STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

ORDER

DEC Case No. R2-20070419-180

- by -

LINDEN LATIMER HOLDINGS, LLC,

Respondent.

This matter arises from an administrative enforcement proceeding commenced by staff of the Department of Environmental Conservation ("Department") for alleged violations of the Environmental Conservation Law ("ECL"), the Navigation Law ("NL"), and related implementing regulations for a petroleum spill at property located in Flushing (Queens County), New York.

FACTUAL AND PROCEDURAL BACKGROUND

Respondent Linden Latimer Holdings, LLC owns real property located at 32-35 Linden Place, Flushing, New York (the "Site"). Respondent Linden Latimer Holdings, LLC acquired the Site from Global Development & Management Corp. ("Global Development") in November 2006.

On November 25, 1997, a petroleum spill at the Site was reported to the Department and assigned Department spill number 9709908 (the "spill"). The spill impacted soil and groundwater at the Site. As found by the Administrative Law Judge ("ALJ") in this proceeding, an investigation at the Site revealed volatile organic compounds in ground water in excess of applicable ground water quality standards.

As evidenced by Department staff's submissions in this proceeding, the Site's prior owner, Global Development, was aware of the spill during its ownership of the Site (see affidavit of Andre Obligado sworn to August 2, 2007, submitted in support of staff's motion for order without hearing, and Exhibits "A"

through "E" attached thereto).[1] Following Linden Latimer Holdings, LLC's acquisition of the Site in November 2006, Department staff made repeated efforts to obtain respondent's compliance in remediating the Site. Linden Latimer Holdings, LLC failed to address the contamination and the Site remains unremediated.

On June 13, 2007, Department staff commenced this proceeding by service of a complaint upon respondent via certified mail. On June 19, 2007, Department staff served a notice of hearing upon respondent via certified mail. Staff's complaint alleges that, as owner of the Site and commencing January 31, 2007, respondent:

> 1. Discharged petroleum into the waters of the State, which caused or contributed to a condition in contravention of the standards adopted pursuant to ECL 17-0301, and as set forth in 6 NYCRR part 700, et seq., in violation of ECL 17-0501;
>
> 2. Discharged petroleum into the waters of the State without a permit in violation of ECL 17-0501 and 17-0807;
>
> 3. Discharged petroleum without a federal or State permit in violation of NL § 173; and
>
> 4. Failed to immediately undertake to contain the prohibited discharge in violation of NL § 176 and 17 NYCRR 32.5.[2]

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[1] David Wong, who is the president of respondent Linden Latimer Holdings, LLC, was also the president of Global Development at the time of the transfer of ownership of the Site from Global Development to Linden Latimer Holdings, LLC in November 2006 (see copy of deed attached as Exhibit "B" to September 10, 2007 affirmation of Assistant Regional Attorney John K. Urda submitted in opposition to respondent's cross-motion).

[2] Staff selected January 31, 2007 as the commencement date for the violations alleged in its complaint based upon the official copy of the deed for the Site recorded/filed in the Office of the City Register of the City of New York on that date. The deed, which states that respondent acquired the Site on November 17, 2006, was filed with the City on January 31, 2007 (City Register File Number: 2007000056948) (see Exhibit "A" attached to August 2, 2007 affirmation of Assistant Regional Attorney John K. Urda submitted in support of Department staff's motion for order without hearing).

Respondent filed an answer to staff's complaint on July 16, 2007 and raised seven affirmative defenses. Thereafter, the matter was assigned to ALJ Helene G. Goldberger.

By notice of motion dated August 2, 2007, Department staff moved for an order without hearing in this matter pursuant to 6 NYCRR 622.12. By notice of cross-motion dated August 30, 2007, respondent moved to dismiss the proceeding against it. Assistant Regional Attorney John K. Urda filed an affirmation dated September 10, 2007 in opposition to respondent's cross-motion.

Following the submission of papers, ALJ Goldberger prepared the attached summary hearing report. Upon reviewing the record in this matter, I concur with and hereby adopt in part ALJ Goldberger's hearing report as my decision in this proceeding, subject to the following comments.

DISCUSSION

Department staff bears the burden of proof on all charges and matters that it affirmatively asserts in the June 13, 2007 complaint (see 6 NYCRR 622.11[b][1]). Respondent bears the burden of proof regarding all affirmative defenses (see 6 NYCRR 622.11[b][2]). The party making a motion bears the burden of proof on that motion (see 6 NYCRR 622.11[b][3]).

Respondent's Cross Motion to Dismiss

Respondent cross-moved to dismiss the proceeding for lack of jurisdiction. For the reasons stated by the ALJ, the cross motion is denied.

