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 Parts 612, 613, and 614 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

- by -

MIRON LUMBER CO., INC.,

Respondent.

ORDER

DEC Case No.
R2-20080116-28

Staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondent Miron Lumber Co., Inc., by service of a complaint dated May 7, 2008. In accordance with 6 NYCRR 622.3(a)(3), the complaint, together with a notice of hearing, was served upon respondent by certified mail on May 7, 2008. Respondent and its counsel received the complaint and the notice of hearing on May 8, 2008.

The complaint alleged that based upon Department staff's November 8, 2007 inspection at respondent's petroleum bulk storage ("PBS") facility located at 256-272 Johnson Avenue, Brooklyn, New York, respondent had failed to comply with various PBS regulations relating to registration, labeling, equipment requirements, inspections and recordkeeping. In addition, Department staff alleged that respondent failed to adhere to the terms of a November 16, 2007 stipulation by which respondent agreed, among other things, to: immediately submit an application to register the petroleum bulk storage tanks at the facility; and submit to the Department (within 30 days of the effective date of the stipulation) an Investigation Summary Report that delineated soil and groundwater contamination resulting from a petroleum discharge at respondent's facility.

Pursuant to 6 NYCRR 622.4(a), respondent's time to serve an answer to the complaint expired on May 28, 2008, and has not been extended by Department staff. Respondent failed to file an answer to the complaint.

Department staff filed a motion for default judgment, dated June 20, 2008, with the Department's Office of Hearings and Mediation Services. Respondent was served with a copy of Department staff's motion for default on June 20, 2008 and received the motion on June 23, 2008. The time to respond to the motion expired on June 30, 2008.[1]

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

Department staff's complaint alleges facts sufficient to establish each of the violations alleged. Accordingly, respondent's liability for the counts charged is established as a result of its default in answering the complaint.

Pursuant to section 71-1929 of the Environmental Conservation Law ("ECL"), a person who violates any provision of, or who fails to perform any duty imposed by, titles 1 through 11 and title 19 of article 17 of the ECL or the rules, regulations, orders or determinations of the Commissioner promulgated thereto, is liable for a penalty not to exceed $37,500 per day for each violation. Navigation Law ("NL") § 192 provides that any person who violates any provision of article 12 of the NL is liable for penalties up to $25,000 per day for each violation. Based on the record of this proceeding, the ALJ recommends that staff's request for a civil penalty of $50,000 be assessed and I adopt that recommendation.

Based upon staff's complaint and motion papers, the ALJ also recommends that Department staff's request for injunctive relief be granted. This would include directing respondent to come into compliance with the petroleum bulk storage regulations and to cleanup and remove the petroleum contamination resulting from a spill at the facility that was the subject of the November 16, 2007 stipulation executed by the Department and respondent. Based upon my review of the record, I also adopt that

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[1] The office of respondent's counsel sent a letter by facsimile transmission to Administrative Law Judge ("ALJ") Goldberger on July 3, 2008 noting that respondent's counsel was on vacation and was planning to send papers in opposition to staff's default motion in mid-July. The ALJ correctly determined that this letter, without any statement of good cause for filing a late response to either the complaint or the default motion, was insufficient to extend respondent's time to respond.

recommendation.

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

I. Pursuant to 6 NYCRR 622.15, Department staff's motion for a default judgment is granted.

II. Respondent Miron Lumber Co., Inc. is adjudged to be in default and to have waived the right to a hearing in this enforcement proceeding. Accordingly, the allegations against respondent, as contained in the complaint, are deemed to have been admitted by respondent.

