STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Articles 17 and 71 of the New York State Environmental Conservation Law, Article 12 of the New York State Navigation Law, and Title 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

- by -

KLIGOF HOLDING CORP.,

Respondent.

ORDER

NYSDEC File No. R2-20080829-430

Respondent Kligof Holding Corp. owns property at 1724 Webster Avenue, Bronx, New York (the "site"). Respondent entered into an order on consent (DEC file no. R2-20061012-414, effective November 2, 2007)("consent order") with the New York State Department of Environmental Conservation ("Department") to address and remediate a petroleum spill at the site.

Department staff served a notice of hearing and complaint on respondent by certified mail on December 30, 2008, which respondent received on January 5, 2009. Respondent filed an answer dated February 10, 2009.

On April 24, 2009, Department staff served upon respondent a motion for order without hearing on its complaint. Respondent received the motion on April 27, 2009, and has not filed a response to Department staff's motion. Thus, Department staff's motion for order without hearing is unopposed.

In its papers, staff alleges that respondent: violated the terms of the consent order by failing to submit an investigation summary report by January 31, 2008; and failed to contain the petroleum discharge at the site, in continuing violation of Navigation Law § 176 and 17 NYCRR 32.5. Staff, in its motion, also alleges that respondent failed to pay the suspended penalty of two thousand five hundred dollars ($2,500), that was provided for in the consent order, and which Department staff demanded in its Notice of Non-Compliance letter dated December 30, 2008

("non-compliance letter"), be paid by January 7, 2009. Respondent received the non-compliance letter on January 5, 2009.

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

As noted, respondent filed an answer to the complaint, but failed to answer or otherwise respond to staff's motion for order without hearing. Although the ALJ concluded that Department staff would be entitled to pursue a default judgment in this case, Department staff here is requesting that the motion be decided on its merits, as an unopposed motion for order without hearing. Accordingly, I need not decide whether respondent's failure to respond to the motion for order without hearing provides a basis for a default judgment in this case.

Based upon the record, I conclude that the civil penalty of $20,875 for the violation of the consent order and Navigation Law § 176 and 17 NYCRR 32.5, as requested by Department staff and recommended by the ALJ, is appropriate.

In addition, Department staff requested that respondent be directed to pay $2,500, the amount of the suspended portion of the penalty under the consent order. Respondent's consent order obligations have been outstanding for some time, and despite Department staff's December 30, 2008 demand for payment of the suspended penalty, respondent has failed to do so. Respondent is hereby directed to pay this amount immediately upon service of this order on respondent.

I further note that respondent remains obligated to fulfill all of its obligations under the consent order and, if those obligations are not met, respondent may be subject to further enforcement action and penalty.

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 an order without hearing on its complaint is granted.

II. Respondent Kligof Holding Corp. is adjudged to have violated:

a. the order on consent (DEC file no. R2-20061012-414, effective November 2, 2007); and

b. Navigation Law § 176 and 17 NYCRR 32.5.

III. Respondent is hereby assessed a civil penalty in the amount of twenty thousand eight hundred seventy-five dollars ($20,875) for the violations set forth in paragraph II of this order, which amount 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 or delivered to the Department at the following address:

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

IV. Respondent is also directed to pay the amount of two thousand five hundred dollars ($2,500) that had been suspended under terms of the order on consent, and which amount is currently due pursuant to the Notice of Non-Compliance letter dated December 30, 2008. Respondent shall submit payment of this amount immediately upon service of this order upon respondent. Payment shall be made in the form of a cashier’s check or certified check payable to the order of the “Environmental Protection and Spill Compensation Fund” and mailed or delivered to the Department at the following address:

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

V. All communications from respondent to the Department concerning this order shall be made to Assistant Regional Attorney John K. Urda, New York State Department of Environmental Conservation, Region 2 Office, 47-40 21st Street, Long Island City, New York 11101.

VI. The provisions, terms and conditions of this order shall bind respondent Kligof Holding Corp. and its agents, successors and assigns, in any and all capacities.

