STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 19 of the Environmental Conservation Law and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

ORDER

– by –

DEC Case No. R7-20070124-3

FULTON COGENERATION ASSOCIATES, L.P., AND LION CAPITAL MANAGEMENT, LLC d/b/a LION CAPITAL MANAGEMENT GROUP, LION CAPITAL GROUP AND LION CAPITAL MANAGEMENT,

Respondents.

Respondent Fulton Cogeneration Associates, L.P. ("FCA"), owns and operated an electricity generation facility located at 662 South 7th Street, Fulton, Oswego County, New York (the "facility"). The New York State Department of Environmental Conservation ("DEC" or "Department") issued Air Title V Facility Permit No. 7-3504-00023/00012 ("Title V permit") to the facility, with an effective date of July 23, 2001. The Title V permit, by its terms, carried an expiration date of July 23, 2006.

Department staff commenced this administrative enforcement proceeding against respondent FCA by service of a notice of hearing and complaint dated September 10, 2007. Department staff served a notice of hearing and amended complaint dated January 2, 2008 on FCA on January 2, 2008 ("January 2008 papers"). In addition to FCA, the January 2008 papers listed Lion Capital Management, LLC d/b/a Lion Capital Management Group, Lion Capital Group and Lion Capital Management (collectively, the "Lion Capital entities") as respondents.

Department staff alleges in its amended complaint that FCA and the Lion Capital entities violated the terms of the Title V permit by:

a. failing to timely submit, on or before January 30, 2006, a compliance certification for the period of January 1, 2005 through December 31, 2005, in accordance with the Title V permit (condition 25), in violation of 6 NYCRR 201-6.5(a) and 6 NYCRR 201-6.5(e);

b. failing to timely submit, on or before January 30, 2006, a monitoring report for the period of July 1, 2005 through December 31, 2005, in accordance with the Title V permit (condition 26), in violation of 6 NYCRR 201-6.5(a) and 6 NYCRR 201-6.5(c); and

c. failing to timely file three quarterly reports (for the periods: July 1, 2005 through September 30, 2005; October 1, 2005 through December 31, 2005; and January 1, 2006 through March 31, 2006), in accordance with the Title V permit, in violation of 6 NYCRR 201-6.5(a) and 6 NYCRR 201-6.5(c).

In addition, Department staff alleged that FCA and the Lion Capital entities failed to submit, on or before January 24, 2006, a Title V permit renewal application to the Department, in violation of 6 NYCRR 201-6.3.

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

This matter has a complicated procedural history which the ALJ has discussed in detail (see Hearing Report, at 1-5). By papers dated October 10, 2008, Department staff filed a motion for order without hearing on its amended complaint against respondent FCA. Respondent FCA cross-moved by papers dated November 3, 2008, requesting that the motion for order without hearing be denied and that a hearing be convened. By papers dated January 5, 2009, Department staff filed a second motion for order without hearing, listing FCA and the Lion Capital entities as respondents. The ALJ denied the motion dated January 5, 2009 as procedurally and substantively defective, and I concur. Accordingly, I affirm the ALJ's denial of the January 5, 2009 motion for order without hearing.

With respect to the October 10, 2008 motion, as discussed by the ALJ, Department staff has only demonstrated proof of service of its amended complaint with respect to FCA. Department staff has failed to demonstrate proof of service of any complaint against any of the Lion Capital entities in this proceeding. Accordingly this order only addresses issues relating to

liability and civil penalty with respect to respondent FCA.

By letter dated July 19, 2006 to Department staff (see Exhibit A to Defendant's Motion in Opposition to Plaintiff's Motion for Order Without Hearing dated March 3, 2008), FCA advised that the facility had not been in operation since August 21, 2005, and that no emissions had occurred from that date to the date of the letter. This statement was uncontested by Department staff. Furthermore, the Department's June 2008 inspection report of the facility, of which I take official notice pursuant to 6 NYCRR 622.11(a)(5), states that the facility has not operated since early to mid-2005.

The non-operating status of the facility does not, however, relieve respondent FCA from complying with the terms and provisions of its Title V permit, including but not limited to complying with the Title V permit reporting requirements. Nothing in this record indicates that FCA requested to be relieved of its Title V permit reporting obligations because of the facility's non-operating status. Although FCA finally submitted the overdue compliance certification, monitoring report and quarterly reports, these were not received by the Department until August 2006.

As to the renewal application, which was due in January 2006, FCA did not submit it until July 20, 2006, just days before the expiration of the Title V permit. I do not accept FCA's argument that the move of its offices to California and the resulting mailing-related problems excuse the late submission of its renewal application (see Letter dated July 19, 2006 from Hausmann Alain Banet, Ph.D., of FCA to Reginald Parker, P.E., DEC Region 7 Air Pollution Control Engineer). This does not relieve FCA of its compliance obligations.

