STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 12 of the New York State Navigation Law and Part 32 of Title 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York (17 NYCRR),

- by -

CHEROKEE PARTNERS,

Respondent.

ORDER

DEC File No.
R2-20090512-306

This administrative enforcement proceeding concerns the alleged discharge from a 5,000-gallon petroleum bulk storage tank at an apartment building in the Bronx, New York, and the failure to contain the discharge.

Cherokee Partners (respondent) owns property at 1553-1555 Bryant Avenue, Bronx, New York, that includes a five-story, multi-family apartment building (site). Located at the site is a 5,000-gallon petroleum bulk storage tank that respondent owns and which contains fuel oil.

In this administrative enforcement proceeding, staff of the New York State Department of Environmental Conservation (Department or DEC) alleges that an illegal discharge of approximately 3,000 gallons of petroleum from the tank occurred on February 20, 2009, and that respondent has failed to remediate the discharge. The petroleum spilled into the basement of the apartment building, its foundation, a neighboring property, and the sewer. The discharge of petroleum was assigned DEC spill number 0812688.

Department staff commenced this proceeding against respondent Cherokee Partners by service of a motion for order without hearing, in lieu of complaint, dated October 7, 2010, by certified mail. Respondent received the motion on October 8, 2010.

In the motion, which serves as the complaint in this matter, staff alleges that respondent committed the following violations:

(1) illegally discharged petroleum at and from the site, in violation of Navigation Law § 173; and

(2) failed to immediately undertake containment of the petroleum discharge at the site, in violation of Navigation Law § 176 and 17 NYCRR 32.5. Staff asserted that respondent's violation of Navigation Law § 176 and 17 NYCRR 32.5 has extended for a period of 595 days.[1]

Respondent failed to file a reply to the motion. Respondent's time to serve a reply expired on October 28, 2010, and has not been extended.

The matter was assigned to Administrative Law Judge (ALJ) P. Nicholas Garlick, who prepared the attached summary report. I adopt the ALJ's report as my decision in this matter, subject to the following comments.

I concur with the ALJ's determination that Department staff is entitled to a finding of liability on the two causes of action alleged in its motion.

Department staff requested a civil penalty of two hundred ninety-seven thousand five hundred dollars ($297,500), as well as an order requiring respondent to fully investigate and remediate the discharge pursuant to a work plan prepared by respondent and approved by the Department.

In support of the requested civil penalty, staff noted the following:

(1) the petroleum bulk storage tank is located in a large apartment building in a residential area;

[1] Section 32.5 of 17 NYCRR states, in pertinent part, that "(a)[a]ny person responsible for causing a discharge which is prohibited by [Navigation Law § 173] shall take immediate steps to stop any continuation of the discharge and shall take all reasonable containment measures to the extent that he is capable of doing so [and](b) [t]he person responsible for causing a discharge which is prohibited by [Navigation Law § 173] shall also take those measures or actions necessary for the cleanup and removal of the discharge."

(2) respondent was given an opportunity to perform the necessary remedial work and failed to do so;

(3) the discharge remains uninvestigated and unremediated; and

(4) respondent was given an opportunity to resolve this matter and failed to do so.

The ALJ recommends that I impose the staff-requested penalty of $297,500. However, the ALJ proposes that the penalty request be modified, recommending that $100,000 of the $297,500 penalty be suspended, conditioned, among other things, on respondent's submission of a work plan and undertaking the necessary remediation.

Based on this record, a civil penalty of $297,500 is authorized and appropriate. In particular, respondent has failed over a period of 595 days to fully investigate and remediate the discharge. Respondent has also ignored the efforts of Department staff to resolve this matter.

However, I concur with the ALJ that a portion of the penalty should be suspended to facilitate the necessary remediation. Accordingly, I have determined to suspend one hundred thousand dollars ($100,000) of the civil penalty, conditioned upon:

(1) respondent's payment of the non-suspended portion ($197,500) of the penalty within thirty days of the service of this order upon it;

(2) respondent's timely submission to Department staff of an approvable work plan;

(3) respondent's completion of the investigation and remediation of the discharge in accordance with the Department-approved work plan; and

(4) respondent's compliance with the other terms and conditions of this order.

If respondent fails to meet any of these conditions, the suspended portion of the penalty shall become immediately due and payable.