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

/s/

By: ______________________________
Alexander B. Grannis
Commissioner

Dated: September 15, 2009
Albany, New York

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Articles 17 and 71 of the New York State Environmental Conservation Law, Article 12 of the New York State Navigation Law, and Title 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

- by -

KLIGOF HOLDING CORP.,

Respondent.

SUMMARY REPORT

NYSDEC File No. R2-20080829-430

PROCEEDINGS

Staff of the New York State Department of Environmental Conservation ("Department") served a motion for order without hearing on respondent, Kligof Holding Corp., by certified mail on April 24, 2009. In accordance with sections 622.3(a)(3) and 622.12(a) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), service was complete upon respondent's receipt of the motion on April 27, 2009. Staff filed the motion, together with proof of service on respondent, with the Office of Hearings and Mediation Services under cover letter dated May 19, 2009.

By its motion, staff alleges that respondent violated the terms of an order on consent (DEC file no. R2-20061012-414, effective November 2, 2007) ("consent order"), and failed to contain a petroleum discharge, in violation of Navigation Law § 176 and 17 NYCRR 32.5. The alleged violations relate to property (the "site") owned by respondent at 1724 Webster Avenue, Bronx, New York. For the reasons set forth below, I recommend that staff's motion for order without hearing be granted.

Department staff's filing included the following:

- a notice of motion, dated April 24, 2009;
- an affirmation ("staff affirmation"), dated April 24, 2009, by staff counsel in support of the motion;
- a copy of the consent order;
- a notice of non-compliance, dated December 30, 2008, from Department staff to respondent demanding payment of the portion of the penalty that had been suspended under the consent order;
- an affidavit ("staff affidavit") in support of the motion, dated April 23, 2009;

- a Department spill report form (Department spill no. 9411303), last updated April 23, 2009;
- a notice of violation, dated June 30, 2008, from Department staff to respondent demanding immediate compliance with the consent order;
- an affidavit of service, dated April 24, 2009, of the motion for order without hearing on respondent and on respondent's counsel;
- a copy of a notice of hearing and complaint, both dated December 30, 2008; and
- a copy of respondent's answer, dated February 10, 2009.

Although respondent answered Department staff's 2008 complaint, respondent did not file papers in opposition to the instant motion. Staff's notice of motion for order without hearing duly advised respondent that the failure to file a response to the motion would constitute a default. Although staff is entitled to seek a default judgment under these circumstances (see 6 NYCRR 622.12[b]), staff instead requests a determination of the motion on its merits.

POSITIONS OF THE PARTIES

Department Staff's Allegations

By its motion, Department staff alleges that respondent violated the consent order and failed to contain a petroleum discharge (Department spill no. 9411303) at the site. Staff alleges these violations were ongoing "from February 1, 2008 until the date of the Complaint [December 30, 2008] – a total of 334 days" (staff affirmation ¶¶ 9, 10).

Staff states that respondent violated the consent order by failing to submit the investigation summary report required under paragraph 3 of the corrective action plan established under the order. Staff states that the consent order "required submittal of an Investigation Summary Report delineating the extent and intensity of on- and off-site soil and groundwater contamination within 90 days of the effective date [of the order]" (staff affidavit ¶ 5). Staff further states that it approved respondent's investigation plan for the site, but that respondent did not timely implement the plan (id. ¶¶ 7-10). Staff issued a notice of violation, dated June 30, 2008, advising respondent that the failure to submit the investigation summary report placed respondent in violation of the consent order (id. ¶ 11, exhibit B). Staff also served a notice of non-compliance on respondent, dated December 30, 2008, again advising respondent that its failure to submit the investigation summary report placed respondent in violation of the consent order (see staff affirmation, exhibit B).