Based on this record, I concur with the ALJ's recommendation that respondent FCA be held liable for its failure to timely submit a compliance certification, monitoring report, and quarterly reports in accordance with the provisions of its Title V permit, and for its failure to timely submit a Title V permit renewal application to the Department.

Department staff has cited to the following authorities and guidance in its calculation of the requested penalty: section 71-2103(1) of the Environmental Conservation Law; DEC's Civil Penalty Policy; and the United States Environmental Protection Agency's Office of Enforcement and Compliance Assurance Workbook, Appendix B – Clean Air Act Stationary Source Civil Penalty Policy, issued October 25, 1991, clarified January 17, 1992

("USEPA penalty policy"). Based on those authorities and guidances, Department staff calculated a recommended civil penalty of $151,000. As explained in the hearing report, the ALJ determined that the penalty should be lowered to $89,000.

This matter, however, presents unique circumstances and, in the interests of justice, I am further reducing the penalty. The facility has not been in operation since August 2005 and the record contains no evidence of any air emissions during the time period covered by some of the required submissions. The gravity of the offense, where a facility has not been in operation and has not been reactivated, is less than if the facility were operating. Furthermore, the compliance certification, monitoring report, and quarterly reports that are the basis for the first three causes of action (which reports and certification, for the most part, cover periods when the facility was inactive), have been received by the Department, albeit late. I note also that the DEC's Department Application Review and Tracking ("DART") system lists the facility's Title V permit as having been discontinued as of August 11, 2009. Accordingly, a lesser penalty than one where a facility is fully operating, or where a facility is inactive but subsequently reactivated, is warranted.

Based upon the foregoing, I conclude that the proposed civil penalty for each of staff's first three causes of action (relating to FCA's failure to timely submit a compliance certification, monitoring report, and quarterly reports for its Title V facility), should be reduced to $7,500 each, or $22,500. I concur with the ALJ's recommendation of a further penalty of $2,000 based on the size of the violator, for a total of $24,500.

With respect to the fourth cause of action (failure to timely file a Title V renewal application), Department staff correctly noted that FCA was required to submit its renewal application at least 180 days but not more than eighteen months prior to the date of the permit's expiration. FCA did not, however, submit its renewal application until July 20, 2006, three days prior to the date that the Title V permit was due to expire. Staff requested a civil penalty of $12,000 because of FCA's six months delay in filing its renewal application. In addition, Department staff stated that, because FCA filed its renewal application late, its Title V permit had expired and, accordingly, a further penalty of $15,000 should be imposed based on respondent's failure to obtain an operating permit (for a total penalty for the fourth cause of action of $27,000). The ALJ concurred.

However, FCA did file its renewal application once it became

aware of its omission, and the application was filed prior to the permit's expiration date for this non-operating facility. I have taken this into consideration, as well as the fact that this inactive facility has not subsequently been reactivated. Accordingly, I do not see a basis for imposing a $15,000 penalty on a failure to obtain an operating permit, and the papers do not allege that the facility was operating without a permit. I concur that a penalty for the late submission of the renewal application is appropriate, but am, in light of the factual circumstances here, adjusting the remaining recommended penalty for the fourth cause of action from $12,000 to $6,000.

Accordingly, I hereby impose a civil penalty of $30,500 ($7,500 for each of the first three causes of action, $6,000 for the fourth cause of action, and $2,000 relating to the size of the violator) on FCA. This penalty is authorized and appropriate for the violations identified herein.

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 dated October 10, 2008, for an order without hearing on its January 2, 2008, amended complaint, which listed Fulton Cogeneration Associates, L.P. as the sole respondent, is granted.

II. Pursuant to 6 NYCRR 622.12, Department staff's motion for an order without hearing dated January 5, 2009 which listed, as respondents, Lion Capital Management, LLC d/b/a Lion Capital Management Group, Lion Capital Group and Lion Capital Management, in addition to Fulton Cogeneration Associates, L.P., is denied.

III. Respondent Fulton Cogeneration Associates, L.P.'s cross-motion dated November 3, 2008, requesting that Department staff's motion for order without hearing be denied and that a hearing be convened, is denied.

IV. Respondent Fulton Cogeneration Associates, L.P. is adjudged to have committed the following violations:

A. failing to timely submit a compliance certification for the period of January 1, 2005 through December 31, 2005, in accordance with its Title V permit (condition 25), in violation of 6 NYCRR 201-6.5(a) and 6 NYCRR 201-6.5(e);

B. failing to timely submit a monitoring report for the period of July 1, 2005 through December 31, 2005, in accordance

with its Title V permit (condition 26), in violation of 6 NYCRR 201-6.5(a) and 6 NYCRR 201-6.5(c);

