STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

the Alleged Violations of Article 17 of the New York State Environmental Conservation Law ("ECL"), and Parts 612 and 613 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

- by -

**HCIR SERVICE, INC., and RICHARD FINKELSTEIN,**

Respondents.

DEC Case No. R2-20020327-152

# DECISION AND ORDER OF THE COMMISSIONER

October 23, 2006

DECISION AND ORDER OF THE COMMISSIONER

Pursuant to section 622.15 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), staff of the Department of Environmental Conservation ("Department") seeks a default judgment against respondents HCIR Service, Inc. ("HCIR") and Richard Finkelstein on a complaint dated January 24, 2003. In response, respondent Finkelstein filed a cross motion seeking, among other things, to vacate his default in answering the Department's complaint.

In the attached default summary report, Administrative Law Judge ("ALJ") Helene G. Goldberger recommends that a default judgment be issued against both respondents. I agree with the ALJ that a default judgment should be issued against respondent HCIR and, accordingly, I grant Department staff's motion in part. For the following reasons, however, I deny Department staff's motion insofar as it seeks a default judgment against respondent Finkelstein.

FACTS AND PROCEDURAL BACKGROUND

I adopt the ALJ's proceedings, and findings of fact nos. 1 and 3-8 (see Default Summary Report and Ruling, Aug. 2, 2005, at 1-2, 5-6). I modify finding of fact no. 2 to find that respondent HCIR Service, Inc., was the owner of a petroleum storage facility located at 1709 Surf Avenue, Brooklyn, New York, and that respondent Richard Finklestein was a principal owner of

HCIR. The factual background is as follows.

On January 24, 2003, Assistant Regional Attorney David S. Rubinton served a notice of hearing and complaint upon respondents HCIR and Finkelstein. The complaint was sent to Marvin E. Kramer, Esq., who had agreed to accept service on behalf of respondents.

The complaint alleged that respondent HCIR was the owner of a petroleum bulk storage ("PBS") facility located at 1709 Surf Avenue, Brooklyn, New York (the "facility"), and that respondent Finkelstein was the owner of respondent HCIR. The complaint further alleged three causes of action:

1. that respondents failed to register the PBS facility with the Department as required by Environmental Conservation Law ("ECL") § 17-1009 and 6 NYCRR 612.2;

2. that respondents failed to remove all product from the facility's tanks and piping system to the lowest draw-off point, failed to lock or securely bolt all manways, and failed to cap or plug all fill lines, gauge openings, or pump lines to prevent unauthorized use or tampering, as required by ECL 17-1005 and 6 NYCRR 613.9; and

3. that respondents failed to conduct tightness testing and submit results of that testing to the

Department, as required by 6 NYCRR 613.5.

Mr. Kramer sent a letter dated February 28, 2003, acknowledging receipt of the complaint. In the letter, Mr. Kramer asserted that approximately seven to eight years earlier, rather than have the City of New York foreclose a tax lien on the facility, "Mr. Finkelstein's corporation abandoned the station in favor of the City of New York. He has had no affiliation with the premises since that date. Accordingly, any claim against him or the corporation is totally inappropriate" (Letter from Marvin Kramer, Esq., to David Rubinton, Asst. Regional Attorney [2-28-03], Motion for Default Judgment, Exhibit D). Respondents filed no formal answer to the complaint, nor did they appear at a pre-hearing conference scheduled for March 3, 2003.

By notice of motion dated July 7, 2005, Assistant Regional Attorney John K. Urda, who is now the Department's attorney on this matter, sought a default judgment against respondents for the claims alleged in the January 24, 2003 complaint and the imposing of a civil penalty for those violations. The motion for a default judgment was served upon respondents, by certified mail, on July 7, 2005.[1]

On July 19, 2005, respondents served, by ordinary mail,

[1] In this case, because more than a year had elapsed since respondents' alleged default in answering, Department staff properly served a notice of motion and motion for a default judgment upon respondents (see Matter of Singh [Makhan], Decision and Order of the Commissioner, March 19, 2004, at 2-3).

a notice of motion seeking an order vacating respondent Finkelstein's default in appearing, answering, or otherwise responding to the January 24, 2003 complaint. Accompanying the motion is a proposed answer to the complaint by respondent Finkelstein, among other things. Department staff subsequently filed a July 26, 2005 response to respondents' motion. On August 1, 2005, respondents filed a further affirmation in support of the cross motion.