Staff states that it received a letter, dated March 30, 2009, from respondent's consultant indicating that investigation activity had commenced at the site (staff affidavit ¶ 13). Staff further states, however, that as of April 23, 2009, "respondent still has not submitted the required Investigation Summary Report, originally due [under the terms of the consent order] no later than January 31, 2008" (id.). Staff also asserts that respondent

admitted, in its answer to the 2008 complaint, that it had not submitted the investigation summary report (staff affirmation ¶ 6 [citing respondent's answer at ¶ 6]).

With regard to Department staff's allegation that respondent failed to contain the petroleum discharge, staff states that respondent "has neglected to investigate the extent of the Spill contamination as required" and that the site "remains contaminated" (staff affidavit ¶¶ 12, 14). Further, staff asserts, respondent admitted this violation under the terms of the consent order (staff affirmation ¶ 7 [citing consent order ¶¶ 14-17[1]]).

Respondent's Answer

As previously noted, although respondent served an answer to the 2008 complaint, it did not file a reply to the instant motion for order without hearing. In its answer to the complaint, respondent expressly admits that it signed the consent order and that the order became effective on November 2, 2007, the date it was executed by the Department (see answer ¶ 2 [admitting, inter alia, the allegations in ¶¶ 3 and 4 of the complaint]). With regard to the submittal of the investigation summary report, respondent admits in its answer that it "has not as yet submitted an Investigation Summary Report" (id. ¶ 6). Respondent denies, however, the allegations set forth in paragraph six of the complaint which states that, pursuant to section II of the consent order, respondent "agreed to fully investigate and remediate the petroleum contamination at the Site pursuant to the 'Corrective Action Plan for Spill No. 94-11303' at page six of the Order" (id. ¶ 3). Respondent also denies the allegations in paragraph eight of the complaint wherein staff alleges that the investigation summary report was to be submitted to the Department "no later than January 31, 2008" (id. ¶ 5).

By its answer, respondent also admits the allegations contained in paragraph five of the complaint relating to containment of the petroleum discharge. Specifically, respondent admits "liability for the illegal discharge of petroleum at the Site . . . and the failure to undertake containment of the discharge in violation of [Navigation Law] § 176 and 17 NYCRR § 32.5" (see answer ¶ 2; complaint ¶ 5). Despite these admissions, respondent denies the allegation contained in paragraph 12 of the complaint which states that respondent failed to undertake measures to contain the petroleum discharge (see answer ¶ 8). Respondent does not provide a basis for its denial of the allegations set forth under paragraph 12 of the complaint, nor does respondent proffer any evidence to demonstrate that it undertook corrective measures at the site either before or after service of the complaint.

[1] Paragraphs 14-17 of the consent order set forth the violations charged to respondent. Respondent admits to those violations under paragraph 18 of the order.

FINDINGS OF FACT

Based upon the papers filed by Department staff, I make the following findings of fact:

1. Respondent, Kligof Holding Corp., is a domestic business corporation authorized to do business in the State of New York and owns the site located at 1724 Webster Avenue, Bronx, New York (see complaint ¶ 2; answer ¶ 2).

2. On October 26, 2007, respondent executed the consent order (DEC file no. R2-20061012-414)[2] which became effective on November 2, 2007, the date it was signed by the Department (see complaint ¶¶ 3, 4; answer ¶ 2).

3. Under the terms of the consent order, respondent admitted liability for the illegal discharge of petroleum at the site and into the waters of the State in violation of ECL 17-0501 and 17-0807 (see consent order ¶¶ 14, 15, 18; complaint ¶ 5; answer ¶ 2).

4. Under the terms of the consent order, respondent admitted liability for the illegal discharge of petroleum at the site in violation of Navigation Law § 173 and for failure to undertake containment activities in violation of Navigation Law § 176 and 17 NYCRR 32.5 (see consent order ¶¶ 16-18; complaint ¶ 5; answer ¶ 2).

5. As of April 23, 2009, respondent had not submitted an investigation summary report to the Department (staff affidavit ¶ 13).