Department staff advised respondent of various remedial activities that need to be undertaken (see, e.g., letters dated February 24, 2009 and May 7, 2009 from Ryan M. Piper, DEC Engineering Geologist 1, to respondent [Piper letters]). These include: a subsurface investigation to completely delineate the full extent of fuel oil contamination to soil and groundwater, both inside and outside the building; removal of all contaminated debris and soil and the collection of soil endpoint samples from the limit of the excavation; tightness testing of the fuel oil system, including fill and vent lines, at the site and submitting the results of that testing to the Department;[2] submission of a site plan to Department staff, together with a description of the cause of the discharge; and submission of any manifests or other documentation relating to the disposal of contaminated materials arising from the cleanup activity. Respondent failed to undertake these activities.

Based on this record, the work plan requirement and the remedial activities that Department staff is requesting, and which the ALJ has recommended, are authorized and appropriate. The remedial activities that were referenced in the Piper letters are to be included as components of respondent's work plan.

To provide appropriate milestones for the completion of the investigation and remediation activities, the work plan is to indicate the dates by which designated work plan requirements and tasks shall be met. I urge respondent, in its preparation of the work plan, to discuss it with Department staff prior to submitting the work plan to Department staff for review.

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

I. Pursuant to 6 NYCRR 622.12, Department staff's motion for order without hearing is granted.

[2] Department staff references, in its May 7, 2009 letter, tightness testing of the fuel oil system. Department records list the tank at the site as an aboveground tank in contact with soil (see Facility Information Report attached to staff's motion for order without hearing). Based on this record, a visual inspection of the tank's exterior surface may, in part, be sufficient to determine deficiencies or other impairment of the tank's integrity. Accordingly, I am directing that respondent inspect the petroleum bulk storage tank at the site for any leaks or other maintenance or structural deficiencies and report the results of that inspection to the Department. Based on the findings in that inspection, Department staff may direct that testing be performed of components of the fuel oil system, including fill and vent lines.

II. Respondent Cherokee Partners is adjudged to have violated (a) Navigation Law § 173 by illegally discharging petroleum at and from the site, and (b) Navigation Law § 176 and 17 NYCRR 32.5, by failing to immediately undertake to contain the illegal discharge or to take those measures necessary for the cleanup of the discharge that occurred at the apartment building at 1553-1555 Bryant Avenue, Bronx, New York.

III. Respondent Cherokee Partners is assessed a civil penalty in the amount of two hundred ninety-seven thousand five hundred dollars ($297,500), of which one hundred thousand dollars ($100,000) is suspended on the condition that respondent timely pays the non-suspended portion of the civil penalty, timely submits an approvable work plan to Department staff, investigates and remediates the petroleum discharge in accordance with the work plan as approved by the Department, and complies with the other conditions and terms of this order.

The non-suspended portion of the penalty (one hundred ninety-seven thousand five hundred dollars [$197,500]) is due and payable within thirty (30) days of service of this order upon respondent. Payment of the civil 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 delivered to the Department at the following address:

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

If respondent fails to comply with any of the terms and conditions of this order, including but not limited to the timely payment of the non-suspended portion of the civil penalty, the submission of an approvable work plan within thirty days of service of this order upon it, or the completion of the investigation and remediation work in accordance with the Department-approved work plan, the suspended portion of the penalty (that is, one hundred thousand dollars [$100,000]) shall immediately become due and payable and shall be submitted to Department staff in

the same form and to the same address as the non-suspended portion of the penalty.

IV. Within thirty (30) days of service of this order upon respondent, respondent shall submit to Department staff an approvable work plan that will provide for the delineation of the extent of the discharge, both on and off the site, and for its remediation. The work plan shall include, but not be limited to, the following:

(A) a subsurface investigation to completely delineate the full extent of fuel oil contamination to soil and groundwater, both inside and outside the apartment building;

(B) removal of all contaminated debris and soil and the collection of soil endpoint samples from the limit of the excavation;

(C) inspection of the petroleum bulk storage tank in the apartment building and its connecting fill and vent lines at the site for any leaks or other structural and maintenance deficiencies. Respondent shall submit the results of that inspection to the Department and, based on staff's review, respondent may be directed to conduct testing of the fill and vent lines, or other components of the fuel oil system;

(D) submission of a site plan to Department staff, together with a description of the cause of the discharge;

(E) submission of any manifests or other documentation relating to the disposal of contaminated materials from the cleanup activity; and

(F) a schedule of milestone dates for completion of the tasks set forth in the work plan.

