STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17 of the New York State Environmental Conservation Law (ECL), Article 12 of the New York State Navigation Law, and Titles 6 and 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR),

ORDER[1]

DEC Case Nos.
R2-20150203-52
R2-20150429-268

- by -

CAROLEI REALTY L.L.C.,

Respondent.

Procedural Background

This administrative enforcement proceeding concerns allegations that respondent Carolei Realty L.L.C. (respondent) violated ECL article 17, 6 NYCRR part 612, Navigation Law article 12, and 17 NYCRR part 32 at respondent's petroleum bulk storage (PBS) facility located at 2561-2585 Boston Road (also known as 800-816 Allerton Avenue), Bronx, New York (site).

Staff of the New York State Department of Environmental Conservation (DEC or Department) commenced this enforcement proceeding by serving on respondent, by certified mail return receipt requested, the following documents: (i) notice of motion for order without hearing, dated October 30, 2015; (ii) affirmation of John K. Urda, Esq. dated October 30, 2015 (Urda Affirmation); (iii) affidavit of Andre Obligado, sworn to October 30, 2015 (Obligado Affidavit); and (iv) affidavit of Brian Falvey, sworn to October 30, 2015. Respondent received the certified mail on November 2, 2015.

Department staff alleges that respondent violated:

[1] The order is being reissued to correct the case numbers.

- Navigation Law § 173, by discharging petroleum at the site (first cause of action);
- Navigation Law § 176 and 17 NYCRR 32.5, by failing to immediately clean up the spill at the site (second cause of action);
- Stipulation R2-20120809-488, effective August 14, 2012 (2012 Stipulation), by failing to submit a remedial action work plan (RAWP) to the Department (third cause of action);
- ECL 17-1009(2) and 6 NYCRR 612.2(a)(1), by failing to register the installation date, tank spill prevention, pipe secondary containment and pipe leak detection for the waste oil tank (fourth cause of action);
- ECL 17-1009(2) and 6 NYCRR 612.2(a)(2), by failing to renew the registration of the waste oil tank (fifth cause of action); and
- Order on Consent, PBS No. 2-605939SWO, dated May 2, 2008, by failing to renew the facility registration (sixth cause of action).

In its motion for order without hearing, Department staff requests that I: (i) hold that respondent committed the alleged violations; (ii) assess a civil penalty of $117,500; and (iii) direct respondent to clean up and remove the subject contamination from the spill at the site under a Department-approved work plan.

Respondent did not file or serve a response to staff's motion papers. Accordingly, Department staff's motion is an unopposed motion for order without hearing.

The matter was assigned to Administrative Law Judge (ALJ) Michael S. Caruso, who ruled on staff's motion, making findings of fact and conclusions of law. (See Matter of Carolei Realty L.L.C., Ruling of the ALJ [ALJ Ruling], May 20, 2016). The ALJ granted staff's motion on the first four causes of action, and denied staff's motion on the fifth and sixth causes of action (see ALJ Ruling at 18-19). As to staff's request for an order (i) imposing a civil penalty of $117,500, and (ii) directing respondent to clean up and remove the contamination at the site in accordance with a Department-approved work plan, the ALJ reserved until a hearing could be held with respect to the fifth and sixth causes of action (see ALJ Ruling at 18-19).

The ALJ advised the parties that, in the event Department staff elected not to pursue the fifth and sixth causes of

action, the ALJ would issue a summary report with respect to the requested penalties and relief, and a hearing would not be held.

By letter dated May 24, 2016, John K. Urda, Assistant Regional Attorney, withdrew staff's fifth and sixth causes of action, and requested that a summary report be prepared.

The ALJ has prepared the attached summary report (Summary Report), in which he recommends that I:

- grant staff's motion for an order without hearing;
- hold that respondent violated Navigation Law § 173, Navigation Law § 176 and 17 NYCRR 32.5, the 2012 Stipulation, and ECL 17-1009(2);
- assess a civil penalty of $83,750 against respondent;
- direct respondent to submit the penalty payment within thirty (30) days of service of the order on respondent;
- direct respondent to submit a RAWP to the Department within thirty (30) days of service of the order on respondent; and
- direct respondent to clean up and remove the contamination from spill DEC Spill No. 9902856 pursuant to a Department-approved work plan.

