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

In the Matter

- of -

the Alleged Violations of Articles 27 and 17 of the Environmental Conservation Law ("ECL"), Article 12 of the Navigation Law, and Parts 372, 373, 376, 612, and 613 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

- by -

DOUGLAS GIAMBRONE and MARCON ERECTORS, INC.,

Respondents.

DEC Case No. R9-4454-97-11

DECISION AND ORDER OF THE COMMISSIONER

March 17, 2010

DECISION AND ORDER OF THE COMMISSIONER

This administrative enforcement is before the Department of Environmental Conservation ("Department") pursuant to a judgment and order of Supreme Court, Erie County (Dillon, J.), which remitted the proceeding for a penalty hearing on the violations established in a prior order of the Commissioner (Dec. 31, 2001). In that order, the Commissioner determined that respondents Douglas Giambrone and Marcon Erectors, Inc., were liable for violations of the statutes and regulations governing the generation, storage and disposal of hazardous waste and the discharge of petroleum. The violations arose from the discharge of polychlorinated biphenyls ("PCBs") and petroleum from above ground storage tanks ("ASTs") formerly located at property owned by respondent Giambrone and leased by respondent Marcon Erectors in Buffalo, New York.

The penalty hearing was presided over by Administrative Law Judge ("ALJ") Molly T. McBride, who prepared the attached hearing report. In that report, the ALJ recommends that respondents' motion to dismiss the proceeding be granted pursuant to Matter of Cortlandt Nursing Home v Axelrod (66 NY2d 169 [1980], cert denied 476 US 1115 [1986]). For the reasons that follow, the ALJ's recommendation is rejected, respondents' motion to dismiss is denied, and a penalty is imposed upon respondents.

FACTS AND PROCEDURAL BACKGROUND

The facts and procedural background of this proceeding, as determined by the December 31, 2001, Commissioner's order,[1] or as supported by a preponderance of the evidence presented during the penalty phase of this proceeding (see 6 NYCRR 622.11[c]), are as follows.

This proceeding concerns a parcel of real property located at One Howell Street, Buffalo, New York. The site is located in a mixed commercial and residential neighborhood and is adjacent to a bike path running along the Scajaquada Creek.

[1] The findings of fact as determined by the ALJ and adopted by the Commissioner in the December 31, 2001, order are incorporated by reference herein, and will not be repeated in their entirety here (see ALJ Summary Report on Motion for Order Without Hearing, Dec. 31, 2001, at 3-9).

The site was purchased by respondent Giambrone in 1980. Respondent Giambrone purchased the property from B. Hoffman Roofers, Inc., who in turn had purchased the property from Ashland Oil Company in 1971. Ashland had used the site as a home heating oil distribution facility.

Upon purchasing the property, respondent Giambrone leased the property to respondent Marcon Erectors. Respondent Marcon Erectors is a custom aluminum window and door installation company. Respondent Giambrone is Marcon's president and chief executive officer.

When respondent Giambrone purchased the site, three ASTs were located in a containment area in the eastern corner of the property. Two of the ASTs were 10,000-gallon horizontal tanks resting on supports (Tanks 1 and 2). The third AST was a 25,000-gallon vertical tank measuring 20 to 30 feet in diameter (Tank 3). The containment area consisted of 10-foot high concrete walls with a soil floor covered in vegetation. At the time of the purchase, respondent Giambrone observed black, oily heating oil residue staining the containment area walls. He was also aware of the history of the site, including Ashland's ownership and storage of petroleum at the facility.

In 1985, the City of Buffalo contacted respondent Giambrone concerning the aesthetic impact the 25,000-gallon vertical tank (Tank 3) had on the neighborhood, particularly for users of the Scajaquada bike trail adjacent to the property. A city employee suggested that respondent Giambrone either paint the tank or have it cut down so that it was no longer visible above the containment area walls. Rather than incur the expense of periodic painting, respondent Giambrone decided to have the tank walls cut down. He directed employees of respondent Marcon to remove the walls of the tank down to about two to three feet from the base of the tank.

As a result of the removal of tank walls, a black sludge about two feet deep that had collected in the bottom of the tank was now exposed to the environment. The sludge had an oily, gritty character with a crusty surface. Respondent Giambrone testified that he assumed the sludge was petroleum residue, an assumption that later proved to be correct.

After respondent Giambrone's employees had removed the tank walls, only an uneven rim between zero and six inches high above the surface of the sludge remained. In some locations,

the employees had cut notches in the walls below the surface level of the sludge. Over the years, precipitation had collected in what remained of the tank and overflowed into the containment area, transporting contamination onto the floor of the area and further staining the containment walls.

Department staff first inspected the facility in September 1995 after receiving a spill complaint from a party other than respondents. After observing that the area around the ASTs was contaminated with spilled petroleum product and that the sludge remained in the open-top 25,000 gallon AST, Department staff informed respondent Giambrone that he would have to clean up the ASTs and the spill according to a Department-approved schedule. He was also informed that he had to either register and maintain the ASTs according to standards contained in the Department's petroleum bulk storage regulations, or permanently close them in accordance with those regulations.

During the following years, respondent Giambrone's communications with the Department were infrequent and he occasionally failed to respond to staff's inquiries (see Summary Report, Findings of Fact 20-30). Nevertheless, respondent Giambrone proceeded to take steps to locate and hire a consultant to perform clean-up work. Ultimately, in early September 1997, respondent Giambrone informed Department staff that he had hired Safety-Kleen to perform clean-up work at the site. Safety-Kleen informed staff that work would begin the following week.

Site inspections by Department staff during the clean-up operation revealed that Safety-Kleen was hired only for tank clean-up, not to clean up any spillage around the tanks (see also Dixon Letter [8-19-97], Waste Disposal Service Quote, attached to Resps' Summary Statement). Also, although the two 10,000 gallon ASTs were cleaned out, they were not cleaned to regulatory standards.

In mid-September 1997, Department staff first became aware that material at the site was hazardous waste containing PCBs at levels over 50 parts per million ("ppm"). Tests conducted by respondents' contractors revealed PCB levels of 186 ppm and 259 ppm, respectively, in the two 10,000 gallon ASTs, and 214 ppm in the cut-down 25,000 gallon tank. Soil samples taken in and outside the containment area indicated PCB levels varying from 7 ppm to 230 ppm. The Department's recommended soil clean up level for PCBs was 1 ppm (see Recommended Soil

Cleanup Objectives for Organic Pesticides/Herbicides and PCBs, Technical and Administrative Guidance Memorandum ["TAGM"] 4046 [1994], Table 3).[2]

Site inspections in late September 1997 revealed that site remediation had not been completed. During an inspection on September 22, 1997, Department staff observed additional spills that occurred during the clean up process, and that two roll-off containers containing material removed from the two 10,000 gallon tanks had been returned after being rejected by the waste disposal facility to which they had been sent.[3] The waste from the two tanks had been mixed with liquid, sawdust and woodchips and, thus, was no longer suitable for landfill disposal. Staff also observed that sludge from the ASTs had seeped under and outside the concrete retaining walls. In addition, respondents' contractor reported seeing children's footprints and a golf ball in the sludge in Tank 3.