The matter was assigned to ALJ Goldberger, who prepared the attached default summary report and ruling. I adopt the ALJ's report and ruling as my decision in this matter, subject to the following comments.

DISCUSSION

I agree with the ALJ that respondent Finkelstein, through his cross motion, seeks to oppose Department staff's motion for a default judgment, not vacate a judgment already issued (see Default Summary Report, at 3). Accordingly, respondents' motion will be treated as a request to reopen a default before issuance of a judgment (see 6 NYCRR 622.15[d]).

Respondent Finkelstein's Default and Liability

Through the cross motion, respondent Finkelstein requests that his default in answering be excused, and that he be afforded the opportunity to file an answer and otherwise defend this proceeding. On a motion to reopen a default before issuance

of a judgment, a respondent must show that "a meritorious defense is likely to exist and that good cause for the default exists" (6 NYCRR 622.15[d]).

I agree with the ALJ that respondent Finkelstein failed to offer a "good cause" for the default. The reasons for the default offered by respondent Finkelstein are that after conferring with his attorney, he concluded that he bore no personal liability in this matter, and that it was unlikely that the Department would pursue the matter. This submission clearly demonstrates that respondent Finkelstein's default was intentional. The intentional determination not to file an answer is even more inexcusable because the decision was made after consultation with an attorney (see, e.g., Awad v Severino, 122 AD2d 242 [2d Dept]). Accordingly, respondent Finkelstein's motion to reopen his default in answering the complaint is denied.

However, I disagree with the ALJ that a default judgment on the issue of respondent Finkelstein's personal liability can be granted based upon the January 24, 2003 complaint as presently pleaded. As the ALJ noted, the corporate form provides a corporate shareholder with a viable defense against personal liability in a Departmental administrative enforcement proceeding (see, e.g., Matter of RGLL, Inc., Commissioner's Decision and Order, Jan. 21, 2005, at 4). Here,

respondent Finkelstein concedes that respondent HCIR was the owner of the facility. However, respondent Finkelstein contends that his relationship to the matter was as a principal owner of HCIR, a corporation. As noted above, the January 23, 2003 complaint itself alleges that HCIR Service, Inc. is the owner of the facility, and that "Richard Finkelstein, (Finkelstein) is the owner of HCIR Services, Inc." (Complaint, at 1). As a corporate shareholder, respondent Finkelstein is shielded from personal liability by the corporate form. The complaint, however, lacks allegations sufficient to meet the requirements for imposing personal liability upon respondent Finkelstein individually, notwithstanding the corporate form (see Matter of RGLL, Inc., at 4). Thus, no viable theory of respondent Finkelstein's liability is sufficiently pleaded in the January 23, 2003 complaint.

Accordingly, Department staff's motion for a default judgment against respondent Finkelstein is denied. I note, however, that staff's submissions on this motion suggest that facts may exist that would support a finding of respondent Finkelstein's personal liability. If staff wishes to pursue the matter, however, staff will have to serve an amended complaint or commence a new proceeding, clarifying its theories of personal liability against respondent Finkelstein and the factual allegations supporting those claims.

Respondent HCIR Service's Default and Liability

With respect to respondent HCIR, respondents, in their submissions on the motion and cross motion, and in the proposed answer, concede the corporation's liability. Accordingly, for the reasons stated in the ALJ's default summary report, Department staff's motion for a default judgment against respondent HCIR is granted.

I also accept the ALJ's recommended penalty and impose it against respondent HCIR. Because the PBS Penalty Schedule the ALJ relied upon does not apply to the resolution of violations after a notice of hearing and complaint has been served (see DEC Program Policy DEE-22, Petroleum Bulk Storage Inspection and Enforcement Policy, May 21, 2003, at V), the ALJ properly used the suggested penalty ranges only as a starting point (see Matter of Hunt, Decision and Order of the Commissioner, July 25, 2006, at 10). The penalty recommended by the ALJ is justified by the circumstances of this case, and consistent with the Commissioner's Civil Penalty Policy (see DEE-1, June 20, 1990).