I adopt the ALJ's findings of fact, conclusions of law and recommendations as set forth in the ALJ Ruling and summary report, subject to my comments below.

Factual Background

As set forth in the ALJ's findings of fact, in 1979, the site was transferred to several individuals, including John Ciardullo, who were doing business as "Carolei Realty Partnership" (see ALJ Ruling at 7, Finding of Fact No. 4). Carolei Realty Partnership transferred the property to respondent Carolei Realty L.L.C. on November 1, 2013 (see id. at 7, Finding of Fact No. 5; see also id. at 13, Finding of Fact No. 41).

In 1999, a contractor hired by Carolei Realty Partnership removed five underground petroleum tanks from the site, and reported a spill to the Department (DEC Spill No. 9902856)(see ALJ Ruling at 7-8, Finding of Fact No. 7). That spill was remediated and Department staff issued a spill closure letter that included an express reservation with respect to unforeseen or future environmental issues related or unrelated to the source of the contamination at the site (see id. at 8, Finding of Fact No. 10).

An off-site spill investigation in 2011 revealed a spill at the site, including the presence of free phase and dissolved phase gasoline in groundwater (see id. at 8-9, Findings of Fact Nos. 13-14). Although Department staff notified then-property owner Carolei Realty Partnership, and respondent Carolei Realty L.L.C., that contamination had been discovered at the site, and directed that an investigation of the contamination be performed, staff's directive was not complied with (see id. at 9, Findings of Fact Nos. 17-19; Obligado Affidavit ¶ 13 & Exhibit F).

Department staff reopened DEC Spill No. 9902856 on January 30, 2012 (see id. at 9, Finding of Fact No. 18; Obligado Affidavit ¶ 15 & Exhibit G). After Department staff conducted a site visit and advised respondent that the Department would perform the investigation and remediation if respondent did not sign a stipulation with the Department, John Ciardullo executed the 2012 Stipulation as a member of, and on behalf of, respondent Carolei Realty L.L.C. (see ALJ Ruling at 10, Findings of Fact Nos. 22-23).

Although respondent's contractor performed an investigation and a supplemental investigation and concluded that respondent's site was not the source of off-site contamination, Department staff disagreed. Department staff directed respondent to comply with the 2012 Stipulation by submitting a RAWP to address the on-site and off-site contamination (see ALJ Ruling at 10-11, Findings of Fact Nos. 24-29). Respondent has not submitted a RAWP as required by the 2012 Stipulation, and has not remediated DEC Spill No. 9902856 at the site (see id. at 9-12, Findings of Fact Nos. 18-34; see also id. at 16-17).

In addition to the five petroleum tanks that were closed and removed in 1999, the site contained a 550-gallon waste oil tank, registered as PBS No. 2-605939 (see id. at 12, Findings of Fact Nos. 36-37). On November 10, 2014, Department staff sent a notice of violation (NOV) to respondent, advising respondent that the waste oil tank was not registered, that the prior registration had expired in 2006, and that the tank and piping must be tightness tested within thirty days of the date of the NOV (see id. at 13, Finding of Fact No. 42). Respondent thereafter closed the tank in place, and submitted a closure report and an application to register the tank as closed (see id. at 13, Findings of Fact Nos. 43-45).

Discussion

Liability

I agree with the ALJ's conclusion that Department staff has made a prima facie showing that it is entitled to judgment as a matter of law on the first, second, third and fourth causes of action. Department staff's proof establishes that respondent, as owner of the property and as signatory of the 2012 Stipulation prior to its ownership of the property, is liable for the contamination at the site, for failing to submit a RAWP and for failing to remediate the site (see ALJ Ruling at 15-17). In addition, staff has established as a matter of law that respondent did not register the waste oil tank within thirty days of becoming owner of the site on November 1, 2013, in violation of ECL 17-1009(2) (see id. at 17-18).