A subsequent inspection on September 25, 1997, revealed that a fence around the site was pushed in and access to the containment area was now possible. The fence was later repaired by respondents.

Further testing that respondents submitted in October 1997 indicated that the sludge in tank 3 contained PCB levels as high as 16,000 ppm. The testing also revealed that the sludge contained both chlorinated and nonchlorinated solvents of the type typically used in industry for cleaning, many of which are known or suspected carcinogens. These solvents included tetrachloroethylene, trichloroethylene, benzene, vinyl chloride, and dichloroethane. Respondents subsequently informed the Department that they could not complete site investigation and remediation.

During inspections in 1999, Department staff observed that tank 3 remained uncovered, and contaminated soil had not been cleaned up.

---

[2] Under the soil cleanup objectives ("SCOs") adopted into regulation in 2006, the PCB SCO for restricted use sites is still 1 ppm (see 6 NYCRR 375-6.8[b]). The PCB SCO for unrestricted use sites is 0.1 ppm (see id. 6 NYCRR 375-6.8[a]).

[3] Safety-Kleen eventually entered into a consent order with the Department for its own violations of the ECL and the Navigation Law arising from its clean-up activities at the site.

Administrative Enforcement Proceedings

Department staff commenced the present proceeding by service of a motion for order without hearing[4] in lieu of complaint in February 2000. Staff alleged sixteen causes of action charging respondents with violations of statutory and regulatory requirements governing the generation, storage and disposal of hazardous wastes, and two causes of action charging violations of Navigation Law requirements governing petroleum discharges. The eighteen causes of action arose from respondents activities in cutting down Tank 3 and exposing the PCB-contaminated sludge to the environment, and the activities of respondents' contractors during the clean-up work at the site, among other things.

After joinder of issue, the Commissioner issued an order, adopting the summary report of the ALJ and granting Department staff's motion in part (see Order of the Commissioner, Dec. 31, 2001, at 2). The Commissioner held that respondents were subject to the federal Resource Conservation and Recovery Act (42 USC § 6901 et seq. ["RCRA"]), as administered under Environmental Conservation Law ("ECL") article 27 and parts 372, 373, and 376 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), in that they are persons that owned or operated an unpermitted hazardous waste storage, treatment or disposal facility (see Summary Report, at 9-16). The Commissioner further held respondents liable for fourteen separate violations of the hazardous waste regulations, and the Navigation Law §§ 173 and 175 violations (see Summary Report, at 17-23).[5] The Commissioner imposed a civil penalty of $135,000

[4] A motion for order without hearing is the administrative equivalent of a motion for summary judgment under the Civil Practice Law and Rules (see 6 NYCRR 622.12[d]).

[5] The Commissioner declined to hold respondents liable for four causes of action charged in the motion on the ground that those causes of action were multiplicitous of other hazardous waste violations already established (see Summary Report, at 19-20, 21-22).

I also note that the ALJ's summary report contained typographical errors with respect to the regulatory authority for the first two causes of action. The first cause of action concerned a violation of 6 NYCRR 372.2(a)(2) (requiring a person who generates hazardous waste to determine if the waste is hazardous), not 6 NYCRR 373.2(a)(2) (which does not exist). The

for the violations established, and directed that certain remedial activities be undertaken (see Order, at 2).

2002 CLPR Article 78 Proceeding

Respondents commenced a CPLR article 78 proceeding challenging the Commissioner's December 31, 2001, order. By judgment and order dated March 12, 2002, Supreme Court, Erie County (Dillon, J.), annulled the civil penalty imposed by the Commissioner, and remitted the matter to the Department to convene a hearing to assess the amount of civil penalties to be recommended to the Commissioner. The court concluded that the ALJ's and, thus, the Commissioner's, liability determinations had a rational basis and were not affected by errors of law (see Bench Decision, Aug. 22, 2001, at 7-10). The court further concluded that on its face, the penalty imposed was not so disproportionate to the offense as to be shocking to one's sense of fairness (see id. at 10-11). Nevertheless, the court concluded that because triable issues of fact existed concerning the amount of the penalty to be imposed, a penalty hearing was required (see id. at 11-17).

Post-Judgment Proceedings

In light of Supreme Court's order directing that a penalty-phase hearing be held, respondents conveyed their settlement position to Department staff, but did not make a specific settlement offer. Several attempts by both the Attorney General's office and Department staff to obtain a credible settlement offer from respondents proved fruitless. Thereafter, staff determined to devote its limited resources to the then on-going remediation effort at the site.

With respect to those on-going efforts, in May 1999, the Department added respondents' facility to the Registry of Inactive Hazardous Waste Disposal Sites as a Class 2 site. Class 2 sites are inactive hazardous waste sites that pose a significant threat to the public health or the environment requiring remedial action (see ECL 27-1305[2][b][2]).

---

second cause of action concerned a violation of 6 NYCRR 372.2(a)(8)(ii) (requiring that the date upon which the period of hazardous waste accumulation begins be clearly marked on storage containers and visible for inspection), not 6 NYCRR 373.2(a)(8)(ii) (which also does not exist).

In January 2001, after respondents declined to do the remedial work, the Department's Division of Environmental Remediation hired contractors to undertake an emergency removal action to remove the ASTs and PCB-contaminated soil located in the containment area. The PCB removal work was completed in February 2001 at a cost to the State of over $200,000. The Department also incurred costs of approximately $50,000 to $100,000 in sampling, analytical, and personal service costs.

Subsequently, in April 2002, the Department began negotiations with Ashland Oil for the investigation and remediation of the petroleum contamination that remained at the site after the PCB cleanup. Ashland ultimately conducted subsurface investigations in November 2003 and April 2005, and commenced cleanup of the site in November 2006. Ashland substantially completed the cleanup in May 2007, incurring costs of approximately $4,000,000 for its investigation and remediation of the property.

With remediation nearing completion in December 2006, Department staff contacted respondents' representative reiterating its willingness to settle the penalty issue. When respondents failed to respond to Department staff's settlement offer, staff, for the first time since Supreme Court's March 2002 judgment, contacted the Department's Office of Hearings and Mediation Services ("OHMS") in March 2007 concerning the need to schedule a penalty hearing.[6]

Attempts to schedule the hearing were delayed due to the circumstance that respondents' counsel had retired from the practice of law in April 2007 and had moved to live outside the United States (see Hearing Report, at 2). After new counsel identified himself to the ALJ, the penalty hearing was initially scheduled to commence in July 2007.