Department Staff's Motion for Order Without Hearing

Where, as here, a motion for order without hearing is contested, it will be granted if, upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party (see 6 NYCRR 622.12[d]).

On a motion for summary judgment under the CPLR, a "movant must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law .... The party opposing the motion ... must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the

opposing claim rests .... '[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient' for this purpose" (Gilbert Frank Corp. v Federal Ins. Co., 70 NY2d 966, 967 [1988] [citations omitted] [quoting Zuckerman v City of New York, 49 NY2d 557, 562 (1980)]. Thus, Department staff bears the initial burden of making a prima facie showing of entitlement to summary judgment as a matter of law with respect to each element of the violations alleged (see Cheeseman v Inserra Supermarkets, Inc., 174 AD2d 956, 957-958 [3d Dept 1991]). Once Department staff has done so, "it is imperative that a [party] opposing a ... motion for summary judgment assemble, lay bare and reveal his proofs" in admissible form (id. at 958 [quoting Du Pont v Town of Horseheads, 163 AD2d 643, 645 [3d Dept 1990]). Facts appearing in the movant's papers that the opposing party fails to controvert are deemed to be admitted (see Kuehne & Nagel, Inc. v Baiden, 36 NY2d 539, 544 [1975]).

In this case, respondent submitted a response to Department staff's motion. As noted in the ALJ's hearing report, however, respondent's affidavit consisted primarily of self-serving and conclusory statements which are insufficient to defeat a motion for summary judgment (see Hearing Report, at 9-11; see also Lerner Stores Corp. v Parklane Hosiery Co., Inc., 54 AD2d 1072 [4th Dept 1976]). The affirmation of respondent's attorney was similarly insufficient to overcome the technical facts established by Department staff (see Hearing Report, at 11).

In view of the documentary evidence submitted by Department staff in its motion and in opposition to respondent's cross-motion, the record clearly demonstrates that staff carried its burden of making a prima facie showing of entitlement to summary judgment as a matter of law with respect to each violation alleged (see Hearing Report, at 9-10). Respondent failed to sustain its burden with respect to any of its affirmative defenses or raise any triable issues of fact (see id. at 10-11). Accordingly, Department staff is entitled to an order without hearing on liability.

Proposed Penalty

Department staff seeks a civil penalty of $75,000 in addition to an order directing respondent to remediate the Site to the satisfaction of the Department under a written work plan approved by the Department.

I agree with ALJ Goldberger that the requested penalty

is reasonable based upon respondent's lack of both cooperation and effort to remediate the Site (see Hearing Report, at 13-15).

I disagree with the ALJ, however, concerning the question of the Department's authority to impose a civil penalty pursuant to the Navigation Law. As was recently held in Matter of Gasco-Merrick Road Gas Corp. (Decision and Order of the Commissioner, June 2, 2008), the Department has the statutory authority to impose a civil penalty for Navigation Law violations in a Commissioner order. Accordingly, the penalty assessed in this case is based upon both the ECL and Navigation Law violations.

Based on the record of this proceeding, and taking into account ALJ Goldberger's recommendations, I conclude that the civil penalty to be assessed against respondent should be $75,000. This penalty, although below the statutory maximum, is significant. Furthermore, based upon my review of the requested and recommended remediation, I conclude that the remediation is authorized and warranted, and the recommended date for the submission of the proposed work plan is reasonable.

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

I. Department staff's motion for order without hearing is granted in its entirety.

II. Respondent's cross-motion to dismiss the proceeding is denied in its entirety.

III. Respondent is adjudged to have violated the provisions of ECL 17-0501 and 17-0807, NL § 173, NL § 176, and 17 NYCRR 32.5 at the Site from January 31, 2007 to August 2, 2007, the date of staff's motion.

IV. Respondent is hereby assessed a civil penalty in the amount of seventy-five thousand dollars ($75,000). The civil penalty shall be due and payable within thirty (30) days after the 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:

John K. Urda, Esq.
Assistant Regional Attorney

New York State Department of
Environmental Conservation
Region 2 Office
47-40 21st Street
Long Island City, New York 11101

V. Respondent is hereby directed to remediate the Site to the satisfaction of the Department in accordance with the provisions of a written work plan approved by the Department. Respondent shall submit a proposed work plan for the remediation of the spill at the Site to the Department within thirty (30) days after the service of this order upon respondent. The proposed work plan for the remediation of the Site shall be sent to the Department at the following address:

Andre Obligado
Engineering Geologist I
New York State Department of
Environmental Conservation
Region 2 Office
47-40 21st Street
Long Island City, New York 11101

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

VII. The provisions, terms and conditions of this order shall bind respondent Linden Latimer Holdings, LLC, and its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By: _____
Alexander B. Grannis
Commissioner

Dated: July 15, 2008
Albany, New York

TO: Linden Latimer Holdings, LLC (By Certified Mail)
5 Peppermill Road
Roslyn, New York 11576

Xian Feng Zou, Esq. (By Certified Mail)
Law Offices of Xian Feng Zou
39-15 Main Street, Suite 303
Flushing, New York 11354-5431

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

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation of Article 17 of the Environmental Conservation Law, Article 12 of the Navigation Law, and Title 17 of the New York Compilation of Codes, Rules and Regulations by:

LINDEN LATIMER HOLDINGS, LLC,

Respondent.