Respondent shall, following Department staff's approval of the work plan, implement the approved work plan and timely complete all steps called for in the work plan.

V. All communications from respondent to the Department concerning this order shall be directed to John K. Urda, Esq., at the address set forth in paragraph III of this order.

VI. The provisions, terms, and conditions of this order shall bind respondent Cherokee Partners, 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
Acting Commissioner

Dated: March 2, 2011
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1550

In the Matter

-of-

the Alleged Violations of Article 12 of the Navigation Law and Part 32 of Title 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

-by-

CHEROKEE PARTNERS,

Respondent.

DEC No. R2-20090512-306

SUMMARY REPORT ON MOTION FOR ORDER WITHOUT HEARING

_____/s/_____
P. Nicholas Garlick
Administrative Law Judge

SUMMARY

This report addresses a motion for order without hearing brought by the Staff of the New York State Department of Environmental Conservation ("DEC Staff"), which is the administrative equivalent of a motion for summary judgment. In its motion, DEC Staff alleges two causes of action involving an unremediated spill of petroleum at an apartment building located at 1553-1555 Bryant Avenue, Bronx, New York (the "facility"). DEC Staff's motion was not opposed by Cherokee Partners ("respondent"). Based on the papers in the record, DEC Staff has met its burden of proof and demonstrated that the respondent is liable for both of the causes of action alleged. This report recommends the Commissioner issue an order finding liability, imposing a civil penalty of $297,500, of which $100,000 should be suspended upon the conditions that the respondent fully investigates and remediates the petroleum discharge pursuant to a DEC Staff approved work plan and timely pays the unsuspended portion of the civil penalty ($197,500).

PROCEEDINGS

By motion for order without hearing (in lieu of complaint) dated October 7, 2010, DEC Staff commenced this administrative enforcement action pursuant to 6 NYCRR 622.12. DEC Staff's papers include: (1) a notice of motion; (2) the affirmation of DEC Staff attorney John K. Urda, Esq.; (3) a copy of the bargain and sale deed for 1553-1555 Bryant Avenue, the apartment building housing the facility; (4) the respondent's Petroleum Bulk Storage Certificate for the facility and its Program Facility Information Report (PBS facility number 2-603980); (5) a copy of a NYSDEC Spill Report form (#0812688); (6) a copy of a February 24, 2009 letter from DEC Staff member Ryan M. Piper to the respondent; (7) a copy of a May 7, 2009 letter from DEC Staff member Ryan M. Piper to the respondent; (8) a copy of a April 1, 2010 letter from DEC Staff counsel John K. Urda, Esq. to the respondent; (9) a copy of a March 24, 2010 article from the *Village Voice* by Elizabeth Dwoskin entitled "New York's Ten Worst Landlords, Part 2"; and (10) the affidavit of DEC Staff member Ryan M. Piper. Also included with DEC Staff's papers are: (1) an affidavit of service by DEC Staff member Louise Munster stating the motion for order without hearing was mailed to the respondent by certified mail on October 7, 2010; (2) a United States Postal Service (USPS) receipt showing delivery to the respondent on October 8, 2010; and (3) a USPS track and confirm receipt showing delivery at 12:39 on October 8, 2010.

The matter was referred to DEC's Office of Hearings and Mediation Services (OHMS) by DEC Staff counsel Urda by letter dated January 24, 2011. According to Mr. Urda's letter, the respondent has neither opposed the motion nor communicated with DEC Staff regarding this action or the subject spill. The matter was assigned to me on February 4, 2011.

DISCUSSION

DEC Staff alleges two causes of action in its motion for order without hearing. Both these alleged violations involve a discharge of approximately 3,000 gallons of petroleum that occurred at the facility beginning on February 20, 2009. This discharge occurred due to a leak in the fill line connected to a 5,000 gallon fuel oil storage tank and a crack in this tank. DEC Staff was alerted to the spill by a contractor who was responding to the spill. According to the spill report, when DEC Staff member Piper arrived, the contractor was pumping the remaining petroleum from the tank. The report also states that the petroleum spilled into the basement of the apartment building, the foundation, a neighboring property, and the sewer. While at the facility, Mr. Piper discussed proper cleanup procedures with the contractor. Three days later, Mr. Piper again spoke to the contractor who informed him that the contractor was in the process of removing debris and breaking a containment wall in the area of the spill. On May 7, 2009, the contractor called Mr. Piper to inform him that the respondent had reconnected the leaking fill line and had refused to pay the contractor for the work completed. Due to the lack of payment, the contractor was not proceeding with the cleanup.