---

[6] Prior to March 2007, Department staff had not informed the ALJ or the Commissioner about Supreme Court's judgment remanding the proceeding to the Department for a penalty hearing, and neither the ALJ nor the Commissioner was otherwise aware of the judgment. As will be discussed later, staff's failure to inform OHMS concerning the judgment does not require dismissal of this proceeding. Nevertheless, it is incumbent upon Department staff to immediately inform OHMS and the Commissioner when such a court order has been issued, particularly when an enforcement proceeding has been the subject of administrative adjudication resulting in a Commissioner's order.

At Department staff's request, the hearing was adjourned due to witness unavailability. The hearing was further adjourned upon the request of respondents' counsel pending the commencement of a second CPLR article 78 proceeding.

2007 CPLR Article 78 Proceeding

In September 2007, respondents commenced a second CPLR article 78 proceeding seeking an order permanently staying all further administrative proceedings against respondents, including the penalty hearing. In an order dated November 15, 2007, Supreme Court, Erie County (Dillon, J.), denied respondents' motion for a permanent stay, and directed that the hearing before the ALJ be completed before November 15, 2007. Citing Cortlandt (66 NY2d 169 [1985]), respondents argued that the Department's enforcement proceeding should be dismissed due to the four and one-half year delay in holding the penalty hearing. The court ruled, however, that it would not intervene at this stage (see Bench Decision, Nov. 1, 2007, at 12-13). The court held that issues of prejudice under Cortlandt were to be determined by the Department in the first instance (see id. [citing Housing Opportunities Made Equal, Inc. v Pataki, 277 AD2d 888 [4th Dept 2000], lv denied 96 NY2d 712 [2001]). Nevertheless, the court directed that the penalty hearing be completed the following week (see id. at 13).

Penalty Hearing and Post-Hearing Proceedings

The penalty hearing was convened on November 7, 2007, in the Department's Region 9 office, Buffalo, New York, before ALJ McBride. Prior to the commencement of the hearing, respondents served upon Department staff a motion to dismiss all further proceedings against respondent due to the delay in holding the penalty hearing. The ALJ reserved decision on the motion and granted staff fourteen days to file a response to the motion (see Hearing Transcript, Nov. 7, 2007 ["Tr."], at 6).

The ALJ then proceeded with the hearing, during which both Department staff and respondents presented a case. Testifying on behalf of the Department were Maurice Frederick Moore, Engineering Geologist I; Francine Gallego, Environmental Engineer; and Thomas Corbett, Environmental Chemist. Respondent Douglas Giambrone testified on behalf of respondents. The hearing concluded the same day it began.

At the penalty phase hearing, Department staff testified that based on the size of the cut down tank 3, an estimated 100 to 999 gallons of petroleum remained in the tank or was released into the containment area and, thus, exposed to the environment. Staff further testified that although PCBs tend to attached to soils and migrate slowly, with years of exposure, they would continue to migrate through the soils and volatilize into the air. Staff indicated that PCBs that had spilled out of Tank 3 had migrated down into the soil under the ASTs and outside the cracks in the containment area walls.

After the hearing, Department staff filed its response to respondents' trial motion to dismiss dated November 21, 2007. Department staff also filed a post-hearing closing brief of the same date. Respondents subsequently filed a summary statement dated December 21, 2007, in response to Department staff's closing brief.

The ALJ forwarded her hearing report dated March 21, 2008, to the Commissioner, recommending that respondents' motion to dismiss be granted.

DISCUSSION

Respondents' Motion to Dismiss

1. Positions of the Parties

In their motion to dismiss, respondents argued that they were prejudiced by the delay in holding the penalty hearing. The prejudice alleged was that (1) the PCB and petroleum contamination at the site was solely attributable to Ashland's conduct at the site, (2) the remediation at the site resulted in a total reconfiguration of the site, making it impossible, in respondents' view, to mount a defense, (3) respondents' former counsel had retired and was no longer available to assist them, and (4) respondent Giambrone had to disclose on business credit applications that he had an outstanding claim against him by the Department and, allegedly, had been limited in his ability to obtain credit to fully finance his business. Citing State Administrative Procedure Act ("SAPA") § 301(1), respondents contended that the four and one-half year delay was unreasonable and, pursuant to Cortlandt, this proceeding should be dismissed. Respondents also contended that the Department failed to comply with 6 NYCRR 622.12(f), which requires an ALJ to "immediately" convene a penalty hearing after determining that summary judgment may be granted on

liability. In support of their motion, respondents filed an unsigned and undated affidavit of their former counsel, among other exhibits (see Burke Affid, Notice of Motion to Dismiss, Nov. 6, 2007, Exh I).

In response, Department staff argued that respondents failed to satisfy the four factors enunciated in Cortlandt sufficiently to warrant dismissal. Staff argued that respondents identified no private interest compromised by the delay and failed to establish any relevant prejudice. Staff noted that respondents were already determined in 2000 to be liable for the violations, and the circumstance that the site has since been remediated had no impact on their ability to present a meaningful defense on penalty. Staff also contended that respondents were partially responsible for the delay in resolving this matter due to their unwillingness to avail themselves of settlement opportunities. Staff further asserted that its contribution to delay was due to limited staff resources, which were primarily devoted to remediation of the hazardous and other wastes at the site. Staff argued that lack of resources does not provide a ground for finding any delay unreasonable. Finally, staff cited the strong public policy in favor of punishing violators of RCRA as a deterrence to other potential violators.

Department staff further argued that rather than suffering any prejudice from the delay, respondents actually benefitted. In particular, respondents avoided any interest that would have accrued if the penalty were established earlier. Moreover, staff contended that respondents benefitted economically, both in terms of avoided clean up costs and increased property values, as a result of the remediation conducted at the State taxpayer's expense, as well as at the expense of Ashland.

With respect to the alleged violation of 6 NYCRR 622.12(f), staff argued that section is inapplicable in the procedural context presented here.

2. Discussion

In her hearing report, the ALJ concluded that respondents were prejudiced by the Department's delay and that respondents were not given an adjudicatory hearing on penalties in a reasonable amount of time. Accordingly, the ALJ recommends that respondents' motion to dismiss be granted. However, the ALJ's conclusions are not supported by a fair reading of the

record. To the contrary, respondents failed to establish relevant and sufficient prejudice under Cortlandt to warrant the drastic remedy of dismissal. Thus, respondents' motion should be denied.

As the party making the motion to dismiss, respondents bear the burden of proof on the motion (see 6 NYCRR 622.11[b][3]). Whenever factual matters are involved, the party hearing the burden of proof must sustain that burden by a preponderance of the evidence (see 6 NYCRR 622.11[c]). On this record, respondents' failed to carry their burden of proof on the motion.