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

I. Pursuant to 6 NYCRR 622.15, Department staff's motion for a default judgment is granted against respondent HCIR Service, Inc. Respondent HCIR Service, Inc., is adjudged to be in default and to have waived its right to a hearing in this proceeding. As a consequence of the default, Department staff's allegations against respondent HCIR Service, Inc., in the complaint are deemed to have been admitted by it.

II. Respondent HCIR Service, Inc., is determined to have

committed the following violations:

A. Respondent HCIR violated ECL 17-1009 and 6 NYCRR 612.2 by failing to register the PBS facility with the Department as required;

B. Respondent HCIR violated ECL 17-1005 and 6 NYCRR 613.9 by failing to remove all product from the facility's tanks and piping system to the lowest draw-off point, failing to lock or securely bolt all manways, and failing to cap or plug all fill lines, gauge openings, or pump lines to prevent unauthorized use or tampering, as required; and

C. Respondent HCIR violated 6 NYCRR 613.5 by failing to conduct tightness testing and submit results of that testing to the Department, as required.

III. Respondent HCIR Service, Inc., is assessed a civil penalty in the amount of fifty-five thousand dollars ($55,000). Payment of the civil penalty is due and payable within thirty (30) days after service of this order upon respondent HCIR Service, Inc. Payment shall be 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 shall be mailed or delivered to the following address: Louis P. Oliva, Regional Attorney, NYSDEC, Region 2, 47-40 21st Street, Long Island City, New York 11101.

IV. The provisions, terms and conditions of this order shall bind respondent HCIR Service, Inc. and its successors and assigns, in any and all capacities.

V. Department staff's motion for a default judgment against respondent Richard Finkelstein is denied.

VI. Respondents' cross motion to reopen Richard Finkelstein's default is denied.

For the New York State Department
of Environmental Conservation

/s/

By: Denise M. Sheehan
Commissioner

Dated: Albany, New York
October 23, 2006

TO: HCIR Service, Inc. (via Certified Mail)
33 Harriet Drive
Syosset, New York 11791

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47-40 21st Street
Long Island City, New York 11101

STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of Alleged Violations of Article 17 of the Environmental Conservation Law and Parts 612 and 613 of Title 6 of the New York Compilation of Codes, Rules and Regulations by

**DEFAULT SUMMARY REPORT and RULING**

Case No. R2-20020327-152

**HCIR SERVICE, INC. and RICHARD FINKELSTEIN**,

Respondents.

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Proceedings

On August 1, 2002, New York State Department of Environmental Conservation (DEC or Department) staff served a notice of hearing and complaint upon the respondents HCIR Service, Inc. (HCIR) and Richard Finkelstein. The notice provided that the respondents had 20 days from receipt of the complaint to serve an answer or be in default. The respondents failed to answer and on January 24, 2003, Department staff served a second notice of hearing and complaint on the respondents. This notice also informed the respondents that failure to serve an answer timely or attend a pre-hearing conference would result in a default and waiver of the respondents' right to a hearing.

By notice of motion dated July 7, 2005, Assistant Regional Attorney John Urda moved for a default judgment against the respondents. The motion was based upon the respondents' failure to file a timely answer to the complaint and to attend the pre-hearing conference scheduled for March 3, 2003.

Staff's motion papers included a copy of the January 2003 notice of hearing and complaint, a copy of the certified mail receipt for service of the 2002 complaint with an acknowledgment of receipt by Ellyn Finkelstein, a letter from attorney Marvin E. Kramer dated February 28, 2003 acknowledging receipt of the second notice of hearing and complaint on behalf of the respondents, an affirmation in support of the default motion by Mr. Urda that addresses, *inter alia*, the relief requested by staff, a copy of the deed for the subject property, and a proposed order for the Acting Commissioner's signature.

The motion papers were sent to James T. McClymonds, the Department's Chief Administrative Law Judge, who then assigned the matter to me.