SUMMARY HEARING REPORT

- by -

/s/
_____
Helene G. Goldberger
Administrative Law Judge

Proceedings

Department staff is represented by John K. Urda, Assistant Regional Attorney of the Department's Region 2 legal staff. The respondent is represented by Xian Feng Zou, Esq., Flushing, New York.

On June 13, 2007, the New York State Department of Environmental Conservation (DEC or Department) staff commenced this enforcement proceeding by serving a complaint upon the respondent, Linden Latimer Holdings, LLC (Linden), by certified mail. On June 19, 2007, Department staff served the notice of hearing upon the respondent also by certified mail. The respondent served its answer upon the DEC staff on July 16, 2007. The staff alleges that the respondent has violated the Environmental Conservation Law (ECL), the Navigation Law (NL), and its implementing regulations contained in Title 17 of the New York Compilation of Codes, Rules and Regulations (NYCRR) by failing to address a petroleum spill on its property located at 32-35 Linden Place, Flushing, New York. By notice of motion dated July 19, 2007, Department staff moved for a default judgment. By ruling dated August 2, 2007, I denied that motion.

I have two motions before me regarding this proceeding - staff's motion for order without hearing dated August 2, 2007 and the respondent's cross-motion to dismiss and opposition to staff's motion dated August 30, 2007.[1]

In support of staff's motion, Assistant Regional Attorney Urda submitted:

1) notice of motion dated August 2, 2007
2) attorney's affirmation dated August 2, 2007
3) deed and related recording documents for 32-35 Linden Place, Flushing, NY dated November 17, 2006
4) affidavit of Andre Obligado dated August 2, 2007
5) spill report for 32-35 Linden Place
6) letter dated July 10, 2006 from Andre Obligado to Global Development & Management Corp.
7) Letter dated September 18, 2006 from Andre Obligado to Global Development & Management Corp.
8) fax cover sheets dated October 30, 2006 from Andre Obligado to Xian Feng Zou, and

[1] In response to the request of Mr. Tony Tsai, an attorney representing Linden, I granted the respondent an extension until September 5, 2007 to respond to staff's motion. The respondent's papers were received in the Office of Hearings and Mediation Services on that date.

9) fax cover sheet dated December 13, 2006 from Andre Obligado to Xian Feng Zou with letter dated December 13, 2006 from Andre Obligado to Global Development & Management Corp. with proposed stipulation.

In support of respondent's cross motion and opposition, Xian Feng Zou, Esq. submitted:

1) notice of cross-motion to dismiss the proceedings dated August 30, 2007
2) attorney's affirmation dated August 30, 2007
3) affidavit of David Wong dated August 30, 2007
4) ruling of ALJ dated August 2, 2007, and
5) copies of four color photographs of gas station.

In response to Linden's cross-motion, staff submitted the affirmation of Assistant Regional Attorney John K. Urda dated September 10, 2007 that includes:

1) affidavit of service of notice of motion without hearing dated August 3, 2007 along with copies of certified mail receipts
2) deed and related recording documents for 32-35 Linden Place, Flushing, NY dated November 17, 2006
3) deed and related recording documents for 32-35 Linden Place, Flushing, NY dated January 20, 2006, and
4) spill report created on November 25, 1997.

Staff's Position

Staff alleges that Linden owns property where there was an oil spill on November 25,1997 (Spill Number 9709908). Respondent took title to the site on January 31, 2007 and based upon ownership, staff asserts that Linden assumed liability for the spill and the remediation of the site.[2] Staff contends that prior to commencing this proceeding it made a number of efforts to obtain the cooperation of Linden to enter into a stipulation that provided for a plan to remediate the site. Staff maintains that the respondent failed to respond to these repeated efforts and accordingly, staff commenced this proceeding.

[2] The January 2007 date is set forth in the staff's complaint. This appear to be the date the deed was recorded in the City Register's office. The deed contains a date of November 17, 2006.

Staff's first cause of action is comprised of three counts:

1) Discharging petroleum into the waters of the state causing or contributing to a condition in contravention of the standards adopted pursuant to ECL § 17-0301 and as set forth in 6 NYCRR Part 700, *et seq*., in violation of ECL § 17-0501;

2) Discharging petroleum into the waters of the state without a permit in violation of ECL § 17-0807; and

3) Discharging petroleum without a federal or state permit in violation of NL § 173.