6. As of April 23, 2009, the site remained contaminated (staff affidavit ¶ 14, exhibit A at 4 [last comment written by affiant on Department spill report form, states that affiant spoke with respondent's environmental consultant regarding the status of the site investigation on April 23, 2009]).

DISCUSSION

As noted above, because respondent failed to file a reply to the instant motion, Department staff was entitled to seek a default judgment. Staff, however, requests a decision on the merits and, therefore, the motion will be determined under 6 NYCRR 622.12(d) which sets forth the standard for granting a contested motion for order without hearing. Specifically, if "the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party," the motion will be granted (id.).

A motion for summary judgment must be decided on the evidence presented by the parties, not on argument. Such evidence may include relevant documents and

[2] The signature of respondent's representative on the consent order is not notarized. However, respondent does not challenge the signature and admits in its answer to the complaint that it executed the consent order on October 26, 2007.

affidavits of individuals with personal knowledge of the disputed facts. An attorney's affidavit "has no probative force" unless the attorney has first hand knowledge of the facts at issue (Siegel, NY Prac § 281, at 442 [3d ed] [citation omitted]).

In 2003, the Commissioner elaborated on the standard for granting summary judgment:

> "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. The moving party carries this burden by submitting evidence sufficient to demonstrate the absence of any material issues of fact. [A supporting] 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 . . . The failure of a responding party to deny a fact alleged in the moving papers, constitutes an admission of the fact."

(Matter of Locaparra, Final Decision and Order of the Commissioner, June 16, 2003, at 4 [internal quotation marks and citations omitted].)

Additionally, on a motion for order without hearing, the "weight of evidence is not considered. Rather, the issue is whether the moving party has offered sufficient evidence to support a prima facie case for summary judgment. The test for sufficiency of evidence in the administrative context is the substantial evidence test -- whether the factual finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs" (Matter of Tractor Supply, Decision and Order of the Commissioner, August 8, 2008, at 3 [internal quotation marks and citations omitted]).

Applying this standard to Department staff's motion for order without hearing, I conclude that staff's motion should be granted.

First Cause of Action

By its first cause of action, Department staff alleges that "[b]y failing to submit an Investigation Summary Report, the respondent violated Section II of the [consent order] and paragraph 3 of the Corrective Action Plan at page six of the [consent order], in violation of ECL § 71-1929" (complaint ¶ 18).[3]

Under the terms of the consent order, respondent admitted that it discharged petroleum into the waters of the State in violation of ECL 17-0501 and 17-0807. To

[3] The causes of action set forth in the complaint are not repeated verbatim in the staff affirmation filed in support of its motion for order without hearing. Nevertheless, the staff affirmation manifestly seeks a ruling on respondent's liability relative to the causes of action articulated in the complaint and expressly requests a penalty for the violations alleged under the first and second causes of action in the complaint.

assess the extent of contamination caused by these violations, paragraph 3 of the corrective action plan provides that "[w]ithin 90 days of the effective date of this [consent order], Respondent shall submit to the NYSDEC, for its approval, an Investigation Summary Report (ISR) that completely delineates soil and groundwater contamination both on-site and off-site." The consent order became effective on November 2, 2007 and, therefore, the investigation summary report was due to be submitted to the Department no later than January 31, 2008. As of April 23, 2009, the date of the staff affidavit, the report had not been submitted to the Department.

The requirement for respondent to submit an investigation summary report is clearly set forth under the consent order and there appears to be no basis for respondent's denial of this allegation in its answer to the complaint.[4] Moreover, respondent does not elaborate on its denial nor does respondent proffer an affidavit or other evidence in support of its denial.

I conclude that Department staff has established a prima facie case with respect to the first cause of action and respondent has not proffered evidence to rebut staff's case. Accordingly, I hold respondent liable for violating paragraph 3 of the corrective action plan established under the consent order by failing to submit an investigation summary report for a period of 334 days, from February 1, 2008 through December 30, 2008.[5]

Second Cause of Action

By its second cause of action, Department staff alleges that "[b]y failing to undertake to contain the petroleum discharge at the Site, the respondent violated [Navigation Law] § 176 and 17 NYCRR § 32.5" (complaint ¶ 22).