Mr. Piper reports in his affidavit that his letters to the respondent dated February 24, 2009 and May 7, 2009 were both ignored. In his affirmation, Mr. Urda states that the respondent also failed to respond to his letter of April 1, 2010 which enclosed a proposed consent order. In addition, the respondent has not responded to the instant motion.

Liability

The Commissioner set forth the standards to be used in evaluating a motion for order without hearing in Matter of Loccaparra (Decision and Order, June 16, 2003).

> Staff brings this motion for an order without hearing pursuant to 6 NYCRR 622.12. That provision is governed by the same principles that govern summary judgment pursuant to CPLR 3212. Section 622.12(d) provides that a contested motion for an order without hearing will be granted if, upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party.
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> The moving party on a summary judgment motion has the burden of establishing "his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd [b])."[3] The moving party carries this burden by submitting evidence sufficient to demonstrate the absence of any material issues of fact.[4] The affidavit may not consist of mere conclusory statements but must include specific evidence establishing a prima facie case with respect to each element of the cause of action that is the subject of the motion. Similarly, a party responding to a motion for summary judgment may not merely rely on conclusory statements and denials but must lay bare its proof.[5] The failure of a responding party to deny a fact alleged in the moving papers, constitutes an admission of the fact.[6]

(id. at 3-4); see also Matter of Alvin Hunt d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 7 n2 ("where a respondent fails to answer a motion for an order without hearing and Department staff … seeks… a determination on the merits of its motion for order without hearing, summary judgment principles are applied in analyzing the motion".

First Cause of Action. In its first cause of action, DEC Staff alleges that the respondent illegally discharged petroleum in

[3] Friends of Animals v Associated Fur Mfrs., Inc., 46 NY2d 1065, 1067 (1979).

[4] See Alvarez v Prospect Hospital, 68 NY2d 320, 324 (1986).

[5] See Hanson v Ontario Milk Producers Coop., Inc., 58 Misc 2d 138, 141-142 (Sup Ct, Oswego County 1968).

[6] See Kuehne & Nagel, Inc. v Baiden, 36 NY2d 539, 544 (1975).

violation of Navigation Law § 173 at the facility beginning on February 20, 2009 and that this violation continued through the date of the motion for order without hearing, October 7, 2010, for a total of 585 days. Navigation Law § 173(1) prohibits the discharge of petroleum. A landowner with control over activities at its property and reason to believe that petroleum is being used there is liable for discharges of petroleum at its property in violation of Navigation Law § 173 (see Matter of Huntington and Kildare, Inc., Order of the Commissioner, Dec. 22, 2009, adopting Hearing Report, at 9-10; State v Green, 96 NY2d 403, 406-408 [2001]).

The evidence attached to DEC Staff's motion, including the spill report and the affidavit of Mr. Piper, demonstrates that a spill of approximately 3,000 gallons did occur at the facility on February 20, 2009 and that the leaking fill line was reconnected as of May 7, 2009. The record also includes a deed for the property in the name of Cherokee Partners and a Petroleum Bulk Storage Certificate and Facility Information Report indicating that Cherokee Partners is the owner of the tank. DEC Staff was informed of the discharge by a contractor employed by Cherokee Partners to remedy the spill on February 20, 2009. Based on this evidence DEC Staff has proven that as the landowner with control over activities at the facility and knowledge of the spill, the respondent is liable for the discharge of petroleum in violation of Navigation Law § 173.

Second Cause of Action. In its second cause of action, DEC Staff alleges that by failing to immediately undertake containment of the spill, the respondent violated Navigation Law § 176 and 17 NYCRR 32.5 and that this violation continued through the date of the motion for order without hearing, October 7, 2010, for a total of 585 days. Navigation Law § 176 and 17 NYCRR 32.5 require any person discharging petroleum to immediately undertake to contain such discharge.

The evidence attached to DEC Staff's motion, including the spill report, the affidavit of Mr. Piper and the affirmation of Mr. Urda, demonstrate that the respondent failed to immediately undertake containment of the spill. Based on this evidence, DEC Staff has proven a violation of Navigation Law § 176 and 17 NYCRR 32.5.