C. failing on three occasions to timely file quarterly reports (for the periods: July 1, 2005 through September 30, 2005; October 1, 2005 through December 31, 2005; and January 1, 2006 through March 31, 2006), in accordance with its Title V permit, in violation of 6 NYCRR 201-6.5(a) and 6 NYCRR 201-6.5(c); and

D. failing to timely submit a Title V permit renewal application to the Department, in violation of 6 NYCRR 201-6.3.

V. Respondent Fulton Cogeneration Associates, L.P., is hereby assessed a penalty in the amount of thirty thousand five hundred dollars ($30,500), which shall be due and payable within thirty (30) days after service of this order upon respondent. 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 to the Department at the following address: New York State Department of Environmental Conservation, Region 7 Office, 615 Erie Boulevard West, Syracuse, New York, 13204-2400. ATTN: Margaret A. Sheen, Esq., Assistant Regional Attorney.

VI. All communications from respondent Fulton Cogeneration Associates, L.P. to the Department concerning this order shall be made to Margaret A. Sheen, Esq., Assistant Regional Attorney, New York State Department of Environmental Conservation, Region 7 Office, 615 Erie Boulevard West, Syracuse, New York, 13204-2400.

VII. The provisions, terms and conditions of this order shall bind respondent Fulton Cogeneration Associates, L.P., and its agents, successors and assigns, in any and all capacities.

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

By: _____/s/_____
Alexander B. Grannis
Commissioner

Dated: November 25, 2009
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 the New York State Environmental Conservation Law Article 19 and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

by

FULTON COGENERATION ASSOCIATES, L.P., and LION CAPITAL MANAGEMENT, LLC d/b/a LION CAPITAL MANAGEMENT GROUP, LION CAPITAL GROUP and LION CAPITAL MANAGEMENT

Respondents.

DEC FILE No. R7-20070124-3

HEARING REPORT

- by -

/s/
P. Nicholas Garlick
Administrative Law Judge

INTRODUCTION

This hearing report addresses two motions for order without hearing filed 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). Based on the record in this matter I conclude that the Staff of the Department of Environmental Conservation (DEC Staff) has demonstrated it is entitled to summary judgment for the violations allegedly committed by Fulton Cogeneration Associates, L.P. (FCA). DEC Staff has failed to demonstrate it is entitled to summary judgment for the violations alleged against Lion Capital Management, LLC d/b/a Lion Capital Management Group, Lion Capital Group and Lion Capital Management (Lion Capital)[1].

This administrative enforcement action was commenced by DEC Staff for violations of a Title V air pollution control permit issued to FCA. Based on the information in the record and as set forth in this hearing report, I find that there exists no issue of material fact regarding FCA's liability for the violations alleged in DEC Staff's amended complaint. I also find that the civil penalty proposed for FCA by DEC Staff is not in accordance with applicable guidance and reduce the recommended penalty from $151,000 to $89,000. With respect to Lion Capital, DEC Staff shall file a statement of readiness before commencement of the administrative enforcement hearing regarding the unproven violations.

PROCEEDINGS

With a cover letter dated July 26, 2001, DEC Staff mailed Air Title V Facility Permit #7-3504-00023/00012 to respondent FCA. This permit had an effective date of July 23, 2001 and an expiration date of July 23, 2006. This permit was issued to FCA.

By Notice of Violation (NOV) dated June 19, 2006, DEC Staff informed respondent FCA of several violations of its Title V air permit. (Exh. A, DEC Staff's memo of law)

With a cover letter dated July 19, 2006, respondent FCA submitted its Title V renewal application. In this letter,

[1] It is unclear from DEC Staff's papers if Lion Capital is meant to be a single respondent or three respondents.

respondent FCA asked for special consideration for its late filed renewal. Respondent FCA explained that its failure to timely file was solely due to the fact that it had moved its office to 88 Kearny Street, San Francisco, CA. Respondent FCA stated that some mail continued to be delivered to its old address and this was the cause of its failure to timely file. Respondent FCA explained that it has never faced a violation of its permit, and that the facility had not operated since August 31, 2005, and no emissions had originated from the facility since. (Exh. A, FCA's 11/3/08 papers.)

By Notice of Violation (NOV) dated August 2, 2006, DEC Staff informed respondent FCA of additional violations of its Title V air permit. (Exh. B, DEC Staff's memo of law.)

With a cover letter dated January 29, 2007, DEC Staff sent a draft consent order to respondent FCA, which was never executed. (Exh. C, DEC Staff's memo of law.)

By papers dated September 10, 2007, DEC Staff commenced this administrative enforcement action. The complaint listed only one respondent, FCA. DEC Staff never received an answer or any other response from respondent FCA. (DEC's memo of law, paragraph 12.)

DEC Staff amended its complaint by papers dated January 2, 2008. The amended complaint listed FCA and Lion Capital Management, LLC[2] d/b/a Lion Capital Management Group, Lion Capital Group and Lion Capital Management (Lion Capital) as respondents. These papers were only served on FCA.[3] The claimed basis for the liability of Lion Capital was its alleged ownership of FCA.