Section 176(1) of the Navigation Law states, in part, "Any person discharging petroleum in the manner prohibited by section one hundred seventy-three[6] of this article shall immediately undertake to contain such discharge." Similarly, 17 NYCRR 32.5(a) states "Any person responsible for causing a discharge which is prohibited by section 173

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[4] I note that section II of the consent order states that respondent "shall carry out the obligations set forth in the attached Schedule of Compliance, which is hereby made part of this Order." The attachment to the consent order, however, is entitled "Corrective Action Plan for Spill No. 94-11303" (consent order at 6) and it does not expressly state that it is a schedule of compliance. Nevertheless, the corrective action plan is the only attachment to the consent order and it manifestly sets forth the schedule of activities that respondent must undertake in order to come into compliance. Accordingly, it is clear that the corrective action plan is the schedule of compliance referred to under section II of the consent order and respondent is bound to undertake its requirements.

[5] Staff proffered evidence that this violation continued at least through April 23, 2009, the date of the staff affidavit. However, staff's motion for order without hearing expressly limits the duration of the violation under this cause of action to the period from February 1, 2008 through December 30, 2008 (see staff affirmation ¶¶ 9, 11).

[6] Section 173 prohibits the discharge of petroleum without a State or federal permit.

of the Navigation Law shall take immediate steps to stop any continuation of the discharge and shall take all reasonable containment measures to the extent he is capable of doing so."

Under the terms of the consent order, respondent admitted that it violated Navigation Law § 173, by discharging petroleum without a permit, and Navigation Law § 176 and 17 NYCRR 32.5, by failing to immediately undertake to contain the discharge. Respondent acknowledges these admissions in its answer to the complaint.

Although respondent admitted to its failure to immediately undertake containment measures, that admission relates only to the time period prior to the execution of the consent order by respondent. Department staff's motion for order without hearing seeks penalties for respondent's alleged failure to undertake containment measures subsequent to the effective date of the consent order. In that regard, the April 23, 2009 staff affidavit in support of the motion for order without hearing expressly refers to "respondent's continuing failure to contain the [unauthorized discharge]" (staff affidavit ¶ 4). Moreover, staff's filings make clear that, at least through early 2009, respondent had not undertaken to delineate the extent of the contamination caused by the discharge, let alone contain it (staff affidavit ¶¶ 10, 12-14; staff affirmation ¶ 10). Respondent did not file any evidence in opposition to these allegations.

I conclude that Department staff has established a prima facie case with respect to the second cause of action and respondent has not proffered evidence to rebut staff's case. Accordingly, I hold respondent liable for violating Navigation Law § 176 and 17 NYCRR 32.5 by failing to undertake to containment measures at the site, including, but not limited to, failing to delineate the extent of contamination caused by the petroleum discharge, from February 1, 2008 through December 30, 2008, a total of 334 days.[7]

Penalty

Department staff argues that the maximum penalty authorized by statute in relation to the first cause of action is $12,525,000 (staff affirmation ¶ 9). Staff calculates this penalty under ECL 71-1929, which imposes a penalty of $37,500 per day for, among other things, failing to perform a duty imposed under a commissioner's order issued pursuant to specific titles of ECL article 17, including titles 5 and 8. The first cause of action alleges that respondent violated the consent order by failing to timely submit an investigation summary report to the Department. The purpose of the investigation summary report is, in part, to provide an assessment of the extent of groundwater contamination caused by respondent's discharge to the waters of the State in violation of

[7] Staff proffered evidence that this violation continued at least through early 2009 (see staff affidavit ¶¶ 10, 12-14 [stating that respondent has neglected to investigate the extent of the petroleum spill, but acknowledging a March 30, 2009 letter from respondent indicating the commencement of investigation activities]). However, staff's motion for order without hearing expressly limits the duration of the violation under this cause of action to the period from February 1, 2008 through December 30, 2008 (see staff affirmation ¶¶ 10, 11).

