STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law ("ECL") and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

ORDER[1]

DEC Case No. R2-20050107-17

- by -

RAPHY BENAIM, TOVIT BENAIM AND R.B. 175 CORP.,

Respondents.

Staff of the Department of Environmental Conservation ("Department" or "DEC") moved, 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"), for an order without hearing against respondents Raphy Benaim, Tovit Benaim and R.B. 175 Corp. Department staff's motion was submitted together with the complaint, alleging seven causes of action relating to violations of article 17 of the Environmental Conservation Law ("ECL") and 6 NYCRR parts 612 and 613.

Respondents own property at 175-14 Horace Harding Expressway, Queens, New York ("site" or "facility") that contained two sets of underground petroleum bulk storage tanks. The first set, which was removed in November 1989, held eleven tanks and the second set, which was removed in May 2002, held seven tanks.

By ruling dated November 8, 2005 ("Liability Ruling"), Administrative Law Judge ("ALJ") Molly T. McBride granted Department staff's motion in part, holding respondents' liable, in whole or in part, for four of the seven causes of action alleged by Department staff. The ALJ reserved a decision on penalties pending a hearing on the unresolved causes of action.

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[1] By memorandum dated February 9, 2007, Acting Executive Deputy Commissioner Carl Johnson delegated decision making authority in this matter to Assistant Commissioner Louis A. Alexander. Commissioner Alexander B. Grannis reconfirmed this delegation of decision making authority by memorandum dated October 15, 2007.

Department staff subsequently withdrew the outstanding causes of action and requested a determination on the penalty. On November 27, 2006, the ALJ issued the attached hearing report ("Hearing Report") recommending a penalty of $409,200.00.

Subject to my comments below, I modify and otherwise adopt the ALJ's Liability Ruling and modify the ALJ's recommended penalty as set forth in the Hearing Report.

Liability

The ALJ granted Department staff's motion for order without hearing with respect to liability on the first, third and fourth causes of action and, in part, with respect to the second cause of action as alleged in the complaint. I concur, in part, with the ALJ's determinations regarding the liability of respondents Raphy Benaim and Tovit Benaim (the "Benaim respondents"). However, I conclude that the record before me does not establish liability on the part of respondent R.B. 175 Corp. ("R.B.").

The latest date of any violation for which liability has been established is May 23, 2002, the date the last underground petroleum bulk storage tanks were removed from the subject site. As alleged in the complaint, and as admitted in respondents' answer, the Benaim respondents acquired title to the site on or about August 26, 1988[2] and did not transfer title to R.B. until October 10, 2002. Therefore, at the time R.B. acquired title to the site, the storage tanks had been removed and none of the violations alleged in causes of action one through four were ongoing. Because Department staff has not established, nor advanced, a basis for holding R.B. liable for violations that occurred prior to R.B.'s acquisition of the site, I decline to hold R.B. liable.

The ALJ properly rejected respondents' argument that they should not be held liable because the tanks were not in use on or after the date the Benaim respondents acquired the site. Section 613.9(b)(2) of 6 NYCRR expressly states that any facility that has not been closed in accordance with Department regulations remains subject to all the requirements of 6 NYCRR

[2] Respondent Raphy Benaim's involvement with the site dates back to the early 1970s. Respondents' answer admits that "Respondent Raphy Benaim or an entity under his control leased the Site and/or operated a gasoline station at the Site" beginning in or about 1971 or 1972 (see Answer, at 2, ¶5).

parts 612 and 613. These requirements, "includ[e] but [are] not limited to periodic tightness testing, inspection, registration and reporting requirements." Therefore, as long as the tanks remained in the ground and were not properly closed in accordance with 6 NYCRR part 613, the Benaim respondents were obligated to comply with the petroleum bulk storage regulations.[3]

With regard to the second cause of action, the ALJ granted Department staff's motion with respect to two of the four alleged violations, specifically the failure to notify the Department prior to a substantial modification (that is, the removal) of the two sets of tanks, and I concur with the ALJ's determination.