By papers dated April 3, 2008, DEC Staff moved for a default judgment in this matter, naming only FCA in the caption as respondent. These papers included a cover

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[2] Attached to DEC Staff's January 9, 2009 reply papers is a Decision and Order dated May 3, 2007 by U.S. District Judge McAvoy (Case No. 06-CV-1033) in which this LLC has a slightly different name, Lions Capital Management, LLC.

[3] DEC Staff served this amended complaint on FCA at three addresses, one was "Fulton Cogeneration Associates, L.P., c/o Lion Capital Management, 88 Kearny Street, Suite 1450, San Francisco, CA 9410". DEC Staff did not address any correspondence in this case to Lion Capital.

letter, the motion, and an affirmation in support of the motion by DEC Staff counsel. Several exhibits were attached to the affirmation. Exhibit A included: a notice of hearing and pre-hearing conference (dated September 10, 2007); a complaint (dated September 10, 2007); and affidavits of service. Exhibit B included: a notice of hearing (dated January 2, 2008); an amended complaint (dated January 2, 2008); proof of service; and a proposed order.

By papers dated April 7, 2008, the Executive Managing Director of respondent FCA, Hausmann-Alain Banet, Ph.D., wrote to DEC's Chief Administrative Law Judge (ALJ) requesting permission to appear on behalf of respondent FCA, due to the respondent's poor financial situation. In these papers, Dr. Banet stated that he knew all the facts related to this case, had been responsible for FCA since 2004 and is custodian of all FCA's records. Included with these papers were copies of documents involving litigation between: (1) FCA and The New York Chocolate and Confections Company; and (2) FCA and the County of Oswego Industrial Development Agency.

On April 14, 2008, this matter was assigned to me.

On a conference call on May 13, 2008, it was agreed that this matter would be held in abeyance to allow time for the parties to negotiate.

On a conference call on June 5, 2008, the parties disclosed that settlement negotiations had been unsuccessful. During this call, Dr. Banet's request to represent FCA in this administrative case was discussed. DEC Staff did not object, and Dr. Banet's request was granted. Also on this call, DEC Staff withdrew its default motion and a schedule was set for FCA to answer the amended complaint.

Respondent FCA's answer, dated June 9, 2008, was received by me via fax on June 24, 2008. No answer was filed on behalf of Lion Capital.

A conference call with the parties was held on June 30, 2008. DEC Staff counsel stated that in lieu of an administrative hearing, DEC Staff would file a motion for order without hearing.

By papers dated October 10, 2008, DEC Staff moved for an order without hearing (first motion) pursuant to 6 NYCRR 622.12. The caption of these papers listed only one

respondent, FCA. These papers included: a cover letter; notice of motion; the motion; an affidavit of service; the affidavit of DEC Staff member David Weaver; the affirmation of DEC Staff counsel Margaret A. Sheen; and a memorandum of law with supporting exhibits.

By papers dated November 3, 2008, but not received until November 28, 2008, via fax, FCA opposed DEC Staff's motion. FCA also made a cross motion to commence a hearing in this matter and require DEC Staff to re-serve its motion for order without hearing.

By email dated December 22, 2008, I requested the following from the parties: (1) from DEC Staff, I requested a response to FCA's cross motion; and (2) from FCA, I requested a complete set of its November 3, 2008 papers to be mailed.

On December 30, 2008, a hard copy of FCA's November 3, 2008 papers were received.

With a cover letter dated January 5, 2009, DEC Staff sent the ALJ a copy of a new notice of motion for order without hearing and motion for order without hearing (second motion); these new documents were dated January 5, 2009 and listed both FCA and Lion Capital as respondents in the caption. DEC Staff also provided an affidavit of service on Dr. Banet. The cover letter indicates that no supporting documents were sent to Dr. Banet, nor were these papers addressed to or served on Lion Capital.

By papers dated January 9, 2009, DEC Staff responded to respondent's cross motion.

By email dated January 28, 2009, I wrote to DEC Staff counsel pointing out the discrepancies in DEC Staff's papers regarding the number and identity of respondents.

By email dated January 28, 2009, DEC Staff counsel responded that DEC Staff had intended to move for order without hearing against both FCA and Lion Capital and that its first motion had mistakenly only named one respondent. Since DEC Staff was of the belief that Dr. Banet was involved with both respondents, DEC Staff believed that service alone on Dr. Banet was sufficient to serve Lion Capital.

A conference call occurred on February 13, 2009. During this call I requested a copy of the respondent's air

permit. The parties also discussed the confusion regarding the number of respondents in the case. After I stated my opinion that since only one respondent was named in the first motion and no affidavit of service was in the record for Lion Capital for either the amended complaint or the second motion, that DEC Staff had not properly served Lion Capital. At the conclusion of the call DEC Staff counsel decided not to withdraw the pending motions or re-serve additional papers, but rather requested the preparation of a hearing report based on the information and documents in the record.