Staff's second cause of action is comprised of one count:

1) Failing to immediately undertake to contain the prohibited discharge in violation of NL § 176 and 17 NYCRR § 32.5.

Staff contends that these violations occurred starting on January 31, 2007 and proposes the calculation of penalties from that date to August 2, 2007 - the date of staff's motion - totaling 183 days. Based upon this number of days multiplied by the statutory maximum for each alleged violation, staff calculated a penalty of $22,875,000. Staff is requesting a penalty of $37,500 for each cause of action and that Linden be required to fully investigate and remediate the site pursuant to a Department-approved plan.

In response to the respondent's cross-motion, Mr. Urda argues that staff obtained jurisdiction in this matter by service of the notice of hearing and in any case, the staff's motion for order without hearing was served, by certified mail, upon both the respondent and its counsel. Staff provided copies of the certified mail receipts in support of this claim. In response to Linden's assertions that it was not aware of the contamination, Mr. Urda notes that the principal in Linden and its counsel were also involved in the company that transferred the property to Linden and had been notified numerous time of the contamination as set forth in the spill report. Finally, Mr. Urda emphasizes that the Navigation Law places responsibility for discharges of petroleum, without fault, on the discharger, defined as an entity with the "capacity to take action to prevent an oil spill or to clean up contamination resulting from a spill." State of New York v. Green, 96 NY2d 403, 407 (2002).

Respondent's Position

Linden has moved for the dismissal of this proceeding on the ground that the Department staff has failed to obtain personal jurisdiction over the respondent. On June 13, 2007, the staff served the complaint on the respondent and on June 19, 2007, staff served the notice of hearing. The notice of hearing was received by the respondent on June 20, 2007 - four days after the respondent acknowledged receipt of the complaint. The respondent contends that because 6 NYCRR § 622.3 requires that an enforcement proceeding be commenced by a notice of hearing and complaint, service of the two documents separately did not effectuate commencement of this proceeding. In addition, although 6 NYCRR § 622.12 provides that the Department staff may commence an enforcement proceeding with a motion for order without hearing instead of a notice of hearing and complaint, Linden argues that this motion must be served on the respondent. Linden maintains that because staff's motion for order without hearing was instead served upon counsel, this pleading also did not achieve commencement of the proceeding.

Respondent also argues in opposition to staff's motion for order without hearing that because there are significant facts in contest, the motion should be denied. Linden argues that it did not have control over the property when the spill occurred in 1997 and therefore cannot be found to have illegally "discharged." Respondent also claims that the seller of the property represented that the property was "free of contamination." Linden cites NL § 176 for the proposition that it was the Department's responsibility to respond promptly to clean up any contamination and yet 10 years have passed.

David Wong, the president of Linden, states in his affidavit that Linden performed "an initial investigation of the property prior to purchase and the property appeared to be clear of any contamination." He also said that it is not Linden's intention to use the property as a gas station but rather to prepare the site for redevelopment. He explains that the site will be thoroughly investigated as part of this endeavor and that the respondent has already retained Hydrotech Environmental to commence initial tests and to work with DEC to "rectify any contamination." Accordingly, Mr. Wong says that "[he does] not quite understand why the Department commenced this proceeding without a final warning or notice."

FINDINGS OF FACT

1. In November 2006, Linden Latimer Holdings, LLC purchased the property located at 32-35 Linden Place, Flushing, New York from Global Development Corp. The deed was recorded in the City Register's office on January 31, 2007.

2. David Wong was the president of Global Development & Management Corp. (Global) and is the president of Linden.

3. On November 25, 1997, Keith Butler of Baltec Assoc. (Baltec) (designated as the "responsible party" on the spill report) notified the Department staff of a petroleum discharge at an Amoco gas station located at 32-35 Linden Place, Flushing, New York and this spill was identified as DEC Spill No. 9709908.

4. Baltec performed soil borings on four locations on the site that revealed high concentrations of benzene, toluene, ethylbenzene, and xylene (BTEX) in two of the borings on the southwestern portion of the property. Baltec also installed eight monitoring wells on-site.

5. On November 30, 2004, M.G. Consulting, P.E. tested two existing underground storage tanks. These tanks did not show signs of leakage.

6. On December 3, 2004, Department staff issued a letter by certified mail requiring a subsurface investigation. This letter was returned to the Department as undeliverable. Staff re-mailed the letter to a different address and the return receipt was received by the Department staff on January 19, 2005.