Penalty

The maximum penalty authorized by statute for the violations in this matter is in the hundreds of millions of dollars. Department staff acknowledged that such a penalty is "prohibitive" and, with respect to the causes of action that were not withdrawn, sought a penalty as follows:

– for the first cause of action, Department alleged that respondents failed to register their site as a petroleum bulk storage facility and requested a penalty of $136,400. The cause of action encompassed two counts: one for the first set of tanks that were not registered from August 26, 1988, when the Benaim respondents purchased the property, until November 7, 1989 when the set of underground petroleum bulk storage tanks were removed; and one for the second set of petroleum bulk underground storage tanks that were not removed until May 23, 2002;

– for the second cause of action, Department staff originally requested a penalty of $25,000 for each of four failures of respondents to notify the Department of substantial

[3] The Liability Ruling, a copy of which is also attached, states that the Environmental Conservation Law and the petroleum bulk storage regulations, except for the registration requirements, are silent about whether tanks need to be in use for the statutory and regulatory requirements to apply (see Liability Ruling, at 4). However, I read the applicable statutory and regulatory requirements to apply to all tanks of regulated capacity at a facility, whether the tank is in use or not (see, e.g., ECL 17-1005 [2][b] [petroleum bulk storage facility not released from testing and inspection requirements until "properly closed"]).

modifications to the facility, or $100,000. Because the ALJ granted Department staff's motion with respect to only two of the four violations, the penalty at issue was $25,000 for each of the two violations, or $50,000 (see Hearing Report, at 2);

– for the third cause of action, Department staff alleged that respondents failed to test both sets of underground petroleum bulk storage tanks and report those results to the Department. For these violations, Department staff requested a penalty of $136,400; and

– for the fourth cause of action, Department staff requested a penalty of $136,400 for respondents' failure to maintain inventory monitoring records for both sets of tanks.

For the foregoing violations, the requested penalty was $459,200. The ALJ recommended that penalties be imposed for the first, third and fourth causes of action, but declined to impose a penalty for the second cause of action, and recommended that a penalty of $409,200 be imposed (see Hearing Report, at 4). On review of the record, however, I conclude that a further modification of the recommended penalty is appropriate.

Penalty: First Set of Tanks

As indicated, a portion of the penalty requested by Department staff involves the failure to register, test, and maintain inventory monitoring records on the first set of tanks from August 26, 1988, when the Benaim respondents purchased the property, until November 7, 1989 when the tanks were removed.

Although the petroleum bulk storage regulations became effective on December 27, 1985, certain aspects of the regulatory program were phased in over time (for example, facility registration was not required until December 27, 1986, while the obligation to perform tightness testing did not accrue until December 27, 1987). During the mid- to late 1980's the Department's general focus was to obtain voluntary compliance with the new regulations (see, e.g., DEC Tank Bulletin, Spring 1989, at 3). Considerable efforts were directed toward removing petroleum bulk storage tanks at facilities where such tanks were no longer in use. Because of the significant number of tank removals at that time in various sections of the State, backlogs in scheduling tank removals were not uncommon.

It is not clear on this record whether the Benaim respondents confronted any difficulties in scheduling the tank removals that would have explained, at least in part, the delay

in removing the first set of tanks. Although the Benaim respondents are liable for violations concerning registration, testing and inventory records in relation to the first set of tanks, taking into consideration the record in this proceeding, I am exercising my discretion and shall not assess a penalty for those violations.

With respect to the Benaim respondents' failure to notify the Department prior to the removal of the first set of tanks, however, a significant penalty is warranted. The notification requirements "are the cornerstones of the petroleum bulk storage regulatory scheme" (Hearing Report, November 27, 2006, at 3). Here, in the absence of such notice, Department staff's ability to ensure the tanks were properly closed in accordance with all regulatory requirements and to determine whether any releases occurred during or before the 1989 tank removals was substantially impaired. Therefore, I conclude that a penalty in the amount of $25,000, as requested by Department staff, is justified.

Penalty: Second Set of Tanks

With respect to the second set of tanks, respondents argue that they had no knowledge of those tanks. Respondents further argue that, upon the discovery of the tanks, it was their tenant's responsibility to remove the tanks or otherwise comply with the applicable petroleum bulk storage regulations. Respondents' argument that the lease with their tenant relieved respondents of their responsibility to comply with the regulations is rejected (see, e.g., Matter of Wiese, Decision and Order of the Commissioner, May 21, 1992 [liability of owner of petroleum bulk storage facility for violations of petroleum bulk storage regulations not affected by lease agreement]).

Department staff proposes a penalty from the date that the Benaim respondents acquired the property (August 26, 1988) until the date of the removal of the second set of tanks (May 2002). The second set of tanks, however, were not discovered until 2002. Absent evidence that a respondent knew or should have known about the existence of underground tanks, a determination of whether to impose penalties with respect to facility registration, tank testing or inventory monitoring records for the period when the tanks were not known is to be made on a case by case basis. Indeed, imposing such penalties in all circumstances could serve as a disincentive for property owners to report the discovery of such unknown tanks to the Department.