With a cover letter dated February 17, 2009, DEC Staff provided a copy of respondent FCA's air pollution control permit (DEC #7-3504-00023-00012).

FINDINGS OF FACT

The Respondent

1. Fulton Cogeneration Associates, L.P. (FCA) is a domestic limited partnership formed under the laws of the State of New York, authorized to conduct business in New York State. (DEC Staff's memo of law, paragraph 1)(Exh. A, FCA's 11/3/8 papers.)

2. FCA owned and operated an electricity generation facility located at 662 South 7th Street, Fulton, Oswego County, NY. (Weaver affidavit, paragraph 4.)

3. The facility is a "major stationary source" as defined by 6 NYCRR 201-2.1(b)(21). (Weaver affidavit, paragraph 4.)

4. Respondent FCA was issued a Title V permit (permit ID number 7-3504-00023/00012) for the facility on July 23, 2001 and this permit had an expiration date of July 22, 2006. (Weaver affidavit, paragraph 4.)

5. DEC Staff was not notified by respondent either: (1) that an extension for filing the required documents would be made; or (2) that it intended to surrender its Title V permit.

Violations

6. Condition 25 of respondent FCA's Title V permit requires the submission of compliance certifications on an annual basis. The certification for the period ending on December 31, 2005, was due on January 30, 2006. However, this certification was not received until August 17, 2006, after a notice of violation (NOV) dated June 19, 2006, was issued. This is a violation of 6 NYCRR 201-6.5(a) and 6 NYCRR 201-6.5(e).

7. Condition 26 of respondent FCA's Title V permit requires the submission of monitoring reports at least every six months. The monitoring report for the period ending on December 31, 2005 was due on January 30, 2006. However, this monitoring report was not received until August 17, 2006, after a notice of violation (NOV) dated June 19, 2006 was issued. This is a violation of 6 NYCRR 201-6.5(a) and 6 NYCRR 201-6.5(c).

8. Conditions 45, 54, 60, 61, 62, 63, 66, 67, 68, 74, 81, 83, 84, 86, 91, 92, 93 and 95 of respondent FCA's Title V permit require the submission of quarterly reports on the continuous emission monitors (CEMs). The monitoring reports for the periods ending on: (1) September 30, 2005, (2) December 31, 2005, and (3) March 31, 2006 were not received until July 20, 2006, after a notice of violation (NOV) dated June 19, 2006 was issued. This is a violation of 6 NYCRR 201-6.5(a) and 6 NYCRR 201-6.5(c).

9. Respondent FCA submitted a renewal application for its Title V permit to DEC on July 20, 2006. It was required to do so at least 180 days before the permit was to expire, on July 22, 2006. This is a violation of 6 NYCRR 201-6.3.

DISCUSSION

In this case DEC Staff has made two motions for an order without hearing pursuant to 6 NYCRR 622.12. A motion for order without hearing is the administrative equivalent of a motion for summary judgment. In its first motion, dated October 10, 2008, DEC Staff listed only FCA as respondent in its caption. In its second motion, dated January 5, 2009, DEC Staff includes both FCA and Lion Capital. Both of these motions are based on DEC Staff's January 2, 2008 amended complaint which was only served on

FCA. The only apparent difference between the two motions is the inclusion of Lion Capital as a respondent in the second motion.

The first motion was properly served on FCA and Dr. Banet appeared for this respondent both in the conference calls and correspondence in this matter. There is no dispute that FCA can be found liable by the Commissioner or that the Commissioner can impose a civil penalty in this matter.

The second motion is problematic. First, DEC Staff has failed to provide proof of service for either the amended complaint or the second motion on Lion Capital. Second, DEC Staff failed to include with this motion the "supporting affidavits reciting all the material facts and other available documentary evidence" as required by 6 NYCRR 622.12(a). Third, neither the amended complaint nor the second motion provide a viable theory of liability for Lion Capital, the assertion of ownership, alone without further elaboration, is insufficient. For these reasons, the second motion for order without hearing is denied.

FCA's Motion to Require Re-service

In its November 3, 2008 papers, FCA seeks re-service of "the order seeking summary judgment." While it is not entirely clear what Dr. Banet means by this phrase, it seems that he is addressing DEC Staff's failure to serve Lion Capital. As DEC Staff points out in its reply, it is unclear what FCA is requesting and more importantly, FCA fails to identify any legal requirement that would require such action. Given the ruling above, that DEC Staff has failed to show service on Lion Capital, no additional service is necessary. Dr. Banet serves as FCA's representative in this matter and has received all documents in this administrative enforcement matter in that capacity.