Civil Penalty

In its motion for order without hearing, Department staff requested a specific penalty for each cause of action (see Urda Affirmation at 9-11, ¶¶ 44, 47, 50, 53, 56 and 59). In support of its penalty requests, Department staff discussed its extensive efforts to obtain compliance and respondent's repeated failures and refusals to comply, and has referred to the relevant statutes and Department enforcement and penalty policies (see id. at 11-14, ¶¶ 60-70).

As the ALJ calculated, the maximum possible penalties for the violations would exceed $67 million (see e.g. Summary Report at 4-5 [maximum penalty for the two Navigation Law violations would exceed $36 million; maximum penalty for the violation of the 2012 Stipulation would exceed $11 million; and maximum penalty failing to register the waste oil tank would exceed $20 million]).

Taking into account staff's withdrawal of two of the causes of action, the penalty would be reduced from one hundred seventeen thousand and five hundred dollars ($177,500) to eighty-three thousand seven hundred fifty dollars ($83,750). I agree with the ALJ that a civil penalty totaling eighty-three thousand seven hundred fifty dollars ($83,750) is authorized and appropriate.

Remedial Relief

Department staff seeks an order directing respondent to clean up and remove the contamination at the site pursuant to a Department-approved work plan (see Urda Affirmation at 14, Wherefore Clause ¶ 3). Respondent agreed in the 2012 Stipulation to clean up and remove the contamination at the site "by taking the steps and according to the conditions set forth in the Corrective Action Plan" attached to the Stipulation (see Obligado Affidavit, Exhibit I [par 2]). The Corrective Action Plan, among other things, sets forth requirements for a RAWP. The RAWP is to detail the work proposed to fully remediate the contamination.

I direct respondent to submit to the Department, within thirty (30) days of service of this order on respondent, an approvable RAWP that includes a schedule for implementation of the plan and completion of the remediation. "Approvable" shall mean that which can be approved by the Department with only minimal revision. I encourage respondent to contact Department staff to discuss the requirements for the RAWP, including the implementation schedule and what documentation that Department staff may require with respect to the remediation activities.

Remediation of the site is to be completed within one hundred twenty (120) days of approval of the RAWP by Department staff. Department staff may modify timeframes contained in the RAWP implementation schedule, upon good cause shown by respondent.

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

I. Department staff's motion for order without hearing pursuant to 6 NYCRR 622.12 is granted with respect to the first, second, third and fourth causes of action.

II. Respondent Carolei Realty L.L.C. is adjudged to have violated:

A. Navigation Law § 173, by discharging petroleum at the site;

B. Navigation Law § 176 and 17 NYCRR 32.5, by failing to clean up the petroleum spill at the site relating to DEC Spill No. 9902856;

C. Stipulation No. R2-20120809-488, by failing to submit a remedial action work plan to the Department; and

D. ECL 17-1009(2), by failing to register the facility within thirty days of the transfer of ownership of the facility to respondent.

III. Respondent Carolei Realty L.L.C. is assessed a civil penalty of eighty-three thousand seven hundred fifty dollars ($83,750). Within thirty (30) days of service of this order upon respondent Carolei Realty L.L.C., respondent shall pay the civil penalty in the amount of eighty-three thousand seven hundred fifty dollars ($83,750) by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation.

IV. Respondent Carolei Realty L.L.C. is directed to clean up and remove the contamination from DEC Spill No. 9902856 pursuant to a Department approved work plan. Within thirty (30) days of service of this order upon respondent Carolei Realty L.L.C., respondent shall submit a remedial action work plan to the Department. Respondent Carolei Realty L.L.C. shall complete the remediation under the plan within one hundred twenty (120) days of approval of the remedial action work plan by Department staff. Department staff may modify the timeframes contained in the remedial action work plan implementation schedule, upon good cause shown by respondent.