On July 21, 2005, the Department's Office of Hearings and Mediation Services (OHMS) received a notice of motion dated July 19, 2005 by respondent Finkelstein's counsel Marvin E. Kramer, Esq. along with a supporting affidavit by respondent Finkelstein dated July 19, 2005, an affirmation by attorney Kramer dated July 19, 2005, a proposed answer to the complaint, and a response to staff's proposed order. In this motion, respondent Finkelstein seeks to vacate the default and/or to respond to staff's motion for the default judgment. On July 29, 2005, the OHMS received staff's response to this motion.

On August 2, 2005, Mr. Kramer filed with the OHMS a document entitled "Respondent's Affirmation in Support of Cross-Motion." Staff opposed the introduction of Mr. Kramer's affirmation based upon § 622.6(c)(3) of Title 6 of the New York Compilation of Codes, Rules and Regulations (6 NYCRR) arguing that there was no permission granted by the ALJ for this submission. I find that this attorney's affirmation adds little to the previously stated arguments of the respondent and based upon the noted rules, I do not accept its submission.

Respondent Finkelstein's Position

In his response to staff's motion, Mr. Finkelstein states that he was the owner of the capital stock of HCIR Service, Inc. (HCIR) which was the land which respondent HCIR formerly owned. Affidavit in support of motion to vacate, ¶ 1. Respondent Finkelstein states that " . . . to the best of his recollection, HCIR never operated the premises." Id., ¶ 2. He explains that the premises were leased to other parties who did not comply with their lease agreement and he had to commence dispossess proceedings. Id., ¶¶ 3-4. Finkelstein states that because the property was not useable as a gas station, HCIR abandoned the property and in 2002, it was sold. Id., ¶¶ 6-7. He also claims that at the time that Mr. Kramer corresponded with DEC in 2003 in response to the Department's service of the second complaint, the attorney was not his "regular attorney" and was not aware of the sale. Id.

Mr. Finkelstein's main defense however is that because he was only a shareholder in HCIR, he was not the owner and therefore, has no liability with respect to the allegations in the complaint. Id., ¶¶ 11-15. He maintains that it was because he was not legally responsible that he and Mr. Kramer determined not to respond to the Department's complaint. Id., ¶¶ 14-15. Mr. Kramer also makes the same arguments - that Mr. Finkelstein was never the owner of the property and there is no liability conferred on the principal of a corporation. Kramer Aff., ¶¶ 4-

5. Mr. Kramer admits that the default was "wilful" but not "intentional." Id., ¶ 8. He explains that because Mr. Finkelstein had no personal liability, they did not believe the Department would pursue this case. Id., ¶ 8. Counsel argues that if the default is not vacated, an inquest should be held on penalties. He explains that because no penalties can be imputed to Mr. Finkelstein personally, there are no damages.

Staff's Position

Staff begins its response to the respondent's motion/response by asking that it be denied because it is premature - no default judgment had yet been granted. Urda Aff. (July 26, 2005), ¶ 2. Assistant Regional Attorney Urda next argues that if the respondent's July 19, 2005 filing is a response to staff's motion for a default it is untimely. Id., ¶ 3. With respect to the merits of the respondent's submission, staff argue that there is no good cause demonstrated for the default and no meritorious defense. Id., ¶¶ 4-6.

Mr. Urda argues that Mr. Finkelstein's efforts to distance himself from respondent HCIR fall short because Environmental Conservation Law (ECL) § 17-1003 and 6 NYCRR § 612.1(c)(18) places owner liability on the owner of the petroleum bulk storage facility and not the owner of the real estate - "owner means any person who has legal or equitable title to a facility." ECL § 17-1003(4). Urda Aff., ¶¶ 8-9. Moreover, Mr. Urda points to the inspection report dated August 31, 2001 in which Mr. Finkelstein was noted as the operator of the facility. Exhibit B annexed to Urda Aff. DEC counsel also argues that while Mr. Finkelstein claims that DEC lost any chance to obtain a recovery because the property was transferred in 2002, this transfer occurred subsequent to DEC's September 2001 notice of violation, DEC's service of an order on consent in July 2002, and DEC's service of the first complaint. Urda Aff., ¶¶ 12-13; Exhibit B annexed to Urda Aff., and Exhibits A, B, and E annexed to staff's motion for default judgment.