FCA's Motion Requesting a Hearing be Convened

In its November 3, 2008 papers, FCA requests that DEC Staff's motion for order without hearing be denied and a hearing be held. FCA does not raise any disputes regarding the material facts in this case, so this request is denied.

Liability

In its amended complaint, dated January 2, 2008, DEC Staff alleges four causes of action. As discussed above, DEC Staff has only put one respondent, FCA, on notice of this action and so this discussion deals only with the liability of FCA. Each cause of action is discussed separately, below.

First Cause of Action. In its first cause of action, DEC Staff alleges that on or before January 30, 2006, a compliance certification was due for the period of January 1, 2005, through December 31, 2005, in accordance with FCA's Title V permit condition 25. This certification was not timely submitted, in violation of 6 NYCRR 201-6.5(a) and 6 NYCRR 201-6.5(e). (Amended complaint, paragraphs 17 and 18.)

As proof of this allegation, DEC Staff offers the affidavit of DEC Staff engineer David Weaver. In his affidavit, he states that the compliance certification due on or before January 30, 2006 was received on or about August 17, 2006, based on the NYSDEC date stamp on the document. (Weaver affidavit, paragraph 5(a).)

In its answer, FCA does not deny DEC Staff's allegation and states that the certificate was submitted.

Based on the evidence in the record, DEC Staff has made a prima facie showing that FCA committed this violation. Respondent raises no triable issue of material fact to the contrary. Accordingly, the motion for order without hearing may be granted on this cause of action.

Second Cause of Action. In its second cause of action, DEC Staff alleges that on or before January 30, 2006, a monitoring report was due for the period of July 1, 2005, through December 31, 2005, in accordance with respondent's Title V permit condition 26. This report was not timely submitted in violation of 6 NYCRR 201-6.5(a) and 6 NYCRR 201-6.5(c). (Amended complaint, paragraphs 20 and 21.)

As proof of this allegation, DEC Staff offers the affidavit of DEC Staff engineer Weaver. In his affidavit, he states that the monitoring report due on or before January 30, 2006 was received on or about August 17, 2006, based on the NYSDEC date stamp on the document. (Weaver affidavit, paragraph 5(b).)

In its answer, FCA does not deny DEC Staff's allegation and states that the monitoring report was submitted.

Based on the evidence in the record, DEC Staff has made a prima facie showing that FCA committed this violation and respondent fails to raise a triable issue of fact in response. Accordingly, the motion for order without hearing may be granted on the second cause of action.

Third Cause of Action. In its third cause of action, DEC Staff alleges that on or before October 30, 2005, and thereafter, quarterly reports were due in accordance with respondent's Title V permit conditions 45, 54, 60, 61, 62, 63, 66, 67, 68, 74, 81, 83, 84, 86, 91, 92, 93 and 95 for the following quarters: (1) July 1, 2005 through September 30, 2005; (2) October 1, 2005 through December 31, 2005; and (3) January 1, 2006 through March 31, 2006. These reports were not timely submitted in violation of 6 NYCRR 201-6.5(a) and 6 NYCRR 201-6.5(c). DEC Staff alleges this constitutes three separate violations. (Amended complaint, paragraphs 23 and 24.)

As proof of this allegation, DEC Staff offers the affidavit of DEC Staff engineer Weaver. In his affidavit, he states that the quarterly reports due on or before: (1) October 30, 2005; (2) January 30, 2006; and (3) April 30, 2006; were received on or about July 20, 2006, based on the NYSDEC date stamp on the document. (Weaver affidavit, paragraph 5(c).)

In its answer, FCA does not deny DEC Staff's allegation and states that the quarterly reports were submitted.

Based on the evidence in the record, DEC Staff has made a prima facie showing that FCA committed these violations, and respondent has failed to raise a triable issue of fact to the contrary. Accordingly, staff's motion may be granted on the third cause of action.

Fourth Cause of Action. In its fourth cause of action, DEC Staff alleges that on or before January 24, 2006, respondent was required to submit a Title V permit renewal application to DEC at least 180 days before the date of permit expiration, July 22, 2006. DEC Staff alleges that the renewal application was not submitted until July 20, 2006, in violations of 6 NYCRR 201-6.3. (Amended complaint, paragraphs 26 and 27.)

As proof of this allegation, DEC Staff offers the affidavit of DEC Staff engineer David Weaver. In his affidavit, he states that the Title V permit renewal application due at least 180 days before permit expiration (July 22, 2006) was received on or about July 20, 2006. (Weaver affidavit, paragraph 6.)

In its answer, FCA does not deny DEC Staff's allegation.

Based on the evidence in the record, DEC Staff has made a prima facie showing that FCA committed this violation, and respondent fails to raise a triable issue of fact to the contrary. Accordingly, staff's motion may be granted on its fourth cause of action.