V. Respondent Carolei Realty L.L.C. shall submit the penalty payment and all other submissions to the following:

Karen Mintzer, Esq.[2]
Regional Attorney
NYSDEC Region 2
47-40 21st Street
Long Island City, New York 11101-5407

[2] Assistant Regional Attorney John K. Urda, Esq. who represented Department staff in this proceeding is now with DEC Region 3. In light of the foregoing, DEC Region 2 Regional Attorney Karen Mintzer is now serving as the Department contact on this matter.

VI. Any questions or other correspondence regarding this order shall also be addressed to Karen Mintzer, Esq. at the address referenced in paragraph V of this order.

VII. The provisions, terms and conditions of this Order shall bind respondent Carolei Realty L.L.C. and its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Basil Seggos
Commissioner

Dated: October 5, 2017
Albany, New York

To: (Via Certified Mail)

Carolei Realty LLC
c/o John Ciardullo
156 Valentine Street
Yonkers, New York 10704

(Via First Class Mail)

Karen Mintzer, Esq.
Regional Attorney
NYSDEC Region 2
47-40 21st Street
Long Island City, New York 11101-5407

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17 of the New York State Environmental Conservation Law (ECL), Article 12 of the New York State Navigation Law, and Titles 6 and 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR),

- by -

CAROLEI REALTY L.L.C.,

Respondent.

SUMMARY REPORT ON MOTION FOR ORDER WITHOUT HEARING

DEC Case Nos. R2-20150202-52 and R2-20150409-231

Appearances of Counsel:

-- Thomas S. Berkman, Deputy Commissioner and General Counsel (John K. Urda, Assistant Regional Attorney, of counsel), for staff of the Department of Environmental Conservation

-- No appearance for respondent

Proceedings

By notice of motion for order without hearing dated October 30, 2015, staff of the New York State Department of Environmental Conservation (DEC or Department) commenced this enforcement proceeding against respondent Carolei Realty L.L.C. (respondent) for alleged violations of ECL article 17, 6 NYCRR part 612, Navigation Law article 12, and 17 NYCRR part 32. On October 30, 2015, Department staff served its notice of motion, supporting statements and exhibits on the respondent by certified mail return receipt requested.

Respondent received the certified mail on November 2, 2015. The notice of motion instructed respondent that a written response must be filed within twenty days of respondent’s

receipt of the motion. The respondent has not responded to the motion.

By letter dated December 9, 2015, Chief Administrative Law Judge James T. McClymonds advised Department staff and the respondent that the matter had been assigned to me. By Ruling dated May 20, 2016, I granted Department staff's motion in part. (See Matter of Carolei Realty L.L.C., Ruling of the ALJ, May 20, 2016 [Ruling] at 18-19.)

The Ruling granted staff's motion for order without hearing on the issue of liability against Carolei Realty L.L.C. on the following violations:

a. Navigation Law § 173 for discharging petroleum at the site (first cause of action);
b. Navigation Law § 176 and 17 NYCRR 32.5 for failing to clean up the petroleum spill (second cause of action);
c. The Stipulation executed by respondent on July 30, 2012, for failing to submit a remedial action work plan to the Department (third cause of action); and
d. ECL 17-1009(2) for failing to re-register the facility within thirty days of the transfer of ownership of the facility to respondent (fourth cause of action).

(See Ruling at 18-19.)

I denied the motion for order without hearing on Department staff's fifth and sixth causes of action and reserved ruling on the civil penalty and relief requested in Department staff's motion for order without hearing until a hearing was held on the remaining causes of action. (See id. at 19)

I advised the parties in the event Department staff elected not to pursue the remaining causes of action, a summary report would be issued with respect to the requested penalties and relief. My cover letter also advised the parties that, should staff withdraw its remaining causes of action, a hearing would not be held.

By letter dated May 24, 2016, John K. Urda, Assistant Regional Attorney, advised the undersigned and respondent that Department staff withdraws its fifth and sixth causes of action, and requested that a summary report be prepared. As the Ruling sets forth the undersigned's findings of fact and conclusions of law, such will not be repeated herein. Liability has already been established on the first four causes of action.