ECL 17-0501 and 17-0807. Accordingly, respondent's failure to submit the report is properly subject to the penalty provisions set forth under ECL 71-1929.

With regard to the duration of respondent's violation of the requirement to submit an investigation summary report, Department staff argues that this violation was ongoing "dating from February 1, 2008 until the date of the Complaint [December 30, 2008] – a total of 334 days" (staff affirmation ¶ 9). As noted previously, I conclude that this violation was ongoing from February 1, 2008 through at least April 23, 2009, the date of the staff affidavit. Accordingly, the total days of violation alleged by staff and, correspondingly, staff's calculation of the maximum penalty authorized by statute in relation to the first cause of action are within the amount that is supported by the record.

In relation to the second cause of action, respondent's violation of Navigation Law § 176 and 17 NYCRR 32.5, Department staff argues that the maximum penalty authorized by statute is $8,350,000 (staff affirmation ¶ 10). Staff calculates this penalty under Navigation Law § 192, which imposes a penalty of $25,000 per day for, among other things, violations of Navigation Law article 12, including section 176.

Department staff argues that respondent's violation under the second cause of action was ongoing "dating from February 1, 2008 until the date of the Complaint [December 30, 2008] – a total of 334 days" (staff affirmation ¶ 10). Pursuant to section IV of the consent order, in the event that respondent violates the order, staff may seek penalties for any ongoing violations that continued after the effective date of the order, November 2, 2007. Respondent's failure to undertake containment measures is an ongoing violation that continued after the effective date the consent order. Because respondent violated the order, staff was entitled to seek penalties from November 3, 2007 through at least early 2009.[8] Accordingly, the total days of violation alleged by staff and staff's calculation of the maximum penalty authorized by statute in relation to the second cause of action are within the amount that is supported by the record.

By its calculation, Department staff asserts that the total maximum penalty authorized by statute in relation to the first and second causes of action is $20,875,000. However, staff requests only a $20,875 penalty, or 0.1% of the maximum amount.

Additionally, staff requests the $2,500 suspended penalty established under the consent order. Pursuant to section I of the consent order, the $2,500 suspended penalty "shall become payable immediately upon service of a Notice of Non-compliance on the Respondent." Department staff issued a notice of violation to respondent, dated June 30, 2008, and served a notice of non-compliance on respondent, dated December 30 2008. Both of these documents duly advised respondent that it was in violation of the consent order.

The total penalty sought by Department staff is $23,375. Staff asserts this penalty is warranted because, among other things, respondent violated its agreement with the Department to expeditiously investigate and remediate the petroleum discharge at the

[8] See discussion on page seven and footnote seven above.

site. Further, staff asserts, respondent has been "non-cooperative and cavalier" in its approach to containment and remediation of the discharge. Staff also argues that respondent's continued delay in investigating and remediating the site has allowed respondent to delay incurring the cost of these activities and has exacerbated conditions at the site. (See staff affirmation ¶¶ 13-20.)

On this record, I conclude Department staff's requested penalty of $23,375 is authorized and appropriate.

CONCLUSIONS OF LAW

Department staff has established, as a matter of law, its allegation that, from February 1, 2008 through December 30, 2008, respondent failed to submit an investigation summary report to the Department in violation of paragraph 3 of the corrective action plan established under the consent order.

Department staff has established, as a matter of law, its allegation that, from February 1, 2008 through December 30, 2008, respondent failed to undertake to contain the petroleum discharge at the site in violation of Navigation Law § 176 and 17 NYCRR 32.5.

RECOMMENDATIONS

I recommend that the Commissioner issue an order holding respondent liable for the violations noted above and assessing a penalty against respondent in the amount requested by Department staff, $23,375.

/s/

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Richard A. Sherman
Administrative Law Judge

Dated: September 8, 2009
Albany, New York