7. On March 14, 2005, an entity entitled Tyree submitted an investigation report to Department staff dated March 10, 2005 based upon samples collected from eight monitoring wells on the site. This report revealed that there were groundwater "impacts" in the area of wells MW-1 and MW-7. At this time, the owner of the property was a Mr. Pilarinos and the operator of the gas station was North Cross Gas, Inc.

8. In response to the March 2005 report, on April 8, 2005, Department staff advised Paul Hatcher of Tyree to install two wells across Linden Place to delineate MW-7.

9. On May 30, 2005, the Department staff received a letter from E. Housos, a son-in-law of M. Pilarinos, requesting an extension until September 2005.

10. On June 24, 2005, Jill Haimsen of Preferred Environmental Services (PES), advised Department staff that PES would be sending in a proposal to do additional delineation.

11. On September 12, 2005, Ms. Haimsen advised the Department staff via an e-mail that work to delineate the property would commence on September 15, 2005. She advised that the area around MW-7 would be further investigated via the installation of soil borings with soil and groundwater sampling. PES would examine all the existing monitoring wells for the presence of petroleum and if found, PES would remove this material. Ms. Haimsen also described other efforts that PES would employ to clean up the groundwater and represented that further testing would occur via existing monitoring wells or soil borings. Ms. Haimsen provided that a report would be filed based upon the results of this testing.

12. On December 13, 2005, Department staff received a Phase II Environmental & Remedial Action Plan report regarding this property. Four soil borings were performed on September 15, 2005 by Geoprobe. From the samples that were collected, soil boring #2 had the highest levels of volatile organic compounds (VOCs) and BTEX. This boring was outside the area that had been excavated 10 years previously. Soil boring #3 showed exceedances for total xylenes. The report indicated that no methyl tertiary butyl ether (MTBE) was found in the soil. As for the groundwater sampling, VOCs were found at levels exceeding groundwater quality standards. In addition, MTBE was detected in the groundwater. The report proposed that three downgradient monitoring wells be installed for use of oxygen diffusion probes and that monitoring of dissolved oxygen would occur monthly and VOC sampling would occur quarterly.

13. By letter received on March 16, 2006, the Department staff was informed by Fred Weill, Esq. that on January 20, 2006, the property was transferred from Panagiotis Pilarinos (T & G Service Station) to Global.

14. On May 26, 2006, Department staff geologist Andre Obligado of DEC's Region 2 Division of Environmental Remediation spoke with Bill Schlageter of PES who advised Mr. Obligado that the building on-site was scheduled to be demolished and that the tanks and contaminated soil would be removed. PES was retained to remain on site during this work. The owner of the property, Global, was planning to build a parking lot.

15. On June 19, 2006, Mr. Obligado spoke with Jill Haimson of PES who confirmed that the site had been transferred to a new owner and PES was no longer involved. On the same day, Mr. Obligado contacted Fred Weill, Esq. who confirmed that the property had been sold to developer Global, 32-17 College Point Blvd., Flushing, NY. He provided the contact for this company, Xian Feng Zou, 39-15 Main Street, Flushing, NY, and advised that he thought townhouses were planned for the site.

16. On June 19, 2006 and June 20, 2006, Mr. Obligado called Mr. Zou and left a message to call DEC.

17. On July 10, 2006, Mr. Obligado sent a stipulation to Global and faxed a copy of this stipulation to Mr. Zou. The Department required that the stipulation be signed within 30 days of its receipt. In the cover letter sent to Global, Mr. Obligado explained that due to petroleum contamination on the property, development of this site could pose a health risk to future residents. The letter also sets forth the nature of previous investigations and what additional measures the Department was requiring to monitor and remediate the location. The proposed stipulation provides that the owner agrees to clean up and remove the petroleum discharge in accordance with the attached corrective action plan (CAP).

18. On September 18, 2006, Mr. Obligado sent a final notification stipulation letter requiring that the signed stipulation be returned by no later than October 18, 2006.

19. On October 23 and 25, 2006, Mr. Obligado called Mr. Zou, left messages, and faxed him the final stipulation letter.

20. On October 30, 2006, Mr. Obligado spoke to Mr. Zou who asked him to fax the final notification stipulation again.

21. On November 14, 2006, Mr. Obligado called Mr. Zou and left a message for a return call.

22. On December 13, 2006, Mr. Obligado sent a revised stipulation to Mr. Zou that provided for additional time for a work plan submission.

23. On January 3, 2007, Mr. Obligado spoke with Mark Robbins from Hydrotech Environmental who advised that he was in contact with the property owner and was preparing a proposal.

24. On February 26, 2007, Mr. Obligado called Mr. Zou and left a message to contact DEC.

25. On April 17, 2007, Mr. Obligado referred the matter to DEC's Division of Environmental Enforcement because he had not received the signed stipulation, any work plan from Hydrotech, or a return call from Mr. Zou.