To warrant dismissal of this administrative proceeding under Cortlandt, respondents must establish substantial actual prejudice resulting from the Department's delay in convening the hearing (see Cortlandt, 66 NY2d at 177-178; Matter of Diaz Chemical Corp. v New York State Div. of Human Rights, 91 NY2d 932, 933 [1998]). The mere lapse of time in rendering an administrative determination does not, standing alone, constitute prejudice (see Matter of Louis Harris and Assocs., Inc. v deLeon, 84 NY2d 698, 702 [1994]). Thus, no fixed period exists after which delay becomes unreasonable as a matter of law (see id. [6 year delay before probable cause hearing and over 7 years before final determination not unreasonable as a matter of law]; Diaz, 91 NY2d at 933 [11 year delay before holding hearing and 3 year delay in issuing order not unreasonable]; Matter of Hansen v New York State Dept. of Envtl. Conservation, 288 AD2d 473 [2d Dept 2001] [9 year delay in bringing complaint not unreasonable]; St. Joseph's Hosp. Health Ctr. v Department of Health, 247 AD2d 136, 151-152 [4th Dept 1998], lv denied 93 NY2d 803 [1999] [10 year delay not unreasonable]).

To determine whether a period of delay is reasonable within the meaning of SAPA § 301(1), agencies and reviewing courts weigh certain factors, including (1) the nature of the private interest allegedly compromised by the delay; (2) the actual prejudice to the private party; (3) the causal connection between the conduct of the parties and the delay; and (4) the underlying public policy advanced by governmental regulation (see Cortlandt, 66 NY2d at 177-178; see also Matter of Hansen, ALJ Hearing Report, at 4-5, adopted by Commissioner Order, Jan. 3, 2000, confirmed on judicial review 288 AD2d 473). Contrary to the ALJ's conclusion, "close scrutiny" of the record here fails to reveal substantial actual prejudice to respondents due to the four and one-half year delay in holding the penalty

hearing (see Diaz, 91 NY2d at 993; Matter of Corning Glass Works v Ovsanik, 84 NY2d 619, 626 [1994]).

The private interests the ALJ concluded were compromised by the delay included additional attorneys' fees allegedly generated by the change in counsel, and the alleged economic impact upon respondent Giambrone, both personally and in the operation of his business, as a result of his disclosure of potential penalties owed to the State on his financial documents. These claimed impacts are conclusory and unsubstantiated, however (see St. Joseph's Hosp., 247 AD2d at 152 [conclusory assertions of prejudice do not raise fact issues]). No evidence was presented on either the motion to dismiss or at the hearing quantifying any additional legal fees the ALJ concluded were incurred. Moreover, the conclusory allegations concerning the impact of the undetermined penalty on respondents' ability to obtain business credit appears only in respondents' attorney's affidavit on the motion. No competent evidence, either on the motion or at the hearing, was offered supporting the assertion that respondents' business credit was actually impacted. Specifically, no evidence was presented indicating that respondents disclosed the undetermined penalty, or that they were denied credit or were otherwise limited in their ability to obtain credit as a result. This lack of evidence is notable, particularly because respondent Giambrone testified at the hearing and was silent on this point.

In addition, even assuming without deciding that disclosure of the undetermined penalty had a negative impact on respondents' business credit, such an impact does not weigh heavily in respondents' favor. The ALJ is correct that administrative delay resulting in an economic impact on the ability of a business to operate has been held to be prejudicial to a petitioner (citing Matter of Utica Cheese, Inc. v Barber, 49 NY2d 1028 [1980]). In the cited case, however, the petitioner was unable to conduct any business at all while the agency delayed in determining his license application (see id.). In this case, in contrast, respondents were in operation during the pendency of administrative proceedings, and no evidence was presented establishing that respondents were hampered in their business operations during the delay as a result of the pending penalty determination.

With respect to alleged prejudice to respondents resulting from the delay, the relevant inquiry is into whether the administrative delay significantly and irreparably handicapped the private party in mounting a defense in the

administrative proceeding (see Cortlandt, 66 NY2d at 180-181; Corning Glass Works, 84 NY2d at 624-625). Again, contrary to the ALJ's conclusion, no evidence was presented on this record establishing any prejudice to respondents in the defense of the penalty phase of this proceeding. Respondents' assertion that they were prejudiced in their defense as a result of the unavailability of their former counsel is again conclusory and unsubstantiated (see Cortlandt, 66 NY2d at 181).

Moreover, respondents' contention that their defense was rendered "impossible" by the remediation of the site is also conclusory and unsubstantiated, and not supported by record evidence. It must be recalled that the liability phase of this proceeding was completed in 2001, and judicially confirmed in 2002. All of the documentation used to establish site conditions during the 2008 penalty hearing was previously presented on the original motion. On the original motion, respondents had the full and fair opportunity to challenge the accuracy of that documentation which, incidentally, consisted solely of site investigation reports submitted by respondents' own agents. Thus, the ALJ's conclusion that respondents were prejudiced by not being able to conduct "their own testing" to determine the nature of the contamination is not supported by record evidence (Hearing Report, at 5). Indeed, respondents did not specifically point to their inability to conduct further testing or any other loss of evidence as a source of prejudice (see Diaz, 91 NY2d at 933).

Respondents were certainly aware of the remediation that was conducted by both the Department and Ashland, and substantially completed in 2007. If respondents were concerned about the impact such remediation might have on their ability to present a defense on penalty, they had the opportunity to preserve evidence, but failed do to so (see Harris and Assocs., 84 NY2d at 705).

During the penalty phase of the hearing, site conditions were relevant to only one of several factors under consideration, namely the potential for harm and actual damage caused by respondents' violations (see e.g. Civil Penalty Policy, Commissioner's Policy DEE-1, June 20, 1990, ¶ IV.D.2.a ["DEC Civil Penalty Policy"]; RCRA Civil Penalty Policy, Oct. 1990, Hearing Exh 7, at 2, 12-14). Other factors relevant to penalty -- culpability, violator cooperation, history of non-compliance, ability to pay, and other unique factors, among other things (see DEC Civil Penalty Policy ¶ IV.E; RCRA Civil Penalty Policy, at 3) -- are not implicated by the removal of

the ASTs and the remediation of the site. Respondents make no claim that witnesses or evidence were unavailable on these factors (see Diaz, 91 NY2d at 933; St. Joseph's Hosp., 247 AD2d at 152). To the contrary, respondent Giambrone testified concerning his degree of culpability, his cooperation with the Department, and his compliance history. Respondents did not present a defense on ability to pay, and they make no claim that site remediation had any impact on their failure to do so. In sum, the record does not support the conclusion that respondents were prejudiced in their ability to present a defense during the penalty hearing.

The third factor weighed under the Cortlandt analysis is the causal connection between the conduct of the parties and the delay. Here, Department staff concedes that the delay in scheduling the hearing was due to the need to devote limited staff resources to the remediation of a site containing hazardous wastes and petroleum contamination that posed a significant threat to public health and the environment. Department staff's inaction with regard to the penalty hearing should not be deemed unreasonable where the delay is attributable to a lack of resources, particularly where those resources were devoted to addressing significant public health and safety concerns (see Harris and Assocs., 84 NY2d at 704; Cortlandt, 66 NY2d at 181). The record otherwise contains no evidence of "repetitive, purposeless and oppressive" action against respondents on the part of Department staff (Cortlandt, 66 NY2d at 181).

