC File No. R2-20050728-236) ("2005 Consent Order"). Respondents failed to comply with the 2005 Consent Order. To resolve the violations of the 2005 Consent Order, Americo signed a second consent order in August 2007 (DEC File No. R2-20070430-188) ("2007 Consent Order"). Although Randall is also listed as a respondent on the 2007 Consent Order, nothing in the record indicates that Randall signed the 2007 Consent Order.

Two causes of action are set forth in the affirmation of John K. Urda, Esq. dated October 6, 2008, in support of the motion for order without hearing ("Urda Affirmation"). Department staff alleges that:

- 1) respondents Americo and Randall failed to contain a

discharge of petroleum, and thereby violated section 176 of the Navigation Law and 17 NYCRR 32.5. Department staff requests a penalty of \$25,000 for the failure to contain the spill from the period of June 2, 2008 to October 6, 2008 (the date of Department staff's motion) (see Navigation Law § 192); and

2) respondents failed to comply with the corrective action plan in the 2007 Consent Order and failed to submit the suspended portion of the penalty under the 2007 Consent Order (as demanded by Department staff by letter dated April 30, 2008). Department staff requests a penalty of \$37,500 for these violations (see ECL 71-1929).

In addition to requesting that a combined total penalty of \$62,500 be assessed, Department staff is also requesting that respondents be directed to immediately comply with the requirements of the 2007 Consent Order. That order, among other things, required a corrective action plan for the spill (including submission of Phase I and Phase II investigation reports and an investigation summary report), development of a remedial action plan (if required by Department staff), and the implementation of any remedial action plan.

Respondents failed to respond to Department staff's motion for order without hearing which serves as the complaint in this matter. Pursuant to 6 NYCRR 622.4(a), respondents' time to serve an answer to the motion has expired, and has not been extended by Department staff. Accordingly, staff's motion for an order without hearing is unopposed.

Department staff filed its motion for an order without hearing with the Department's Office of Hearings and Mediation Services on January 5, 2009. The matter was assigned to Administrative Law Judge ("ALJ") Molly McBride, who prepared the attached summary hearing report. I adopt the ALJ's report as my decision in this matter, as modified below.

- Liability and Penalty

In circumstances where Department staff's motion for an order without hearing is unopposed by a respondent, staff's motion may be granted and respondent's liability determined as a matter of law when staff supports each element of the claims alleged with evidence in admissible form (see Matter of Alvin Hunt d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 7 fn 2). Based on the record of this proceeding, Department staff carried its burden of establishing a prima facie case on the factual allegations underlying each of

the violations.

With respect to the first cause of action, the record shows that respondents, by their failure to comply with the terms and conditions of the consent order signed in 2005 (and Americo's failure to comply with the subsequent consent order signed in 2007) and address the spill, continued to violate Navigation Law § 176 and 17 NYCRR 32.5. Department staff allegations regarding respondents' violations from June 2, 2008 to October 6, 2008 are supported by the record, and the requested penalty of \$25,000 shall be jointly and severally imposed on respondents.

With respect to the violations of the 2007 Consent Order in Department staff's second cause of action, I agree with the ALJ that no liability may be imposed, and no penalty may be assessed, with respect to Randall. No documentation exists in the record that respondent Randall signed the 2007 Consent order. Accordingly, the penalty of \$37,500 for violation of 2007 Consent Order shall only be assessed against respondent Americo.¹

The ALJ concludes that both respondents are liable for a penalty under the 2005 Consent Order (see ALJ's Summary Hearing Report, Conclusions of Law ¶6, at 6). Department staff, however, did not seek penalties under the 2005 Consent Order in this proceeding. Furthermore, with respect to Americo, the 2007 Consent Order settled Americo's liability under the 2005 Consent Order (see 2007 Consent Order, at ¶ 14). Accordingly, I do not accept the ALJ's recommendation and no penalty shall be assessed with respect to the 2005 Consent Order.