Accordingly, I turn to the penalties and relief requested by staff.

Penalty

Department staff seeks a combined penalty of $117,500 and an order directing respondent to clean up and remove the contamination from the spill under a Department approved work plan. Staff requests the following penalty for each cause of action:

A. For discharging petroleum in violation of Navigation Law § 173, $25,000 (first cause of action);
B. For failing to clean up the discharge of petroleum in violation of Navigation Law § 176 and 17 NYCRR 32.5, $25,000 (second cause of action);
C. For failing to submit a remedial action work plan in violation of the Stipulation, $18,750 (third cause of action); and
D. For failing to properly register a PBS facility in violation of ECL 17-1009(2), $15,000 (fourth cause of action).[1]

Department staff bases the requested penalty for the Navigation Law violations on the statutory maximum of $25,000 allowed by Navigation Law § 192 for a single day of violation, and seeks a $25,000 civil penalty for each of the first two causes of action. (See Affirmation of John K. Urda in Support of Motion for an Order Without a Hearing dated October 30, 2015 [Urda Affirmation], at ¶¶ 44, 47 and 60). Staff further asserts that the penalty requested on the Navigation Law violations and on the violation of the Stipulation is consistent with DEE-1: Civil Penalty Policy (June 20, 1990) and notes respondent's repeated refusal to sign the Stipulation and once signed, respondent's failure to comply with the Stipulation. The purpose of the Navigation Law and the stipulations authorized by DEE-18: Spill Site Remediation Under Departmental Order Enforcement Policy (December 18, 1995) is to provide for prompt remediation of petroleum spills and reduce the need for the State to address the spills. (See generally id. at ¶¶ 60-70)

To date, respondent has avoided the cost of compliance. Staff also notes that the spill is in a heavily populated area with nearby sensitive receptors including a daycare center.

[1] Department staff requested a $15,000 penalty on the fifth cause of action, and a $18,750 penalty on the sixth cause of action as part of staff's total combined penalty of $117,500.

(See Urda Affirmation at ¶ 69; Affidavit of Andre Obligado [Obligado Affidavit], sworn to October 30, 2015 at ¶ 40.)

For the purpose of determining a maximum statutory penalty for the violation of Navigation Law §§ 173 and 176 and 17 NYCRR 32.5, I will use the number of days between the date respondent took ownership of the site, November 1, 2013 to the date of staff's motion, October 30, 2015 or 729 days.[2] Respondent did not violate the statute until respondent became the owner of the site in 2013. (See Matter of Raphy Benaim, Tovit Benaim and R.B. 175 Corp., Order of the Commissioner, January 27, 2014, at 5.) The maximum statutory penalty on each of the first two causes of action would be $18,225,000. I conclude that staff's requested penalty of $25,000 on the first and second causes of action is supported and appropriate.

Regarding staff's third cause of action for violation of the stipulation, the stipulation states that it "is equivalent to an order pursuant to ECL §17-0303 and a directive pursuant to NL §176 and is enforceable as such." (See Obligado Affidavit, Exhibit I at ¶ 5.) Therefore, respondent's violation of the stipulation is also a violation of these statutory provisions. (See Matter of Raphy Benaim, Tovit Benaim and R.B. 175 Corp., supra at 4.) Accordingly, I apply the provisions of ECL 71-1929 to determine the appropriate penalty. ECL 71-1929 provides a maximum penalty of up to $37,500 per day of violation for any person who violates any of the provisions of, or fails to perform any duty imposed by ECL article 17 titles 1 through 11 and title 19, or any orders or determinations of the commissioner.

To determine a maximum statutory penalty for violation of the Stipulation, I use the date that the remedial action work plan (RAWP) was due, December 31, 2014[3] to the date of the motion, October 30, 2015 or 304 days. The maximum statutory penalty on the third cause of action would be $11,400,000. Applying the policies and aggravating factors discussed above, I conclude Department staff's requested penalty of $18,750 on the third cause of action is supported and appropriate.