Respondents also share some responsibility for the delay. Although offered by the Department, respondents failed to avail themselves of settlement opportunities. In addition, at no time did respondents contact either Department staff or the ALJ to schedule the penalty hearing, although respondents were certainly aware that the penalty hearing was pending as a result of the court order they obtained (see Cortlandt, 66 NY2d at 179 [the failure to request a hearing results in no cognizable administrative delay]). Although respondents had several avenues available to them to bring the penalty phase to an earlier conclusion, they did not pursue them.

Finally, strong public policy, both federal and State, is implicated in this case. RCRA and its State counterpart, ECL article 27, title 9, were adopted to in order to prevent the dangers presented by inactive hazardous waste sites, such as Love Canal in Niagara Falls, and reduce the "potentially devastating risk" to public health associated with exposure to

toxic chemicals (Weinberg, Practice Commentaries, McKinney's Cons Laws of NY, Book 17 1/2, ECL 27-0900, at 174-175). Similarly, the Navigation Law was adopted to protect New York's waters, both surface and groundwater, from pollution arising from petroleum discharges (see Navigation Law § 170). A key component of both laws is civil penalties, the purpose of which is to encourage expeditious compliance with the laws' requirements and to deter future violations by both the violator and others in the regulated community (see RCRA Civil Penalty Policy, at 5-6; DEC Civil Penalty Policy ¶¶ II and III).

Certainly, as the ALJ noted, Ashland has accepted its responsibility as a former owner, and investigated and substantially cleaned up the site. However, as will be discussed later, respondents are responsible for their own independent actions, particularly in cutting down tank 3 and exposing PCB-contaminated sludge to the environment. Sound public policy designed to prevent exposure of the public and the environment to hazardous and other contamination demands that an appropriate penalty be assessed for respondents' actions.

In sum, respondents failed to demonstrate that the delay in conducting the penalty phase hearing in this proceeding caused them any substantial actual prejudice. A fair weighing of the Cortlandt factors compels the conclusion that respondents' motion to dismiss the proceeding on the ground of delay should be denied.

With respect to respondents' reliance on 6 NYCRR 622.12(f), that reliance is misplaced. Section 622.12(f) governs the situation where, on a motion for order without hearing, an ALJ concludes that although liability can be determined as a matter of law, triable issues of fact on penalty require a hearing. Thus, under the procedural posture of this case, section 622.12(f) is not applicable. In any event, the requirement for an "immediate" hearing is directory only, and does not provide a basis for dismissal of the proceeding absent a showing of substantial actual prejudice attributable to the delay (see Corning Glass Works, 84 NY2d at 623-624; Harris and Assocs., 84 NY2d at 702-703). Thus, respondent's motion to dismiss should be denied.

Penalty Assessment

Having concluded that respondents' motion to dismiss must be denied, the appropriate penalty for respondents' violations as determined by the Commissioner in 2001 and affirmed by the court in 2002 remains to be determined.[7] As to penalty, Department staff carries the burden of proof on all matters affirmatively asserted (see 6 NYCRR 622.11[b][1]). Respondents bear the burden of proof regarding all affirmative defenses to penalty (see 6 NYCRR 622.11[b][2]). Respondents' burden would include any inability to pay defense, which respondents offered no proof on in this case (see DEC Civil Penalty Policy ¶ IV.E.4).

1. Positions of the Parties

Department staff continues to recommend that a total penalty of $135,000 be imposed in this case, $113,000 for the twelve RCRA violations and $22,000 for the two Navigation Law violations (see Department's Post-Hearing Closing Brief). Staff proffered both its RCRA Penalty Computation Worksheet (Exh 8) and the Penalty Matrix for Oil Spill Cases (Exh 6) in support of the recommended penalty. Staff notes that these matrices are generally to be used for settlement purposes and, therefore, penalties recommended in this case are actually discounted from those that would ordinarily be sought after administrative adjudication.

Staff notes that at the time of the Commissioner's 2001 order, the maximum penalty authorized for the RCRA violations was $25,000 per day for the first violation, and $50,000 per day for the second and any further violations (see ECL former 71-2705[1]). Thus, the total maximum penalty authorized for the twelve RCRA violations is $575,000 per day. The maximum penalty authorized for the Navigation Law violations is $25,000 per day per violation, for a total maximum penalty of $50,000 per day (see Navigation Law § 192; see also Matter of Gasco-Merrick Road Gas Corp., Decision and Order of the Commissioner, June 2, 2008, at 4-11 [examining the Department's authority to impose civil penalties under the Navigation Law

[7] Because the appropriate penalty may be determined by me based on the record developed at the penalty hearing and the arguments of the parties in post-hearing briefing, no reason exists for remanding this proceeding to the ALJ to make a penalty assessment in the first instance.

through administrative adjudication]). Thus, the recommended penalty is well within the maximum penalty authorized by law.

In making its recommendation, staff took several factors into account. With respect to the gravity of the violations, staff notes a high level of potential harm to public health and the environment resulting from the release of toxic pollutants -- including PCBs and other chlorinated solvents, many of which are known or suspected carcinogens -- from the open-topped AST. These toxins remained open to the environment for over 15 years and, at times, the site was accessible to the public due to the downed fence. Moreover, actual harm occurred to the environment as a result of the discharge of pollutants into the containment area and their subsequent migration through cracks in the containment walls.

Compounding the gravity component is the importance to the regulatory scheme of the regulatory provisions violated. In particular, Department staff cites the importance of the spill reporting and response requirements to both the hazardous waste and petroleum pollution control programs.

With respect to aggravating factors -- respondents' culpability and history of non-compliance[8] -- Department staff notes respondents' intentional act of cutting down Tank 3, including the cutting of notches for the apparent purpose of draining the tank into the containment area. Staff asserts that respondent Giambrone's culpability is further supported by his own testimony that assumed the material in the ASTs was oil, and yet he deliberately had the tank cut down, and the material discharged to the ground.

With respect to mitigating factors -- violator cooperation, ability to pay, and other unique factors -- staff asserts that none were established by respondents. To the contrary, staff took respondents' failure to timely comply with applicable requirements after being notified of the violations as a basis for recommending penalties at the higher end of the penalty ranges recommended by the applicable policies and penalty worksheets.

In response, respondents propose a total penalty of $10,300 based upon several mitigating factors they assert should

[8] Department staff stated that respondents did not have a history of non-compliance and, therefore, did not use this as an additional aggravating factor.

be taken into account. Among the factors cited are respondents' size and lack of sophistication concerning hazardous waste storage, and the circumstance that the site has been cleaned up, thereby removing deterrence as a consideration. Respondents also seek consideration of the circumstance that respondents had no reason to know about any problems with the ASTs prior to the notification provided by the Department. Respondents claim that the 1984 amendments to RCRA, which respondents assert are the basis for the violations, were not enacted until four years after respondent Giambrone purchased the property.