In sum, respondents Americo and Randall shall be, jointly and severally, assessed a civil penalty of \$25,000 under the first cause of action. Respondent Americo shall, in addition, be assessed a civil penalty of \$37,500 under the second cause of action. In addition, nothing in this order relieves respondent Americo of its obligation under the 2007 Consent Order to submit a further payment of twenty-seven thousand five hundred dollars (\$27,500), payable to the "Environmental Protection and Spill Compensation Fund," as demanded in the letter from John K. Urda, Esq. to Harpal S. Rai dated April 30, 2008 (see Exh I to the Urda Affirmation).

¹ Randall, however, continues to be subject to the terms and conditions of the 2005 Consent Order that it signed.

- Corrective Action Plan

The ALJ also recommends that respondents be directed to submit a corrective action plan within thirty (30) days of service of the order and that they complete the Department-approved remediation within 120 days or as directed by Department staff. Both respondents agreed in the 2005 Consent Order to implement a corrective action plan and Americo recommitted to such a plan in the 2007 Consent Order.²

Pursuant to the consent orders, the corrective action plan includes several components. Respondents were to submit existing Phase I and Phase II investigation reports and an investigation summary report for the site to the Department within fifteen (15) days of the effective dates of the orders. Within sixty (60) days of receipt of the Department's letter reviewing the investigation summary report, respondents were to submit a detailed additional investigation report, as required by the Department, that would determine "the extent and intensity of contamination (if any) at the [s]ite." Respondents were also to submit a remediation action plan, if required by Department staff. Within thirty (30) days of Department staff's approval of any remediation action plan, respondents were to implement the remediation action plan.

Respondents have been aware for more than three years of the requirements relating to the corrective action plan but have failed to meet their obligations. In 2008, Department staff set forth the deficiencies relating to reports that respondents submitted (see, e.g., Exh J to the Urda Affirmation [two letters dated May 28, 2008 from Kartik Chanda, DEC Environmental Engineer I, to Harpal S. Rai³ requiring "a detailed additional investigation report determining the extent and intensity of contamination both on-site and off-site" and noting items to be included in an investigation summary report] and Exh L to the Urda Affirmation [letter dated October 2, 2008 from Kartik Chandra to Harpal S. Rai noting additional information that respondents were required to submit to Department staff and noting that the investigation report submitted failed to meet Department requirements]). On this record, no extended time period for compliance is justified or warranted. Accordingly,

² The provisions relating to the corrective action plan were the same in the 2005 and the 2007 Consent Orders (see 2005 Consent Order, at 3 & 2007 Consent Order, at 3)

³ Harpal S. Rai is affiliated with both respondents.

respondents shall respond to Department staff to the aforementioned May 28, 2008 and October 2, 2008 letters no later than fifteen (15) days following service of this order upon them. Respondent shall file any additional submissions subject to a schedule determined by Department staff. With respect to any remediation action plan, that plan shall be implemented by respondents within thirty (30) days of its approval by Department staff.

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 in part and denied in part.

II. Respondent Americo Petroleum, Inc. is adjudged to have violated Navigation Law § 176, 17 NYCRR 32.5, and DEC Order on Consent (DEC File No. R2-20070430-188) effective August 7, 2007.

III. Respondent 1264 Randall Avenue Holding Corp. is adjudged to have violated Navigation Law § 176 and 17 NYCRR 32.5.

IV. Respondents Americo Petroleum, Inc. and 1264 Randall Avenue Holding Corp. are hereby assessed, jointly and severally, a civil penalty in the amount of twenty-five thousand dollars (\$25,000) for their violations of Navigation Law § 176 and 17 NYCRR 32.5. The civil penalty shall be due and payable within thirty (30) days after service of this order upon respondents. 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 hand-delivered to the Department at the following address: John K. Urda, Assistant Regional Attorney, NYSDEC Region 2, 47-40 21st Street, Long Island City, New York 11101-5407.