[2] Although the stipulation signed by respondent was effective August 14, 2012, respondent did not admit liability to the violations. (See Obligado Affidavit, Exhibit I at ¶ 4.) As noted in the Ruling, respondent, as a subsequent purchaser with constructive knowledge, if not actual knowledge, of the site's previous use as a gas station and petroleum spill history, is liable as a discharger. (See Ruling at 15.)

[3] The date of the final extension of time to submit the RAWP (see Obligado Affidavit at ¶ 39).

As noted in the Ruling, I conclude that respondent violated ECL 17-1009(2) by failing to re-register the facility within thirty days of the conveyance of the facility to respondent. (See Ruling at 17.) Respondent was required to register the facility by December 1, 2013 but respondent's application was not received and processed until May 20, 2015 (see Affidavit of Brian Falvey, sworn to October 30, 2015 at ¶ 16 and Exhibit D), a period of 536 days. Applying the penalty of $37,500 per day of violation authorized by ECL 17-1929, the maximum statutory penalty for 536 days would be $20,100,000.

Department staff requested a penalty of $15,000 based on staff's calculation that the penalty related back to June 4, 2001.[4] I rejected staff's position regarding the date the violation commenced. (See Ruling at 17-18.) Nonetheless, given the history of unregistered underground storage tanks and spills at this site and respondent's repeated lack of cooperation with the Department, I conclude that staff's requested penalty of $15,000 on the fourth cause of action is supported and appropriate.

Because staff withdrew its fifth and sixth causes of action, the total penalty requested is reduced by $33,750 ($15,000 and $18,750 requested on the fifth and sixth causes of action, respectively). The total penalty requested on the first four causes of action, $83,750, is supported on this record and appropriate.

Department staff also requests respondent be ordered to clean up and remove the contamination from spill number 9902856 pursuant to a Department approved work plan. The respondent agreed to clean up and remove the discharge of petroleum spill number 9902856 in 2012. (See Obligado Affidavit, Exhibit I at ¶ 2.) Despite many reminders from Department staff and this enforcement proceeding, respondent has not filed a RAWP or remediated the spill. I conclude that the Commissioner should direct respondent to submit the RAWP and remediate the spill as requested by staff.

[4] 5,262 days of violation.

RECOMMENDATIONS

Based upon the foregoing, I recommend that the Commissioner issue an order:

1. granting Department staff's motion for order without hearing pursuant to 6 NYCRR 622.12;

2. holding respondent Carolei Realty L.L.C. in violation of the following:

   a. Navigation Law § 173 for discharging petroleum at the site (First cause of action);
   b. Navigation Law § 176 and 17 NYCRR 32.5 for failing to clean up the petroleum spill (Second cause of action);
   c. The Stipulation for failing to submit a remedial action work plan to the Department (Third cause of action); and
   d. ECL 17-1009(2) for failing to re-register the facility within thirty days of the transfer of ownership of the facility to respondent (Fourth cause of action);

3. directing respondent Carolei Realty L.L.C. to pay a civil penalty of eighty-three thousand seven hundred fifty dollars ($83,750) for the above referenced violations within thirty (30) days of service of the Commissioner's order on respondent;

4. directing respondent Carolei Realty L.L.C. to submit a remedial action work plan to the Department within thirty (30) days of service of the Commissioner's order on respondent;

5. directing respondent Carolei Realty L.L.C. to clean up and remove the contamination from spill number 9902856 pursuant to a Department approved work plan;

6. directing respondent Carolei Realty L.L.C. to submit the penalty payment and all other submissions to the following:

   John K. Urda, Esq.
   Assistant Regional Attorney
   NYSDEC Region 2
   47-40 21st Street
   Long Island City, New York 11101-5407; and

7. directing such other and further relief as may be deemed just, proper and equitable under the circumstances.

/s/
Michael S. Caruso
Administrative Law Judge

Dated: June 23, 2016
Albany, New York