Respondents also claim that they endeavored to cooperate with the Department once notified of the problems by seeking a contractor to remediate the site. Respondents note that some of the violations established were caused by their contractor Safety-Kleen's improper remediation of the site.

As to actual harm, respondents contend that testing at the site during remediation revealed that hazardous waste did not migrate beyond the concrete containment area and, thus, the actual harm was reduced. Respondents also defend their cutting down of tank 3 on the ground that they were directed to do so by an employee of the City of Buffalo.

2. Discussion

Based upon the RCRA and DEC Civil Penalty Policies, and the two penalty matrices included in the record, I conclude that an adjustment of the penalty requested by Department staff is warranted.

Specifically, four of the RCRA violations established in the Commissioner order resulted primarily from Safety Kleen's improper remedial activities at the facility. In addition, Department staff relies in part on Safety Kleen's activities at the facility in support of its penalty recommendation for cause of action 3 (operating without a permit in violation 6 NYCRR 373-1.2[c]) (see Penalty Computation Worksheet, Exh 8). Respondents remain derivatively liable for the activities of their agent, Safety Kleen, in its attempts to remediate the site (see DEC Civil Penalty Policy ¶ IV.E.2). Nevertheless, under the unique circumstance here, where the contractor has entered into a consent order with the Department for its own violations, I conclude that the penalty to be imposed upon respondents should be at the lower end of the penalty range for causes of action 2, 5, 14, and 16 and in the middle of the range for cause of action 3. Accordingly, a penalty of $500 will be imposed for

each of causes of action 2, 5, and 14 (for a total of $1,500), and a penalty of $1,500 will be imposed for cause of action 16. In addition, a penalty of $22,500 will be imposed for that portion of cause of action 3 for which respondents are solely responsible.

At the penalty hearing, respondents also established limited good faith efforts to come into compliance with RCRA requirements after the Department notified respondents of the need to remediate the site. Although respondents' communications with the Department were often infrequent, they initially took steps to hire contractors to conduct site investigation and remediation. Those steps were limited, however, and respondents eventually failed to complete the remedial activities. Moreover, they ultimately failed to pay Safety Kleen. Thus, respondents' good faith efforts only warrant reducing staff's recommended penalties for the remaining RCRA violations from the high end of their respective penalty ranges to the mid-range.

I have also taken into account respondents' limited violator cooperation for purposes of assessing penalties for the Navigation Law violations. Accordingly, question 19 of the oil spill penalty matrix is answered "yes" (see Exh 6). I also conclude, based upon the penalty hearing record, that respondents were persons not involved in the commercial storage or handling of petroleum, and did not know nor should have known of the obligation to report. Thus, question 18 is answered "no" (see id.). Accordingly, respondents' matrix score is adjusted from 18 to 12, which results in a penalty range of from $5,000 to $19,999 for the Navigation Law violations (see id.).

Beyond the above considerations, I reject the remaining mitigating factors urged by respondents and decline to adjust Department staff's rationale and recommendation any further. With respect to the gravity component factors, I accept staff's assessments. The record reveals an actual release to the environment of PCBs and other contaminants as a result of respondents' action in cutting down tank 3. Besides the fact that the public had access to the PCB contaminated sludge, at least at times, it was simply fortuitous that the PCB and petroleum contamination had not migrated further beyond the containment area. Thus, respondents' contention that the actual harm was limited does not warrant adjustment of staff's assessment of the potential for harm posed by the violations and the extent of respondents' deviation from regulatory requirements.

I also reject as a basis for further reducing the recommended penalties the fact that the site has been substantially remediated by the State and Ashland, and respondents' assertion that deterrence is no longer relevant because they will no longer be storing petroleum and other hazardous wastes at the facility. The deterrence component is directed not only to specific violators, but also to the general public -- i.e., penalties should deter others from violations of the law (see DEC Civil Penalty Policy ¶ III).

Finally, I reject respondents' assertion that prior to notification by the Department, they did not know nor have reason to know of any problems related to the ASTs. As an initial matter, ignorance of the law and its requirements is generally not considered in mitigation of penalty (see RCRA Civil Penalty Policy, at 34; DEC Civil Penalty Policy ¶ IV.E.1). Moreover, respondents do not explain their assertion that the 1984 amendments to RCRA formed the basis of the violations here. Even assuming they do, however, those amendments were in place when respondents cut down tank 3 in 1985. In any event, the applicability of RCRA to respondents' facility was determined in the prior Commissioner's order (see Summary Report, at 9-13, 26), and confirmed on judicial review, and will not be revisited at this phase of the proceeding or considered in mitigation of the penalty.

I further reject respondent Giambrone's claim that he had no idea that cutting down tank 3 presented a risk to public health and the environment. This assertion simply lacks credibility. Respondent Giambrone himself testified that he thought the sludge in tank 3 was petroleum based. No reasonable person would believe that cutting down a storage tank and releasing petroleum to the ground would not cause "a problem," much less someone such as respondent Giambrone, who has a bachelor's degree in biology and taught biology for four years before starting Marcon Erectors. Thus, rather than being a mitigating factor, respondents' willful conduct in cutting down the tank must be considered an aggravating factor.

I also reject respondents' attempt to place blame for the decision to cut down tank 3 on an employee of the City of Buffalo. The employee merely suggested that the tanks either be painted or cut down. It was respondent Giambrone, however, who made the decision to do the latter to save money on paint. These factors, combined with the notches cut in the tank for the apparent purpose of facilitating its drainage, justifies

treating respondents' action in cutting down the tank as an intentional and deliberate act on the oil spill penalty matrix (see Exh 6) -- a deliberate act that contributed at least in part to the expenditure by Ashland and the taxpayers of the State of New York of millions of dollars in remediation costs.

Finally, it must be noted that respondents benefitted economically from their willful conduct in cutting down the AST and discharging PCB and petroleum contaminated pollutants to the environment.[9] In addition to the avoided clean up costs, respondents' property has been substantially cleaned up and, presumably, has increased in value, as result of the actions of the State and Ashland. This consideration further supports a significant penalty in this case.

Accordingly, a total civil penalty of $109,500 is imposed in this case, broken down as follows:

Cause of Action	Penalty Amount
1	$9,500
2	500
3	22,500
4	22,500
5	500
6, 11	6,500
7, 8, 9, 10	6,500
12	6,500
13, 15	22,500
14	500
16	1,500
17, 18	10,000
Total	$109,500

[9] Department staff did not present a formal economic benefits analysis in support of its proposed penalty, as is generally required under both the RCRA and DEC Civil Penalty Policies (see RCRA Civil Penalty Policy, at 25-30; DEC Civil Penalty Policy, ¶ IV.C). As noted recently, in future cases, staff should conduct the economic benefits analysis and provide a rationale for any deviation from the general policy in favor of recovering the economic benefit of non-compliance (see Matter of Huntington and Kildare, Inc., Order of the Commissioner, Dec. 22, 2009, at 2-3).