Discussion

Respondent's Cross-Motion to Dismiss

Respondent asserts that because the notice of hearing and complaint were served several days apart upon Linden by Department staff, the service was defective, staff failed to achieve jurisdiction, and the proceeding should be dismissed. Respondent also argues that staff served the notice of motion for order without hearing on counsel and not the respondent and therefore, this method of initiating an enforcement proceeding did not meet the requirements of 6 NYCRR § 622. 12(a).

I acknowledged in my ruling of August 2, 2007 that the Department staff served the notice of hearing and complaint 6 days apart. Section 622.3(a) of 6 NYCRR requires that when an enforcement proceeding is commenced with service of a notice of hearing, it must be accompanied by the complaint. In this case, staff served the complaint first and followed with the notice of hearing. Because the notice of hearing provides important

information to the respondent, it is critical to the respondent's knowledge of how to proceed in response to the complaint. Accordingly, I determined that the respondent should not be found in default for having answered the complaint six days late. Ultimately however, respondent did receive the required pleadings and was put on notice sufficiently in keeping with the regulatory requirements to answer the complaint.

In addition, staff may commence an enforcement proceeding by service of a motion for order without hearing. See, 6 NYCRR § 622.3(b)(1). Staff has provided the affidavit of service and the certified mail receipts indicating that Linden had been served with the notice of motion for order without hearing and supporting documents at the same time as counsel was served. Therefore, even if the staff's delayed service of the notice of hearing was found to undermine commencement of this proceeding, the motion for order without hearing resolved any deficiency.

I do not find that the 6 day gap in service between the complaint and notice of hearing is a sufficient ground to dismiss the proceeding. Moreover, the staff properly served both the respondent and counsel with the motion for order without hearing. Respondent was able to answer the complaint and has now responded to staff's motion for order without hearing. There has been no failing in staff's provision of due process or other prejudice borne by Linden that would require the dismissal of this proceeding.

I deny respondent's cross-motion to dismiss.

Staff's Motion for Order without Hearing

Grounds for Summary Order

Section 622.12 provides that "[a] contested motion for order without hearing will be granted if, upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor any party." 622.12(d). "The motion must be denied . . . if any party shows the existence of substantive disputes of facts sufficient to require a hearing." 622.12(e). Summary judgment, under the CPLR, is appropriate when no genuine, triable issue of material fact exists between the parties and the movant is entitled to a judgment as a matter of law. CPLR § 3213(b); Friends of Animals v. Association of Fur Mfgrs., 46 NY2d 1065, 1067 (1979).

Staff alleges in its motion that in January 2007 the respondent took title to the property - a contaminated site - and that the respondent has failed to take any action to remediate this contamination. Department staff geologist Andre Obligado establishes in his affidavit in support of staff's motion and annexed exhibits that the property is contaminated as a result of the 1997 oil spill, that the prior owners of the site have failed to remediate the site beyond establishing monitoring wells and taking test borings, and that Linden has failed to respond to Mr. Obligado's repeated efforts to obtain respondent's commitment to a clean-up and to resolve this matter prior to its referral for legal enforcement.

In contrast, Mr. Wong, president of Linden, makes self-serving and conclusory statements about his belief that the property had been cleaned up prior to the respondent's ownership of it. Mr. Wong's statement that respondent received "representations from the seller that the property was free of contaminations . . . that all tanks are empty without gas . . . that there is no gas spillage or contamination or spread of contamination" is insufficient to overcome the December 2005 PES Phase II report that there is contamination at the site and in the groundwater. While Mr. Wong claims that respondent performed "an initial investigation of the property prior to purchase and the property appeared to be clear of any contamination," he provides no detail or support for this statement and therefore, it is insufficient to establish that there are facts in contest with respect to the presence of contamination. General conclusory statements are insufficient to defeat a motion for summary judgment. S.J. Capelin Associates, Inc. v. Globe Mfg. Corp., 34 NY2d 338, 342-343 (1974). And, the fact that the property has not been used as a gas station in several years is not relevant to the issue of the contamination.

Moreover, as indicated in the deeds submitted by staff and the spill report, the respondent and counsel were put on notice of the contamination at this site prior to the transfer of the property from Global to Linden. Mr. Wong was/is a principal in both companies and Mr. Zou has been counsel to both entities. Therefore, in addition to the law's strict liability requirements, the companies were actually alerted to the contamination at the site prior to Linden's acquisition of the property.