Civil Penalty Amount

The amount of civil penalty sought by DEC Staff is one hundred and fifty one thousand dollars ($151,000). The authority cited by DEC staff for these penalty amounts includes: (1) ECL 71-2103, (2) DEC's Civil Penalty Policy (DEE-1), and (3) the United States Environmental Protection Agency's Office of Enforcement and Compliance Assurance Workbook, Appendix B – Clean Air Act Stationary Source Civil Penalty Policy, issued October 25, 1991, clarified January 17, 1992 (USEPA penalty policy).

Statutory Maximum Penalty. DEC's Civil Penalty Policy states that the starting point for any calculation of civil penalty begins with the calculation of the maximum penalty. In this case, DEC Staff argues that the maximum civil penalty exceeds eighteen million dollars ($18,000,000). This calculation is based on ECL 71-2103(1), which authorizes civil penalties of not less than $375 nor more than $15,000 for a first violation, and an additional penalty not to exceed $15,000 for each day the violation continues. (Sheen affirmation, paragraph 14.)

Benefit Component. The next item the Civil Penalty Policy requires to be considered is the benefit to the respondent. In this case, DEC Staff counsel states that the benefit component is de minimus. (Sheen affirmation, paragraph 20.) DEC Staff engineer Weaver states in his affidavit that the economic benefit of non-compliance consists of the cost of time and paperwork in supplying the information and that the civil penalty sought is adequate to recover the economic benefit derived by these violations. (Weaver affidavit, paragraph 10(b).)

Gravity Component. The next item the Civil Penalty Policy requires the penalty to contain is a gravity component based on two factors: (1) the potential and actual damage caused by the violations; and (2) the importance of the violations to the regulatory scheme. In this case, DEC Staff argues that the reporting requirements which respondent violated are critical to ensuring compliance with the Title V permit and are considered high priority violations by the USEPA penalty policy.

Using the USEPA penalty policy, DEC Staff calculates its recommended civil penalty as follows:

First Cause of Action	$27,000
Second Cause of Action	$27,000
Third Cause of Action	$30,000
Fourth Cause of Action	$27,000
Adjustment for Size of Violator	$40,000
Total	**$151,000**

For the first cause of action, DEC Staff justifies its requested $27,000 penalty as follows: (1) for failing to timely submit an annual compliance certification, in violation of 6 NYCRR 201-6.5(a) & (e), the USEPA penalty policy provides a $15,000 penalty (Appendix B, page 11, section B(2)); and (2) an additional penalty of $12,000 (Appendix B, page 9, section B(1)(d)) for the length of the violation for a total of $27,000. (Weaver affidavit, paragraph 10.c1.) DEC Staff is correct that the USEPA penalty policy states that the $15,000 civil penalty should be imposed for failure to submit a certification, but in this case the certificate was filed late. The USEPA penalty policy sets forth a $5,000 penalty for late certifications. In this case the certification was due on January 30, 2006 was received on or about August 17, 2006. The time between the due date for the certificate and date it was received is more than six months and the additional penalty should be $15,000. The total from the USEPA penalty policy should be $20,000.

DEC Staff argues that for the second cause of action, failing to timely submit a semi-annual monitoring report in violation of 6 NYCRR 201-6.5(a) & (c), the USEPA penalty policy provides a $15,000 penalty (Appendix B, page 10, section B(2)) and an additional penalty of $12,000 (Appendix

B, page 9, section B(1)(d)) for the length of the violation for a total of $27,000. (Weaver affidavit, paragraph 10.c2.) The monitoring report due on or before January 30, 2006, was received on or about August 17, 2006. As in the discussion of the first cause of action, this report was, in fact, late filed and the penalty should be $5,000. This report was more than six months late and the additional penalty should be $15,000. The total from the USEPA penalty policy should be $20,000.

DEC Staff argues that for the third cause of action, failing to timely submit quarterly monitoring reports in violation of 6 NYCRR 201-6.5(a) & (c), the USEPA penalty policy provides a $15,000 penalty (Appendix B, page 10, section B(2)) and an additional penalty of $15,000 (Appendix B, page 9, section B(1)(d)) for the length of the violation for a total of $30,000. Even though there are three violations proven, the USEPA penalty police states that only a single penalty should be imposed (Weaver affidavit, paragraph 10.c3.) The quarterly reports were due on or before: (1) October 30, 2006; (2) January 30, 2006; and (3) April 30, 2006; were received on or about July 20, 2006. As in the discussion of the first cause of action, these reports were, in fact, late filed and the penalty should be $5,000.[4] These reports were more than six months late and the additional penalty should be $15,000. The total from the USEPA penalty policy should be $20,000.

DEC Staff argues that for the fourth cause of action, failing to timely file a Title V renewal application in violation of 6 NYCRR 201-6.3, the USEPA penalty policy provides a $15,000 penalty (Appendix B, page 10, section B(2)). DEC Staff argues that as a result of the late application, FCA's permit expired. DEC Staff also seeks an additional penalty of $12,000 (Appendix B, page 9, section B(1)(d)) for the length of the violation (six months) for a total of $27,000. (Weaver affidavit, paragraph 10.c4.) This calculation is correct.