Discussion and Conclusion on Respondent Finkelstein's Motion

As noted by staff, because no default judgment has been issued by the Commissioner of this Department, it is premature to seek to vacate such order. Therefore, I am deeming respondent's submission as opposition to staff's motion. With respect to staff's argument that the opposition has been served late, that is true. However, Mr. Kramer explains that he and his client were out of town when the motion was served and I do not see any prejudice to staff in receiving respondent's submission.

Therefore, I will consider respondent Finkelstein's response.[2]

Section 622.15(d) provides that "[t]he ALJ may grant a motion to reopen a default upon a showing that a meritorious defense is likely to exist and that good cause for the default exists."

Mr. Finkelstein's main defense is that he never had anything to do with the PBS. He contends that it was the respondent HCIR, Inc. that owned the facility. He also states that when the property was leased to third parties, that they did not comply with the lease agreement resulting in his court action to evict them.

With respect to the issue of the shield of the corporate entity, certainly this would be a defense that could be heard in a DEC proceeding. The issue would be to determine whether or not staff has put forward adequate information to demonstrate that the individual respondent participated to show individual liability and that this corporation was merely a shell. See, State of New York v. Della Villa, et al, 186 Misc. 2d 490 (Sup. Ct. Schenectady Co. 2000). I find that staff has pled sufficiently to provide a bare bones cause of action against the respondent. Staff sets forth in the complaint that Richard Finkelstein is the owner of HCIR Service, Inc. which owns the petroleum storage facility in question. Complaint, ¶¶ 3-4, annexed as Exhibit C to staff's motion for default judgment. In addition, in the inspection report annexed as Exhibit B to staff's reply to the respondent's opposition, Mr. Finkelstein is identified as the operator of the PBS facility.

As for the actions or omissions of any third party lessees, it is the owner and operator of the PBS facility that is responsible for adherence to the Department's regulations. See *e.g.,* 6 NYCRR §§ 612.2(a), 613.3(b), 613.4(a). It is interesting that Mr. Finkelstein went to great lengths to secure his interests in the property, yet took no measures to ensure that the environment was also safeguarded through compliance with the petroleum bulk storage regulations. Finkelstein Aff., ¶¶ 3-5.

If Mr. Finkelstein had answered the complaints, he could have raised his defenses; however, he failed to do so.

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[2] Mr. Kramer makes no representations with respect to representation of HCIR and I am assuming that the opposition has been submitted only on behalf of Mr. Finkelstein.

Neither the affidavit of Mr. Finkelstein nor the affirmation of attorney Kramer provide a basis to find good cause for the default. Quite the opposite. Both of these statements indicate that the respondent and his counsel determined that there was no basis for staff's enforcement proceeding and thus, no reason to answer. Mr. Kramer states it quite clearly - the default was wilful. Kramer Aff., ¶ 8. While he states in the same sentence that it was "not intentional", that is a distinction without a difference. The respondent had determined that he was not liable and therefore he did not have to respond to the staff's notice of violation, consent order, or the complaints. This is not good cause for a default. Rather, it shows a pattern of non-compliance.

With respect to the respondent's request that an inquest be held to determine the appropriate penalty, I do not find that such an inquest is necessary based on the argument of attorney Kramer. Mr. Kramer restates his argument with respect to the default - that since Mr. Finkelstein is not liable, there can be no penalty. Kramer Aff., ¶ 7. The respondent does not provide any response to the penalty that is proposed by staff and how it should be modified. Staff has set forth a rationale for the penalty based upon the applicable policy, statutes and regulations. To the extent that I deem it appropriate to modify the amount request as discussed below, it is based on these same sources. The respondent, however, has not provided any factual basis for a hearing on this matter. Accordingly, I have determined that an inquest is unnecessary. See, In the Matter of Robert Howard, 2000 WL 33341458(ALJ granted staff's motion for order without hearing including penalty based upon adequacy of information provided in motion papers)(Commissioner's order affirmed in Howard v. DEC [Sup Ct. Albany Co. 2000], 290 AD2d 712 [2001]).

Findings of Fact

1. On August 1, 2002, Department staff served a notice of hearing and complaint on the respondents by certified mail. DEC staff sent the pleadings to HCIR Service c/o Richard Finkelstein at 33 Harriet Dr., Syosset, NY 11791. The certified mail receipt was signed by an Ellyn Finkelstein on August 5, 2002.