Civil Penalty

In its motion, DEC Staff requests the Commissioner issue an order which includes a total payable civil penalty of $297,500 and directs the respondent to fully investigate and remediate the subject discharge pursuant to a DEC Staff approved work plan.

DEC Staff's requested penalty is arrived at through the following computation. DEC Staff notes that the maximum civil penalty authorized by Navigation Law § 192 for the violations is $25,000 per day for each violation. DEC Staff calculates the maximum civil penalty as $25,000 per day per violation multiplied by the duration of the violations, 595 days, and multiplied again by the two violations for a total maximum penalty of $29,750,000.

In his affirmation, DEC Staff counsel Urda states the amount requested is consistent with the Department's Civil Penalty Policy (DEE 1, issued June 20, 1990) and the Department's Petroleum Bulk Storage Inspection Enforcement Policy (DEE 22, issued May 21, 2003). Mr. Urda states that these policies are aimed at protecting the public health, welfare, and the lands and waters of the State of New York against discharges of petroleum.

DEC Staff identifies three aggravating factors in this case: (1) the fact that the facility is a large residential building in a residential area and the unremediated spill may be having adverse impacts on the health of nearby residents and the surrounding environment; (2) the respondent was given an opportunity to perform the necessary work without penalty and failed to do so, leaving the spill uninvestigated and unremediated; and (3) the respondent was given an opportunity to resolve this matter by Order on Consent and failed to do so.

In addition, in his affirmation Mr. Urda cites a March 24, 2010 *Village Voice* article, which named the respondent and its general partners Victor and Alan Fein as one of New York City's ten worst landlords, and information on the New York City Public Advocate's website which lists the building at issue here and the respondent's general partner, Alan Fein, at the very top of its "watchlist" of New York City's worst landlords.

Based on the evidence in the record, I recommend that the Commissioner include in his order a total civil penalty of $297,500. However, because the spill remains unremediated, I

recommend that the Commissioner suspend $100,000 of the civil penalty upon the condition that the respondent: (1) submit an approvable work plan to investigate and remediate the spill to DEC Staff within 30 days of service of the Commissioner's order upon the respondent; (2) timely complete all steps called for in the work plan after DEC Staff approves the same; and (3) timely pays the payable portion of the civil penalty, $197,500.

Corrective Action

In its motion, DEC Staff requests that the Commissioner direct the respondent to fully investigate and remediate the subject discharge pursuant to a Department-approved work plan. DEC Staff does not provide any greater detail regarding the timing or contents of the work plan. However, the letters sent to the respondent by DEC Staff member Piper and DEC Staff counsel Urda do provide greater detail of what is required, and based on this information, I recommend that the Commissioner include in his order language that directs the following corrective actions be undertaken by the respondent.

Within thirty (30) days of the service of the Commissioner's order upon respondent, respondent shall submit for approval to DEC Staff, an approvable work plan that fully investigates and remediates the spill. The work plan shall include: (1) a subsurface investigation to completely delineate the full extent of fuel oil contamination to soil and groundwater, both inside and outside the building; (2) the removal of all contaminated debris and soil and the collection of soil endpoint samples from the limit of the excavation; (3) tightness testing for the storage tank at the facility; and (4) complying with the reporting requirements set forth in Mr. Piper's February 24, 2010 and May 7, 2010 letters.

The respondent should also be required to timely implement all steps set forth in the work plan following approval of the plan by DEC Staff.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Cherokee Partners owns a regulated PBS facility (DEC #2-603980) at a residential apartment building located at 1553-1555 Bryant Avenue, Bronx, New York.

2. On February 20, 2009, a discharge of approximately 3,000 gallons of petroleum occurred at the facility that affected the basement, foundation, neighboring property and sewer (DEC Spill #0812688).

3. The discharge was not properly investigated or remediated.

RECOMMENDATION

I recommend that the Commissioner issue an Order in this matter that finds the respondent, Cherokee Partners, liable for the two causes of action alleged, as detailed above. I further recommend that the Commissioner impose a civil penalty of $297,500 of which $100,000 shall be suspended upon the condition that the respondent: (1) submit an approvable work plan to investigate and remediate the spill to DEC Staff within 30 days of service of the Commissioner’s order upon the respondent; (2) timely complete all steps called for in the work plan after DEC Staff approves the same; and (3) timely pays the payable portion of the civil penalty, $197,500.