However, when unknown tanks are discovered, the owner must comply with all applicable regulatory requirements including but not limited to those concerning registration, testing, inventory monitoring records and tank closure.

Respondent Raphy Benaim was involved with the site since at least the early 1970's and either he or an entity under his control operated a gasoline station at the site for a number of years. Subsequently, Raphy Benaim became one of the owners of the site. The Benaim respondents argue that, during the period of their ownership of the site, they never stored petroleum on the property or used the tanks. The record before me is insufficient for me to conclude that Raphy Benaim should have known about this second set of tanks. Rather, it appears that the second set of tanks was only discovered after onsite contamination was detected at the site in early January 2002. Once the second set of tanks was discovered, however, the Benaim respondents ignored notices from Department staff relating to the second set of tanks and, once respondents did respond to the Department, they sought to place liability for the violations solely on their tenant.

The exact date when the second set of tanks were found following the discovery of the onsite contamination in 2002, and how much time elapsed between their discovery and their removal in May of 2002, is not clear based on this record. It appears that once the tanks were discovered, the decision was made to remove them and no reason would have existed to conduct a tightness test of the tanks at that time.

Once the tanks were discovered, however, the Benaim respondents were required to register the tanks with the Department, and this they failed to do (see 6 NYCRR 612.2). Furthermore, the Benaim respondents were also required to maintain inventory tank records on these tanks until the tanks were removed (see 6 NYCRR 613.4[a]). In that regard, determining at the outset if any inventory remained in the tanks would have provided information on the potential risk of releases to the environment, and the need for pumping out or otherwise removing contents in the tanks.

Section 71-1929 of the ECL establishes the maximum civil penalty for the violation of the registration and inventory monitoring requirements for underground petroleum bulk storage tanks. On May 21, 2003, the Department issued enforcement guidance entitled DEE-22, “Petroleum Bulk Storage Inspection Enforcement Policy” (“Enforcement Policy”). The Enforcement Policy identifies suggested penalty ranges to be imposed through

orders on consent. However, the suggested penalty ranges in the Enforcement Policy do not apply to the resolution of violations after a notice of hearing and complaint has been served. The Enforcement Policy states that "[t]he penalty amounts calculated with the aid of this [Enforcement Policy] in adjudicated cases must, on the average and consistent with consideration of fairness, be significantly higher than the penalty amounts which DEC accepts in consent orders which are entered into voluntarily by respondents."

Whether the maximum statutory penalty, or some lesser amount, is imposed in a Commissioner's order will reflect the particular circumstances of the matter. A number of factors, including but not limited to the extent of a respondent's cooperation with the Department, the duration of the violation, the number of tanks involved, the nature of the environmental harm and a respondent's prior record of compliance, can affect the amount of the penalty that is imposed. Based on my review of the circumstances of this matter, the penalty provisions in ECL 71-1929, the Enforcement Policy, and the Department's Civil Penalty Policy, I have determined to impose a penalty of $2,500 for failure to register the second set of tanks, and a penalty of $7,500 for failure to conduct inventory monitoring of these tanks following their discovery.

In addition, the Benaim respondents failed to notify the Department prior to the removal of the second set of tanks. As noted, this notification requirement is intended to afford Department staff the opportunity to observe the regulated activity (in this instance, tank closure). As a result, Department staff's ability to ensure the tanks were properly closed in accordance with all regulatory requirements and to determine whether any releases occurred during or before the 2002 tank removals was substantially impaired. As with the Benaim respondents' failure to notify the Department prior to the removal of the first set of tanks, I conclude that a penalty in the amount of $25,000 is warranted for their failure to notify the Department prior to the removal of the second set of tanks.

Accordingly, the total civil penalty to be imposed is $60,000. This includes $50,000 for the Benaim respondents' failure to notify the Department of the removal of both sets of tanks, $2,500 for their failure to register the second set of tanks, and $7,500 for their failure to undertake inventory monitoring. Although this penalty is less than the statutory maximum, and less than the penalty requested by Department staff or recommended in the Hearing Report, it is substantial and should serve as a proper deterrent.