In the attorney's affirmation in support of the respondent's opposition to staff's motion, Mr. Zou selectively quotes from the spill report to attempt to establish that there is no contamination at the site in need of remediation. For example,

he quotes from the March 14, 2005 update that states that wells 3 and 8 do not show contamination. However, this same status report provides that there are "GW [groundwater] impacts in the area of wells MW-1 and MW-7." It also indicates that "[i]mpacts appear delineated around MW-1." Mr. Zou similarly misrepresents the findings of the December 13, 2005 update which reports on the Phase II submission by only citing the findings that provided negative results. This same report indicates that soil boring # 2 indicated contamination outside of the area initially investigated 10 years ago. Soil boring # 3 also showed "exceedances for total xylenes." As stated above, this same report indicated groundwater contamination as well.

Both the attorney's affirmation and the affidavit submitted by respondent are insufficient to overcome the technical facts established by the DEC geologist and the spill report. Neither one of these documents is authored by one who has personal knowledge of the facts and therefore, they do not have any probative value on this motion. See, South Bay Center, Inc. v. Butler, Herrick & Marshall, 43 Misc. 2d 269 (Sup. Ct. Nassau Co. 1964). In addition, to the extent that Mr. Zou attempts to rebut the facts, he has misrepresented them.

As for Mr. Zou's statements that the report was not prepared by DEC and lacks authenticity, there is no merit to these allegations. The spill report contains the status of this site as reported to and chronicled by DEC staff. Mr. Obligado, the geologist who has submitted an affidavit in support of staff's motion, is also the individual identified in the spill report as having been responsible for this site since May 2006.

Mr. Wong states in his affidavit that Linden has retained Hydrotech Environmental to perform initial testing and to "work with the Department to rectify any contamination, if any." The spill report submitted by DEC staff notes that Mr. Obligado spoke with a representative of Hydrotech Environmental in January 2007, however, as of the date of staff's commencement of this proceeding, it appears that no plan had been submitted to staff or work commenced at the site.

Respondent's Responsibility for Contamination

Respondent argues that because the Environmental Conservation Law and Navigation Law use the word "discharge" to characterize violations involving petroleum spills, the respondent cannot be found liable because it acquired the property 10 years after the spill. But as correctly noted by Mr. Zou, whether an owner is responsible or not turns on its capacity

to "prevent an oil spill or to clean up contamination resulting from a spill." State of New York v. Speonk Fuel, Inc., 3 NY3d 720 (2004). In this case, the Court of Appeals confirms the Legislature's intent to place liability on respondents on their ability to take action rather than on actual fault. Linden, since it took ownership of this site, had the capacity to investigate and remediate the spill even though it was not the owner in 1997 when the spill took place, and therefore, it is responsible as a "discharger." As noted by the Court of Appeals in Speonk and in State of New York v. Green, 96 NY2d 402 (2001), a landowner who could have prevented a discharge of petroleum and did not, is a "person who has discharged petroleum" within the meaning of the statute. Thus, because Linden, as owner of the property, failed to investigate or remediate this spill, the term "discharger" is applicable.

As for respondent's contention that it is DEC's responsibility to respond promptly to clean up any contamination, it appears from the spill report submitted by DEC staff that as soon as the State was notified of the spill in 1997 it has taken steps to effectuate a cleanup. Where possible, it is preferable that those responsible as property owners or operators remediate a spill in order to control costs, avoid further liability, and conserve taxpayer funds. See, *e.g.*, State v. Dennin, 17 AD3d 744, 792 (3d Dep't 2005).

Respondent is Liable for Violations of ECL § 17-0501, 17-0807, and NL § 173

ECL § 17-0501 prohibits the discharge of matter "that shall cause or contribute to a condition in contravention of the standards adopted by the department pursuant to section 17-0301." ECL § 17-0807(4) prohibits "any discharge not permitted by the provisions of this article, rules and regulations adopted or applicable pursuant hereto, the Act, or provisions of a permit issued hereunder." NL § 173 prohibits the discharge of petroleum.

Staff alleges in its first cause of action that the respondent violated ECL § 17-0501 by discharging petroleum into the waters of the state causing or contributing to a condition in contravention of the standards adopted pursuant to ECL § 17-0301. See, 6 NYCRR § 703.5. In addition, the staff alleges that the respondent discharged petroleum into the waters of the state without a state or federal permit in violation of ECL § 17-0807 and NL § 173.

Respondent has not raised any opposing facts claiming that it or any prior owner of the property had a permit to discharge petroleum at this site. In addition, the spill report sets forth evidence that there has been groundwater contamination resulting from the oil spill. 6 NYCRR § 703.5. The results of testing done in March 2005 and September 2005 provided that groundwater impacts were found and that groundwater quality standards were exceeded. The respondent has not submitted any evidence to the contrary.

Accordingly, the respondent is found to be in violation of ECL §§ 17-0501, 17-0807 and NL § 173.