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

I. The motion by respondents Douglas Giambrone and Marcon Erectors, Inc., to dismiss is denied.

II. Respondents Douglas Giambrone and Marcon Erectors, Inc., are hereby jointly and severally assessed a civil penalty in the amount of one hundred nine thousand five hundred dollars ($109,500). The civil penalty shall be due and payable within thirty (30) days after service of this order upon respondents. 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: Maureen A. Brady, Esq., Regional Attorney, New York State Department of Environmental Conservation, Office of General Counsel, Region 9, 270 Michigan Avenue, Buffalo, New York 14203-2999.

III. All communications from respondent to the Department concerning this order shall be made to Maureen A. Brady, Esq., Regional Attorney, New York State Department of Environmental Conservation, Office of General Counsel, Region 9, 270 Michigan Avenue, Buffalo, New York 14203-2999.

IV. The provisions, terms and conditions of this order shall bind respondents Douglas Giambrone and Marcon Erectors, Inc., and their agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

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

Dated: March 17, 2010
Albany, New York

STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation of Articles 27 and 17 of the Environmental Conservation Law of the State of New York, Article 12 of the Navigation Law and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR), by

HEARING REPORT
DEC Case No. 97-66 R9-4454-97-11

DOUGLAS GIAMBRONE and
MARCON ERECTORS, INC.,
Respondents

This hearing report addresses the New York State Department of Environmental Conservation (DEC Staff, Department) request for penalties in the Department's motion for order without hearing.

BACKGROUND

DEC Staff commenced this action by service on or about February 22, 2000 of a motion for order without hearing pursuant to 6 NYCRR 622.12. Staff, in the complaint served upon respondents, allege violations of the Resource Conservation and Recovery Act (RCRA) and violations of the Navigation Law of the State of New York. RCRA was enacted in 1976 by the United States Government. The Environmental Protection Agency (EPA) has delegated authority to the NYS DEC to administer the RCRA program. Article 27 of the New York State Environmental Conservation Law (ECL) charges the DEC with the responsibility for "preparing and updating the New York solid waste management plan..." consistent with RCRA.

The violations center around property owned by respondent Giambrone and three above ground storage tanks (AST) located at the property. The site held three ASTs prior to respondent Giambrone's purchase of the property. DEC received a spill complaint regarding the property in 1995. Through site visits, contact with respondents and investigation, DEC learned that the ASTs contained petroleum product that was placed in the ASTs by a former owner, Ashland Oil Company. PCB contamination was identified at the site.

The motion for order without hearing was granted by order of Commissioner John P. Cahill, dated December 31, 2001 (Order). The Order granted Staff's request for penalties and ordered respondents to pay a civil penalty of One Hundred and Thirty-Five Thousand dollars ($135,000.00) within 60 days of service of the Order.

Respondents commenced a proceeding pursuant to Civil Practice Law and Rules (CPLR) Article 78 to annul the Order. By New York State Supreme Court Judgment and Order dated March 12, 2002, Justice Kevin M. Dillon upheld the Commissioner's Order with respect to liability but not penalties and remanded the matter back to the Department to convene a hearing to assess the amount of civil penalties to be recommended to the Commissioner. Department Staff referred the matter back to the Office of Hearings and Mediation Services in March, 2007.

By letter dated April 3, 2007 this office attempted to contact respondents' attorney, Peter J. Burke. No response was received to the April 3 letter so a second letter was sent to Mr. Burke on April 16, 2007. The April 16, 2007 was sent by certified mail, return receipt requested. The letter was signed for by an unknown woman at the last known address for Mr. Burke but no response was ever received from Mr. Burke. Efforts were also made to contact Mr. Burke by telephone but were unsuccessful. Eventually this office learned that Mr. Burke retired and left the country and respondents retained new counsel. A conference call was held with respondents' new counsel, Jonathan D. Estoff, Esq. and Maureen A. Brady, Esq., assistant regional attorney in the Department's Region 9 office. A hearing on the issue of penalties was scheduled for July, 2007.

The hearing scheduled for July was adjourned at the request of DEC Staff due to witness unavailability. Respondents' counsel was granted an adjournment of the rescheduled date so that a motion could be brought before NYS Supreme Court. Respondents moved to permanently stay all further proceedings by the Department against respondents, including the assessment of penalties, as respondents had been seriously prejudiced by the delay in convening the hearing. Respondents noted in the motion before the NYS Supreme Court that the site has since been remediated by a third party, all instrumentalities involved in the alleged violations have been removed and that it would be impossible for the respondents to prepare a viable and meaningful defense to the penalties issue. Respondents argued that New York State Administrative Procedure Act (SAPA) section 301 requires adjudicatory proceedings be conducted within a reasonable period

of time. Respondents argued that the more than five-year delay in conducting the court ordered hearing on penalties was not a reasonable period of time. This office was advised that the motion was denied by Judge Dillon on November 1, 2007 in a ruling from the bench. I was not told the basis for the ruling.

Consequently, the hearing on the issue of penalties was held on November 7, 2007, twelve years after the spill was first reported to the Department. The hearing was held in the Department's Region 9 office, Buffalo, New York. Respondents appeared by Douglas Giambrone and counsel Jonathan D. Estoff, Esq. The Department appeared by Maureen A. Brady, Esq., as well as several DEC staff members.

Consistent with the recent Supreme Court action, respondents' counsel served a motion on the Department on the morning of the hearing to dismiss all further proceedings against respondents due to the delay in holding the penalty hearing. Respondents allege the delay has caused them prejudice and that holding a hearing more than five years after being directed to do so is unreasonable. The arguments made in the motion before the Department mirrored those arguments made in the Supreme Court motion. As Department Staff did not have an opportunity to respond to the motion before the hearing, the hearing went forward and Department Staff was given time to submit opposing arguments in writing. Maureen A. Brady, Esq. submitted an affidavit and memorandum of law in opposition to the motion to dismiss.

MOTION TO DISMISS

Ms. Brady's affidavit and memorandum of law in opposition to respondents' motion to dismiss noted that efforts were made in 2002 by her office to work out a settlement with respondents on the penalty issue. A settlement was not reached, according to Ms. Brady, because respondents' counsel did not provide a penalty amount that his client would pay and then failed to respond to a July, 2002 letter requesting a penalty proposal. Ms. Brady's July, 2002 letter stated that she would schedule the penalty hearing for the Fall of 2002 if the matter was not settled. According to Ms. Brady, after those efforts in 2002, "limited staff resources were thereafter devoted to seeking remediation of the site." (Brady November 21, 2007 affidavit)

The Department's Division of Environmental Remediation managed the clean up at this site beginning in January, 2001. Clean up of polychlorinated biphenyls (PCB) contamination found at the site was completed in February, 2001 and subsequent investigative work was completed in November, 2001 for the

remaining petroleum contamination at the site. This investigative work concluded that the fuel storage at the site resulted in the PCB and petroleum contamination found at the site. Ashland Oil was the former owner of this site and the Department, according to Ms. Brady, contacted Ashland Oil seeking "investigation and remediation of the petroleum contamination" (Brady affidavit at p.4) Ashland ultimately conducted site investigation and completed the remediation of the site in May, 2007.