NOW, THEREFORE, having considered this matter, it is **ORDERED** that:

I. Department staff's motion for order without hearing pursuant to 6 NYCRR 622.12 is granted in part.

II. With respect to the first set of tanks, respondents Raphy Benaim and Tovit Benaim failed to:

(a) register the subject petroleum bulk storage facilities within 30 days of acquiring ownership of the facility, in violation of 6 NYCRR 612.2(b);

(b) conduct tightness tests and report the results of such tests to the Department, in violation of 6 NYCRR 613.5(a)(1) and (4);

(c) monitor inventory, in violation of 6 NYCRR 613.4(a); and

(d) provide 30 days advance notice of the closure of the facility, in violation of 6 NYCRR 612.2(d) and 613.9(c).

III. With respect to the second set of tanks, respondents Raphy Benaim and Tovit Benaim failed to:

(a) register the subject petroleum bulk storage facility in violation of 6 NYCRR 612.2;

(b) conduct tightness tests and report the results of such tests to the Department, in violation of 6 NYCRR 613.5(a)(1) and (4);

(c) monitor inventory, in violation of 6 NYCRR 613.4(a); and

(b) provide 30 days advance notice of the closure of the facility, in violation of 6 NYCRR 612.2(d) and 613.9(c).

IV. Respondents Raphy Benaim and Tovit Benaim are jointly and severally assessed a total civil penalty of sixty thousand dollars ($60,000) for the violation relating to notice set forth in paragraph II and for the violations relating to tank registration, inventory monitoring and notice set forth in paragraph III above. The civil penalty shall be due and payable within thirty (30) days after the service of this order upon respondents. Payment of the penalty shall be by cashier's check, certified check or money order payable to the order of the "New

York State Department of Environmental Conservation" and mailed (by certified mail, return receipt requested or by overnight delivery) or hand-delivered to: Regional Director, New York State Department of Environmental Conservation, Region 2, One Hunter's Point Plaza, 47-40 21st Street, Long Island City, New York 11101-5407.

V. All communications between respondents and Department staff concerning this order shall be made to the Regional Director, New York State Department of Environmental Conservation, Region 2, 47-40 21st Street, Long Island City, New York 11101-5407.

VI. The provisions, terms, and conditions of this order shall bind respondents, their successors and assigns, in any and all capacities.

For the New York State Department of Environmental Conservation

/s/

By: _____

Louis A. Alexander
Assistant Commissioner

Dated: January 25, 2008
Albany, New York

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STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation of
Article 17 of the Environmental Conservation
Law of the State of New York and Title 6 of the Official
Compilation of Codes, Rules and Regulations of the State
of New York (NYCRR), by:

HEARING REPORT
DEC Case No.R2-20050107-17

RAPHY BENAIM, TOVIT BENAIM AND
R.B. 175 CORP.,

Respondents

Procedural Background

By motion dated April 15, 2005 the New York State Department of Environmental Conservation (Department, DEC) moved for an order without hearing against RAPHY BENAIM, TOVIT BENAIM and R.B. 175 CORP., (respondents) pursuant to Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) Part 622. The Department alleged that respondents violated New York State's petroleum bulk storage regulations. The respondents own property in Queens, New York that contained 2 sets of underground storage tanks (UST) for petroleum bulk storage (PBS). The first set had eleven tanks and the second set had seven tanks and both sets of tanks have been removed from the property since the violations occurred.

The tanks at issue were not registered with the Department nor tested and daily inventory logs were not maintained for the tanks. The motion was granted with respect to four of the seven causes of action alleged by Department Staff. Department Staff withdrew the remaining causes of action and requested to move forward with the penalty portion of the motion.

Department Position

Department Staff's complaint had seven causes of action and the motion was granted with respect to the first, third, and fourth causes of action and the second cause of action was granted in part. The first cause of action, failure to register a PBS facility, has two counts, one for each of the two sets of tanks at the facility. Each violation has a maximum penalty of $25,000 per day for each day the violation continued. The violation period for the first set of tanks was from August, 1988 when respondents purchased the property until November, 1989 when the tanks were removed. The violation period for

the second set of tanks was from 1988 until May, 2002 when the second set of tanks was removed. Based upon the length of time that the violations continued for both sets of tanks, Department Staff calculates the maximum penalty to be One hundred and thirty-six million, four hundred thousand dollars, $136,400,000.00. Department Staff requested 0.1% of that, One hundred and thirty-six thousand four hundred dollars, $136,400.00.

Department Staff requested a penalty of $25,000 for each of four violations alleged in the second cause of action. The Ruling granted the motion with respect to two of the four violations, failure to notify the Department of substantial modifications to USTs. Therefore, Department's Staff's requested penalty for those violations is $50,000.00.