V. Respondent Americo Petroleum, Inc. is hereby assessed an additional civil penalty of thirty-seven thousand five hundred dollars (\$37,500) for its violation of DEC Order on Consent (DEC File No. R2-20070430-188) effective August 7, 2007. This civil penalty shall be due and payable within thirty (30) days after service of this order upon respondents. It shall be submitted in accordance with the payment procedure set forth in Paragraph IV of this order. In addition, nothing in this order relieves respondent Americo Petroleum, Inc. of its obligation under the 2007 Consent Order to submit a further payment of twenty-seven thousand five hundred dollars (\$27,500) payable to the

"Environmental Protection and Spill Compensation Fund" as demanded in the letter from John K. Urda, Esq. to Harpal S. Rai dated April 30, 2008 (see Exh I to the Urda Affirmation).

VI. Within fifteen (15) days after service of this order upon respondents Americo Petroleum, Inc. and 1264 Randall Avenue Holding Corp., respondents shall provide the additional information relating to the discharge of petroleum at the site as requested by Department staff's May 28, 2008 and October 2, 2008 letters to Harpal S. Rai. Respondent shall file any additional submissions required by Department staff with respect to the site in accordance with a schedule established by Department staff. With respect to any remediation action plan that may be required, respondents shall implement the plan within thirty (30) days of its approval by Department staff.

VII. All communications from respondent to the Department concerning this order shall be made to John K. Urda, Assistant Regional Attorney, NYSDEC Region 2, 47-40 21st Street, Long Island City, New York 11101-5407.

VIII. The provisions, terms and conditions of this order shall bind respondents Americo Petroleum, Inc. and 1264 Randall Avenue Holding Corp., and their agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/
Alexander B. Grannis
Commissioner

Dated: June 4, 2009
Albany, New York

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violation of
Articles 17 and 71 of the Environmental Conservation
Law of the State of New York (ECL), Article 12 of the
New York State Navigation Law (NL), and Title 17
of the Official Compilation of Codes, Rules and
Regulations of the State of New York (NYCRR)

Summary Hearing Report

-By-

DEC Case No.
R2-20080626-323

**AMERICO PETROLEUM, INC., AND
1264 RANDALL AVENUE HOLDING CORP.,**

Respondents

PROCEEDINGS

By notice of motion dated October 6, 2008, staff of the Department of Environmental Conservation (DEC or Department staff) moved for an order without hearing against respondents. The motion was served on respondents on October 6, 2008 and filed with the DEC Office of Hearings and Mediation Services (OHMS) on January 5, 2009. The matter was assigned to Administrative Law Judge Molly T. McBride (ALJ). Neither respondent answered the motion.

Department staff has alleged that respondents violated two Orders on Consent (OC). The first OC was executed on December 16, 2005 and the second OC was executed on August 2, 2007. In the 2005 Order on Consent, respondents admitted violations of ECL 17-0503, 17-0501 and NL 173. The violations relate to a petroleum discharge that occurred at 1264 Randall Avenue, Bronx, New York (site). The site is owned by respondent 1264 Randall Avenue Holding Corp (1264 Randall Avenue). Respondent Americo Petroleum, Inc. (Americo) operates a gasoline service station at the site. The discharge occurred on February 24, 2005 and was assigned DEC spill number 0412487. The first OC called for respondents to pay of penalty of five thousand dollars (\$5,000). Also, the respondents were to submit a detailed investigation report and a corrective action plan.

According to Department staff, respondents did not comply with any part of the first OC and a second OC was executed to address that deficiency. The second OC was executed by respondent Americo and the Department on August 2, 2007. The second OC was not signed by respondent 1264 Randall Avenue. In the second OC, respondent Americo admitted a violation of NL 176 and 17 NYCRR 32.5 (failure to take action to contain a spill), admitted that it violated

the first OC in violation of ECL 71-1929 and waived the right to a hearing on the issues. Also, Americo agreed to pay a penalty of thirty-seven thousand five hundred dollars (\$37,500) with \$10,000 being paid to the Department and the remainder suspended provided that respondent Americo complies with the terms of the second OC. Finally, the second OC again called for the submission of a corrective action plan, the submittal of a remediation action plan (RAP), and a clean up of the site pursuant to a Department approved RAP. Department Staff alleges in its motion that the second OC was violated by both respondents. However, only Americo was a party to the second OC. It is alleged that both respondents violated the first OC.