DEC Staff argues that the USEPA penalty policy also provides for an additional penalty based on the net current

[4] The USEPA penalty policy states that a late report should be considered a failure to report if the report is submitted after the objective of the requirement is no longer served (B-11). DEC Staff does not address this in its papers and has not met its burden of showing that the higher, $15,000, penalty is warranted.

assets of the partnership, FCA. DEC Staff estimates that the minimum size of the violator is between one and five million dollars. Based on this, DEC Staff calculates the USEPA penalty policy provides for an additional $10,000 per violation, or $40,000 (Appendix B, page 11, section B(3)). (Weaver affidavit, paragraph 10.c4.) However, there are two problems with DEC Staff's claim: (1) DEC Staff presents no proof other than an estimate of violator size by a DEC Staff engineer (which is not the same as net current assets); and (2) USEPA's penalty policy states that the size of the violator factor should be figured only once for all violations (B-17). Because, DEC Staff has not met its burden of proof with respect to the net current assets of FCA, the minimum penalty (for partnerships with net current assets of less than $100,000) should be assessed, $2,000, as provided in USEPA's penalty policy (B-11).

Based on the above discussion, I believe the correct application of USEPA's penalty policy suggests the following penalty amount.

First Cause of Action	$20,000
Second Cause of Action	$20,000
Third Cause of Action	$20,000
Fourth Cause of Action	$27,000
Adjustment for Size of Violator	$ 2,000
Total	**$89,000**

Penalty Adjustments. The Civil Penalty Policy next directs penalty adjustments to provide flexibility and equity. Five adjustments are identified: (1) culpability; (2) violator cooperation; (3) history of non-compliance; (4) ability to pay; and (5) unique factors. DEC Staff reports it has no information on respondent's culpability and that these are the first violations for this respondent. Subsequent to the violations, respondent has submitted the delinquent information but settlement discussion regarding these violations have been unsuccessful. DEC Staff notes that it has no evidence of unique or mitigating factors or of respondent's ability to pay. (Weaver affidavit, paragraph 10.c4.)

In its papers opposing DEC Staff's motion for order without hearing, Dr. Banet provides background on FCA and its financial position. From the documents included with FCA's papers, it seems that FCA was formed in 1998. FCA received its air permit from DEC in 2001. In 2004, FCA's general partner was replaced three times: first Coastal Refining & Marketing, Inc., was replaced by El Paso Merchant Energy-Petroleum Company and finally Lions Capital Management, LLC assumed the title. In his papers, Dr. Banet states that FCA has had no income since the third quarter of 2004 and that due to litigation, approximately $1.5 million loaned to FCA by Lion Capital Management have been put in escrow by court order. Dr. Banet alleges that the County of Oswego Industrial Development Agency has been acting improperly and as a result, FCA cannot access this money to finance its operations, including environmental compliance issues. These financial circumstances have required FCA to be represented by Dr. Banet. Dr. Banet offers no documentary support for his claim of poor financial health of FCA, other than his statements and, therefore, no adjustment to the civil penalty is warranted.

Recommended Civil Penalty. Based on the information in the record and the discussion above, DEC Staff has shown that a penalty of eighty nine thousand dollars ($89,000) is warranted in this case.

CONCLUSIONS

1. DEC Staff has proven service on respondent Fulton Cogeneration Associates, L.P.

2. DEC Staff has not shown service on Lion Capital Management LLC d/b/a Lion Capital Management Group, Lion Capital Group and Lion Capital Management. Accordingly, DEC staff lacks personal jurisdiction over Lion Capital Management.

3. DEC Staff has established that it is entitled to summary judgment on the issue of the liability of respondent Fulton Cogeneration Associates, L.P. for the following violations:

   (a) failing to timely submit a compliance certification in accordance with respondent's Title V permit in violation of 6 NYCRR 201-6.5(a) and 6 NYCRR 201-6.5(e);

(b) failing to timely a submit monitoring report in accordance with respondent's Title V permit in violation of 6 NYCRR 201-6.5(a) and 6 NYCRR 201-6.5(c);

(c) failing on three occasions to timely file quarterly reports in accordance with respondent's Title V permit in violation of 6 NYCRR 201-6.5(a) and 6 NYCRR 201-6.5(c); and

(d) failing to timely submit a Title V permit renewal application to DEC, in violation of 6 NYCRR 201-6.3.

4. DEC Staff has shown it is entitled to a civil penalty in the amount of $89,000.

RECOMMENDATIONS

I recommend that an order without hearing be issued that holds respondent Fulton Cogeneration Associates, L.P. liable for the four violations set forth above and imposes a civil penalty of a penalty of eighty nine thousand dollars ($89,000).