Department Staff's third cause of action alleged that respondents failed to test both sets of USTs in violation of section 6 NYCRR 613.5(a)(1)-(3); and send in reports to the Department pursuant to section 613.5(a)(4). Each of those violations carries a penalty of $25,000.00[1] for each day the violation continued. Department Staff again requested 0.1% of the maximum penalty, $136,400.00.

The final cause of action granted was the fourth cause of action regarding inventory monitoring rules for PBS tanks. Daily inventory records are to be kept to monitor for leaks. Respondents did not maintain such records for either set of tanks. The maximum penalty for these violations is the same as that for the first and third causes of action, $136,400,000.00 and again Department Staff requested 0.1%, $136,400.00.

The Department has identified the maximum penalty allowed for each violation and requested a penalty that is significantly less than the maximum of $409,250,000.00. The total requested penalty is $459,200.00.

Respondents' Position

Respondents want the Department to recognize a lease agreement with its tenants which places responsibility for clean up and any penalties on that tenant. No legal authority was provided to support that argument. Respondents also argue they had no knowledge of the second set of tanks and they removed the first set within a year of acquiring the property. They claim that they never stored petroleum on the property and never used the tanks during their ownership of the site. Respondents argue that they could not test and maintain records for tanks that they were not aware of with respect to the second set

[1]Environmental Conservation Law §71-1929 was amended to increase the daily penalty amount of $37,500.00 after the date that these violations ended.

of tanks. They were not involved in the closure of the second set of tanks, their tenant handled that. The first set of tanks were removed at their direction and they believed that the contractor had the knowledge and experience to remove such tanks in the manner prescribed by the regulations.

Discussion

The Department has a Civil Penalty Policy[2] (Policy). It serves as guidance in calculating a penalty in an enforcement case. The policy states that "the penalty should equal the gravity component, plus the benefit component." The benefit component is defined as the economic benefit that results from a failure to comply with the law. The gravity component is to be reflective of the seriousness of the violation.

The Department is responsible for the regulatory oversight of the PBS industry pursuant to Title 10 of Article 17 of the ECL. The notification requirements are the cornerstones of the petroleum bulk storage regulatory scheme. In addressing the Civil Penalty Policy, Department Staff examined the seriousness of the violation and noted that the length of time the violation continued increased the risk of harm to natural resources. The respondents by all accounts, are familiar with the petroleum bulk storage business. They have owned this property for a long period of time and own other properties that have USTs. There is no legal authority cited by respondents to support their argument that they bear no responsibility for these violations because the facility was leased.

The ongoing violations, in particular the failure to register the facility and submit testing reports, prevented the Department from fulfilling its duty of overseeing this PBS facility. The violations continued for more than one year with respect to the first set of tanks and four years for the second set of tanks. Respondents avoided a great deal of expense by not complying with the applicable regulations. Department Staff also stated that respondents ignored numerous notices from them. Two notices were mailed to the respondents when Department Staff first became aware of the violations at the site. After no response was received by the Department, a Department environmental conservation officer delivered notices. Again, the notices went unanswered and a Notice of Violation was mailed several months later, by certified mail to the respondents and their counsel before they contacted the Department. According to Department Staff, even after contact was made, the respondents refused to discuss entering into any settlement or agreeing to a stipulated order.

Department Staff has further supported its penalty request by

[2]NYS Dept. of Environmental Conservation Civil Penalty Policy, June 20, 1990.

noting that a significant penalty amount may serve as a deterrent to the respondents who own other PBS facilities in New York State. The penalties requested for the violations established in the first, third and fourth causes of action have been supported properly. The violations in the second cause of action do not necessarily warrant a penalty award. The second cause of action established that the respondents failed to notify the Department of substantial modifications to the facility. In this case, the substantial modification was the removal of the tanks. While the removal does meet the definition of substantial modification, the only modification done was to remove the tanks. A penalty does not seem warranted based on those facts and in light of the penalties being recommended for the other violations that have been established.

Findings

I agree with Staff that given the serious nature of the violations, and the respondents refusal to acknowledge the violations and work with the Department to correct them, the penalty requested is justified as detailed above.

Recommendation

I recommend that the Commissioner grant Department Staff's request for penalties in the amount of $409,200.00.

/s/

Molly T. McBride
Administrative Law Judge

DATED: November 27, 2006
Albany, New York

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