2. The respondents were the owners of a petroleum storage facility located at 1709 Surf Avenue, Brooklyn, New York.

3. The notice of hearing advised the respondents that, pursuant to 6 NYCRR § 622.4, they must, within 20 days of receiving the notice and complaint serve upon Department staff an

answer, signed by them, their attorney(s) or other authorized representative.

4. The notice of hearing further advised the respondents that failure to make timely service of an answer or attend a scheduled pre-hearing conference would result in a default and waiver of their right to a hearing.

5. The respondents failed to answer the complaint or to attend the pre-hearing conference scheduled for September 10, 2002.

6. On January 24, 2003, the Department staff served a second notice of hearing and complaint upon the respondents by sending these pleadings to the respondents' counsel, Marvin Kramer, Esq., at 1325 Franklin Avenue, Garden City, NY 11530. By letter dated February 28, 2003, Mr. Kramer acknowledged the receipt of the notice of hearing and complaint.

7. The 2003 notice also advised the respondents of the consequences of their failure to answer or to attend the scheduled pre-hearing conference on March 3, 2003.

8. The respondents failed to answer the complaint or to attend the March conference. The deadline for service of the answer has not been extended.

Discussion

This discussion addresses the bases for a default judgment and the Department staff's penalty considerations.

Bases for Default

According to the Department's hearing regulations, a respondent's failure to file a timely answer or to attend a pre-hearing conference constitute a default and waiver of respondent's right to a hearing. 6 NYCRR § 622.15(a). In such circumstances, Department staff may move for a default judgment, such motion to contain:

(1) proof of service of the notice of hearing and complaint;
(2) proof of the respondent's failure to file a timely answer; and
(3) a proposed order. 6 NYCRR § 622.15(b).

Department staff's motion papers include an affirmation by Assistant Regional Attorney John K. Urda, which adequately

demonstrates service of the notice and complaint. Mr. Urda describes the staff's service of the pleadings on the respondents on the two occasions. He supports these descriptions by attaching (1) a copy of the certified mail receipt showing that the respondents were served on August 5, 2002 and (2) Mr. Urda's letter that accompanied the January 24, 2003 service of the pleadings, and (3) a letter from respondents' counsel acknowledging receipt of the notice of hearing and complaint in early 2003. In addition, Mr. Urda attached copies of the deeds for the property located at 1717 Surf Avenue - the location of the petroleum bulk storage facility that is the subject of this enforcement proceeding - showing the respondents to be the owners of this property from March 15, 1982 until May 29, 2002 when the property was transferred to Progress 1, Inc.

Mr. Urda's affirmation also states that the respondents failed to answer the complaint or to attend either of the two scheduled pre-hearing conferences. The time to respond to either of the two complaints has long since elapsed and staff has not extended the time to answer. Because the respondents have never responded to either complaint or attended the pre-hearing conferences, staff is entitled to a default judgment.

Penalty Considerations

In its proposed order, Department is seeking a civil penalty of $157,925 for violations of its regulations governing control of the bulk storage of petroleum at the respondents' facility located at 1709 Surf Avenue, Brooklyn, New York. The complaint contains three allegations: 1) the respondents failed to renew the registration of the petroleum bulk storage facility which expired on June 28, 1998 in violation of ECL § 17-1009 and 6 NYCRR § 612.2; 2) the respondents failed to conduct tightness testing and submit the results of that testing to the Department for tank nos. 001, 002, 003, and 004 and their connecting piping systems in violation of 6 NYCRR § 613.5 and; 3)respondents failed to remove all product from the tanks which have been out of service for more than thirty days and comply with the closure requirements set forth in 6 NYCRR § 613.9.

Mr. Urda has submitted an affirmation in support of the components of the civil penalty sought by Department staff. According to the affirmation, the respondents failed to re-register their petroleum bulk storage tanks as of June 28, 1998 when the registration expired. According to ECL § 71-1929, such violations are subject to a penalty of up to $25,000 per day for

each violation.[3] Staff recommends a penalty of $25.00 per day from June 28, 1998 until the date respondents transferred the property as noted in a quitclaim deed -- June 25, 2002 –- a total of 1,458 days resulting in a penalty of $36,450.