Ms. Brady acknowledges that she took no action to complete the penalty hearing while the work at the site was being performed by Ashland from 2002-2007. She made one phone call to respondents's counsel in December, 2006 offering to discuss settlement and she sent a follow up letter in February, 2007. Respondents' former counsel Peter Burke responded to Ms. Brady's February 2007 letter asking the Department to "reconsider" its position and to advise him accordingly. This office was contacted in March 2007 by Ms. Brady asking to schedule a penalty hearing after she failed to reach Mr. Burke by telephone.

SAPA section 301 reads, in relevant part, "In an adjudicatory proceeding, all parties shall be afforded an opportunity for a hearing within a reasonable time." (SAPA §301.1) As noted by Department Staff in the memorandum of law submitted in opposition to the motion to dismiss the proceedings, *Matter of Cortlandt Nursing Home v. Axelrod, 66 N.Y. 2d 169 (1980*) is the seminal case interpreting SAPA 301. The Court of Appeals decision in *Cortlandt* applied a four point test to determine whether the period of delay was "reasonable." The Court examined the following factors: (1) the nature of the private interest allegedly compromised by the delay; (2) the actual prejudice to the private party; (3) the causal connection between the conduct of the parties and the delay; (4) the underlying public policy advanced by governmental regulation. In this case, respondents claim that they were seriously prejudiced by the delay in that the site has been remediated by Ashland Oil, the former owner, and all structures related to the matter (i.e. petroleum storage tanks) have been removed and the site has been completely reconfigured. Respondents also claim that they are prejudiced by the fact that their long time attorney in this matter, who was most familiar with the facts of the case, has since retired and is out of the country. Respondents allege that these factors make it "impossible" for a viable and meaningful defense to be presented. Finally, respondent Douglas Giambrone claims further prejudice to himself as he has had to report the DEC action, pending since 2000, on all business credit applications since 2002, and this has limited

his ability to obtain the necessary credit to fully finance the operation of his business.

Applying the four point test outlined in *Cortlandt*, it is reasonable to conclude that the respondents were prejudiced by the delay in having the penalty hearing and that the delay was not reasonable. Because the hearing was not held in a reasonable period of time, the respondents' motion to dismiss these proceedings should be granted. First, the respondents interests were compromised by the delay in that their legal counsel, who had represented them for years and who was intimately familiar with the proceedings, retired and left the country. Respondents then had to retain new counsel and the new counsel had to then review what was a complicated and detailed file. No doubt, this resulted in additional legal fees for the respondents. Also, respondent Douglas Giambrone has indicated that his business financing was negatively affected by the long delay in this matter. Mr. Giambrone personally, as well as his business, had the potential to owe the Department large penalties in this matter. This information had to be reported on business financial documents for years and that exposure negatively effected his business according to Mr. Giambrone.

The Court in *Cortlandt* looked at the negative impact delay could have on the ability of a business to operate. The Court referenced *Matter of Utica Cheese v. Barber, 49 N Y 2d 1028, 406 N.E. 2d 1342* where the Agency's failure to act on an application for a dealer license for 16 months "precluded petitioner from engaging in economic activity." (*Cortlandt at 181).* The Court in *Cortlandt* looked for an economic impact that the Department's delay may have had on the business operation of the petitioners, questioning whether the Agency's delay "precluded expansion of services or caused curtailment of existing services" and the Court found no such impact. *(Cortlandt at 181)* Here, respondents argue that the delay was unreasonable because it negatively impacted the operation of the business. Respondent Giambrone claims that his business financing was negatively impacted by the delay and consequently, his business growth was harmed.

Respondents also note that the ability to defend at the penalty hearing is hampered by the delay because the site has been cleaned up by Ashland Oil, the site is completely remediated and all relevant structures have been removed. Respondents allege that those facts prevent them from presenting a complete defense. The respondents can not conduct their own testing of the contamination at the site as it was completed in 2001 by Ashland Oil. Respondents have been prejudiced by not being able to conduct independent sampling and testing to determine the nature

of the contamination. Department Staff has argued that no prejudice has occurred, but the facts show otherwise.

The third prong of the test is the "causal connection" between the delay and the parties. No facts have been presented that the delay was caused by the respondent. The site was being remediated by the former owner Ashland Oil from 2001-2007. The DEC Staff focused on that and did not turn to the penalty hearing issue until after the remediation was completed. While letters were exchanged in 2002 between the parties and, Department Staff advised respondents that a hearing would be scheduled for the Fall of 2002, DEC Staff did not take any action from 2002 until December, 2006 and did not request that this office schedule a hearing until 2007.

The last prong in the *Cortlandt* test relates to the underlying public policy advanced by the regulation(s) involved. There is a strong public policy underlying RCRA as well as the Navigation Law. However, in this case, the former owner accepted responsibility for investigation and clean up of the site.

FINDINGS OF FACT

1. The Department brought a motion for order without hearing dated February 2000. Pursuant to the December 31, 2001 order of Commissioner John P. Cahill, the motion was granted with respect to liability and penalties and a civil penalty of $135,000.00 was ordered.

2. Respondents commenced an action pursuant to CPLR Article 78 to vacate the order of Commissioner Cahill. The Supreme Court upheld the determination with respect to liability but not with respect to penalties. By order of NYS Supreme Court Justice Kevin Dillon the matter was remanded back to the Department for a hearing on penalties.

3. The matter was referred back to the Department's Office of Hearings and Mediation Services in 2007. A hearing was scheduled for July 2007 and was adjourned by Department Staff due to a conflict. A hearing was held in November, 2007 on the issue of penalties.

4. Respondents moved to dismiss all further proceedings against respondents due to the Department's delay in conducting the hearing on penalties.

5. The Department opposed the motion to dismiss.

6. Department Staff did not request that a hearing on penalties be scheduled until 2007.

7. The site has been remediated by Ashland Oil.

CONCLUSIONS OF LAW

1. New York State Administrative Procedure Act section 301 requires adjudicatory proceedings be conducted within a reasonable period of time.

2. The respondents were prejudiced by the Department's delay in conducting the hearing on penalties.

4. The respondents were not given an adjudicatory hearing on penalties within a reasonable period of time.

RECOMMENDATION

The respondents moved to dismiss all further proceedings by the Department against the respondents. The language contained in the motion is rather broad and could be interpreted to include any future unrelated actions against these respondents. I recommend that the motion to dismiss all further proceedings against the respondents be granted with respect to the penalties requested in the February 22, 2000 motion for order without hearing.

_____/s/_____
Molly T. McBride

Dated: March 21, 2008
Albany, New York