FINDINGS OF FACT

1. Respondent Americo Petroleum, Inc. operated a gasoline service station at 1264 Randall Avenue, Bronx, New York on February 24, 2005 when a petroleum spill occurred at the site.

2. Respondent 1264 Randall Avenue Holding Corp. was the owner of the site on February 24, 2005 when a petroleum spill occurred at the site.

3. Both respondents executed a consent order on December 15, 2005 admitting to violations of the ECL and Navigation Law with regard to the petroleum spill at the site.

4. Pursuant to the terms of the 2005 OC respondents agreed to pay a penalty of five thousand dollars (\$5,000). Also, the respondents were to submit a corrective action plan for the petroleum spill that included a remediation plan and finally complete the Department approved remediation.

5. Both respondents violated the 2005 OC. No penalty was paid and no corrective action plan was submitted.

6. Respondent Americo Petroleum, Inc. executed an Order on Consent in August, 2007 wherein it waived its right to a hearing and admitted that it violated the 2005 OC, admitted that it violated Navigation Law §176 and 17 NYCRR 32.5 by failing to take steps to contain the petroleum spill at the site in accordance with a corrective action plan, and admitted a violation of ECL 71-1929 by breaching the terms of the 2005 CO.

7. Respondent Americo Petroleum, Inc., by executing the second OC, agreed to pay a penalty of thirty-seven thousand five hundred dollars (\$37,500.00) with twenty-seven thousand five hundred dollars (\$27,500.00) suspended provided respondent complied with the second OC. Americo did not comply with that CO.

8. Respondent Americo Petroleum, Inc. violated the 2007 OC.

9. Respondent Americo Petroleum, Inc. and respondent 1264 Randall Avenue Holding Corp. were served with the motion for order without hearing by regular mail on October

6, 2008.

10. Neither respondent opposed the motion for order without hearing.

DISCUSSION

Part 622 of 6 NYCRR provides for Department Staff to move for an order without a hearing in lieu of a notice of hearing and complaint, and the motion shall be granted if "the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party." (6 NYCRR 622.12[d]) The causes of action have been adequately established in this motion. Respondents executed the 2005 OC admitting the spill and agreeing to take appropriate action to remediate.

Department Staff has submitted proof that the 2005 OC was violated. Respondent Americo admitted to violating the 2005 OC when it executed the second OC. Neither respondent has appeared nor opposed the motion and Department Staff has submitted adequate proof that both respondents violated the 2005 OC. No question of fact remains with respect to the violation of the 2005 Order on Consent.

As for the second OC, the 2007 OC, only Americo executed that document. Department Staff has adequately demonstrated that Americo violated the terms of the second OC and Americo has not appeared in the action nor has it opposed the motion in any manner.

CONCLUSIONS OF LAW

1. Respondent 1264 Randall Avenue Holding Corp. violated the 2005 Order on Consent.
2. Respondent Americo Petroleum, Inc. violated the 2005 Order on Consent.
3. Respondent Americo Petroleum, Inc. violated the 2007 Order on Consent.
4. Respondents violated ECL 71-1929 as they violated the 2005 Order on Consent.
5. Americo Petroleum, Inc. violated ECL 71-1929 by violating the 2007 Order on Consent.
6. Both respondents are liable to the Department for a penalty of \$5,000.00 pursuant to the terms of the 2005 Order on Consent.
7. Respondent Americo Petroleum, Inc. is liable to the Department for a penalty of \$37,500.00 pursuant to the 2007 Order on Consent.

8. The motion for order without hearing should be granted.

RECOMMENDATION

I recommend that the Commissioner issue an order directing respondents to pay the penalties detailed above within 30 days of service of the order herein. I also recommend that respondents be directed to submit a corrective action plan within 30 days of service of said order and that respondents complete the Department approved remediation within 120 days or as directed by Department staff.

DATED: June 2, 2009
Albany, New York

_____/s/_____
Molly T. McBride
Administrative Law Judge