With respect to the failure to tightness test, the staff recommends a penalty of $25 per day for each day from December 1, 1991 (the first day tests were so required) until June 25, 2002 – a total of 3,859 days for a penalty amount of $96,475. ECL § 71-1929 also governs this violation with a maximum penalty of $25,000 per day for each violation.

As for the failure to properly close the facility pursuant to 6 NYCRR § 613.9, staff has recommended a penalty of $25,000 pursuant to ECL § 71-1929.

In his affirmation, Mr. Urda explains that the penalty is based on the length of time the violations occurred during which period the respondents "avoided the expense of properly registering, testing and closing their underground storage tanks as required by law." By failing to register their tanks, the respondents undermined DEC'a mandate to regulate these facilities in the public interest. And, according to Mr. Urda, the respondents' failure to heed the repeated notices from staff in 2001 prior to the commencement of any enforcement proceeding and the two complaints compounds the severity of the violations.

The Commissioner's civil penalty policy provides that the starting point for a penalty calculation should be computation of the statutory maximum for all provable violations. In this case, this sum would amount to almost $2 million. Because staff considered this sum to be "prohibitive", it devised the above-described formula.

The Commissioner's Civil Penalty policy directs that staff consider gravity and economic benefit in addition to culpability, violator cooperation, history of non-compliance, ability to pay and unique factors in fashioning an appropriate penalty. Staff has established the gravity of these violations based on their duration and their interference with the State's program to

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[3] ECL § 71-1929 currently provides for a penalty not to exceed $37,500 per day for each violation of Article 17, Title 10, or the regulations promulgated thereto concerning the bulk storage of petroleum. However, because the allegations set forth in staff's complaint concern actions that occurred prior to May 15, 2003, the $25,000/day maximum penalty is applicable.

monitor these facilities to protect the public health. The failure to test these tanks jeopardized public health and safety as there was no means to determine whether or not the tanks were leaking petroleum product. The respondents also derived an economic benefit of unknown amount by avoiding the registration, tightness testing, and closure requirements. Because this is a default, the staff has established culpability. Mr. Urda has set forth the lack of respondents' cooperation and history of non-compliance. Respondent Finkelstein has submitted a response to staff's motion that is discussed above; however, there is no mention of financial capability other than to state that HCIR is devoid of any assets. Finkelstein Aff., ¶ 9.

Staff's papers do not establish whether or not the violations alleged actually caused environmental harm or whether the current owner of the facility has properly closed the facility. However, respondents' inaction could have resulted in contamination because of the lack of safeguards against spills and leaks.

Given the four years of inaction by the respondents, the penalty requested by staff is not unreasonable. However, in other recent PBS matters submitted to the OHMS, staff has utilized a PBS Penalty Schedule that sets forth the following penalties for the violations at issue:

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|---|---|---|
| 1. | Failure to register | Penalty Range: $500-5,000 |
| 2. | Failure to tightness test | Penalty: $2,500 per facility |
| 3. | Failure to close | Penalty: Penalty Range: $500-5000/tank |

Given the length of time that the respondents remained in violation and the potential for environmental harm, I recommend that the respondents be held jointly and severally liable for a penalty of $55,000. I calculated this sum by applying a penalty of $5000 for failure to register, $2500 for failure to tightness test and $20,000 for failure to close the four tanks. Then because of the aggravating factors described above, I doubled this amount.

Conclusion

The respondents, HCIR Service, Inc. and Richard Finkelstein, did not submit an answer to the complaint nor did they attend the scheduled pre-hearing conferences and therefore, they are in default.

While staff has supplied a logical formula for the requested requested penalty of $157,925, I find this amount excessive in comparison to other similar matters adjudicated by this office. Accordingly, I have revised the penalty to $55,000.

Recommendation

The Commissioner should sign the attached order to confirm the default and provide the relief as set forth above. I have modified the order that staff provided with its default motion based upon the above penalty calculation. Staff should also advise the Commissioner as to the status of the tanks and what if any remediation is required at the site.

/s/

Dated: August 2, 2005
Albany, New York

Helene G. Goldberger
Administrative Law Judge