Respondent is Liable for Violations of NL § 176 and 17 NYCRR § 32.5

NL § 176 requires that "[a]ny person discharging petroleum . . . shall immediately undertake to contain such discharge." Section 32.5(a) of 17 NYCRR provides similarly, "[a]ny person responsible for causing a discharge which is prohibited by section 173 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."

As set forth above, because Linden has failed to take any affirmative steps to remediate the discharge, it is liable for violation of NL § 176 and 17 NYCRR § 32.5.

Penalties

The Department staff calculated that the maximum penalty for the violations is $22,875,000 based upon respondent's ownership of the property for 183 days (up until the date of the staff's motion) multiplied by the maximum fines that are permitted under the ECL and NL. Staff has requested a payable penalty of $75,000. In addition, staff has asked for an order requiring that Linden undertake an investigation and remediation of the site.

The Department's 1990 Civil Penalty Policy requires that several factors be assessed in determining a penalty. This policy requires that the gravity of the violation and the economic benefits of non-compliance be assessed. To assess the gravity of the offense, the policy sets forth these factors: a) potential harm and actual damage caused by the violations; and b) relative importance of the type of violations in the context of the Department's overall regulatory scheme. Respondent's failure

to address the spill as soon as it was in ownership has allowed the existing contamination to continue to harm the environment.[3] The Legislature has placed great importance on the prevention of oil spills as well as their prompt cleanup as demonstrated in the statutory scheme that has been put in place. ECL § 17-0501 and NL, Article 12.

By delaying the creation, submission, and implementation of a plan to investigate and remediate the site, the respondent has saved money. However, the staff has not put forward any estimates of the amount of funds that the respondent has saved through this forestallment. Therefore, I cannot include economic benefit in recommending a penalty to the Commissioner.

The policy also sets forth factors to be used to adjust the gravity component: a) culpability, b) violator cooperation, c) history of non-compliance, d) ability to pay, and e) unique factors. With respect to culpability, it appears that the original spill was reported by the discharger when it was detected in 1997. While Linden did not take title to the property until this year, it has failed to take any action to address the continuing discharge and contamination. See also, footnote 3.

As for cooperation, the staff has documented repeated efforts to cooperate with the respondent to achieve an appropriate investigation and cleanup to no avail. Mr. Wong states in his affidavit that Linden has retained HydroTech Environmental to address the contamination but does not provide any details as to when the company was hired, what it has accomplished, and when Linden intends to produce a plan for Department approval. Instead, the Department professional recounts one conversation with a representative of HydroTech Environmental in January 2007 but no further communications or submissions.

There is no information in the record before me as to any indication that the respondent has had a prior history of environmental non-compliance nor are there any facts asserted as

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[3] In its opposition to Linden's cross-motion, staff addresses the apparent continuity of involvement of both Mr. Wong and Mr. Zou in the transfer of the property from Global to Linden. Thus, it appears that these actors could have assisted in the initiation of an environmental remedy earlier than January 2007.

to the respondent's ability to pay. I do not find any unique factors in this record that would mitigate the penalty.

The Civil Penalty Policy requires that all monetary penalty calculations begin with the potential statutory maximum dollar amount which could be assessed. My calculation of this amount using the 183 days that staff provides is less than the staff's calculation. The first cause of action contains three counts; however, because the second and third counts are essentially the same allegation - discharging without a permit - the maximum amount for this violation is $13,725,000. I calculated this amount by multiplying $37,500 (the maximum penalty for each day of violation pursuant to ECL § 71-1929) by 183 and then by two for the two separate violations established in the staff's first cause of action.

As for the second cause of action, these are violations of the Navigation Law which requires that penalties be sought in a court of competent jurisdiction. NL § 192. Therefore, I do not include the additional $4,575,000 in penalties under the Navigation Law for failure to undertake remediation (183 days multiplied by $25,000 per day, the maximum penalty provided in NL § 192).

Clearly, the staff's request for a $75,000 penalty is appreciably less than the maximum amount that could be assessed pursuant to the Environmental Conservation Law. Given the complete failure of this respondent to demonstrate a willingness to promptly address this significant environmental harm while at the same time contemplating a residential development that could expose tenants to toxic pollutants, I find the staff's request reasonable. It is important that the penalty be significant so that other developers do not conclude that the risk of being subject to a penalty as a result of delaying a cleanup is just a cost of doing business.

Conclusion

The respondent's cross-motion to dismiss is denied. The staff's motion for summary order is granted based upon the respondent's failure to put forward any material issue of fact to defeat staff's motion. Linden is liable for violations of ECL §§ 17-0501, 17-0807, NL §176, and 17 NYCRR § 32.5. Staff's proposed penalty of $75,000 should be granted along with an order requiring a prompt investigation and remediation of the site.

Dated: Albany, New York
October 18, 2007