III. Respondent Miron Lumber Co., Inc. is adjudged to have committed the following violations:

A. Respondent violated ECL § 17-0303 and NL § 176 by failing to comply with the November 16, 2007 stipulation requiring respondent to immediately submit an application to register the petroleum bulk storage tanks at the facility, and to submit to the Department an Investigation Summary Report within thirty days of the effective date of the stipulation that delineated soil and groundwater contamination resulting from discharge of petroleum at respondent's facility;

B. Respondent violated 6 NYCRR 612.2(a) by failing to register a 1,000 gallon underground petroleum bulk storage tank ("UST") and to properly identify the product stored in a 4,000 gallon UST, thereby failing to properly and accurately register the facility;

C. Respondent violated 6 NYCRR 612.2(a)(2) by failing to renew its facility registration every five years;

D. Respondent violated 6 NYCRR 612.2(e) by failing to display a current and valid registration certificate on the premises of the facility;

E. Respondent violated 6 NYCRR 613.3(b) by failing to properly mark two fill ports at the facility;

F. Respondent violated 6 NYCRR 613.3(c)(3)(ii) by failing to mark the design capacity, working capacity, and identification number on two aboveground tanks and at the tank gauges at the facility;

G. Respondent violated 6 NYCRR 613.3(c)(3)(i) by

failing to equip an aboveground tank with a tank gauge;

H. Respondent violated 6 NYCRR 613.4(a) and (d) by failing to keep properly reconciled inventory records at the facility;

I. Respondent violated 6 NYCRR 613.6(a) by failing to inspect two aboveground storage tanks at least monthly;

J. Respondent violated 6 NYCRR 613.6(c) by failing to maintain and make available to staff monthly inspection reports for a period of ten years for two aboveground storage tanks at the facility;

K. Respondent violated 6 NYCRR 614.3(a) by failing to conspicuously display and permanently affix a label showing all the information required under 6 NYCRR 614.3(a) to two UST fill ports at the facility; and

L. Respondent violated 6 NYCRR 614.7(d) by failing to maintain site drawings or as-built plans in compliance with Part 614 for the facility.

IV. Respondent Miron Lumber Co., Inc., is assessed a civil penalty in the amount of fifty thousand dollars ($50,000), which is due and payable within thirty (30) days after service of this order on respondent. Payment of this penalty shall be made by cashier's check, certified check or money order drawn to the order of the "New York State Department of Environmental Conservation" and delivered to: John K. Urda, Esq., Assistant Regional Attorney, New York State Department of Environmental Conservation, 47-40 21st Street, Long Island City, New York 11101-5407.

V. Within thirty (30) days of the date of service of this order, respondent shall: properly register its PBS facility; renew its PBS registration; display its PBS registration certificate; color-code the fill ports; mark the aboveground tanks with their design capacity, working capacity and identification numbers on the tanks and at the tank gauges; equip with a gauge the one aboveground tank that lacks that item; reconcile its inventory records; commence monthly inspections of the facility's aboveground tanks; maintain inspection reports; label fill ports; and maintain as-built plans.

VI. Within thirty (30) days after service of this order upon respondent, respondent shall submit to the Department for its approval an Investigation Summary Report that completely

delineates soil and groundwater contamination both on-site and off-site (if applicable), as required by the November 16, 2007 stipulation (see Corrective Action Plan attachment to the November 16, 2007 stipulation, at ¶ 2). Within sixty (60) days after service of this order upon respondent, respondent shall submit a remediation action plan ("RAP") for Department staff approval. The procedures governing review and approval of the RAP, as set forth in the November 16, 2007 stipulation (see Corrective Action Plan attachment to the November 16, 2007 stipulation, at ¶ 3), shall apply. Following Department staff's approval of the RAP, respondent shall implement the RAP.

VII. All communications from respondent to the Department concerning this order shall be made to John K. Urda, Esq., Assistant Regional Attorney, New York State Department of Environmental Conservation, 47-40 21st Street, Long Island City, New York 11101-5407.

VIII. The provisions, terms and conditions of this order shall bind respondent Miron Lumber Co., Inc., and its 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: July 15, 2008
Albany, New York

TO: Miron Lumber Co., Inc. (via Certified Mail)
268 Johnson Avenue
Brooklyn, New York 11206

John A. Servider, Esq. (via Certified Mail)
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Middle Village, New York 11379

John K. Urda, Esq. (via Regular Mail)
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NYSDEC - Region 2
47-40 21st Street
Long Island City, New York 11101-5407

STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law, Article 12 of the Navigation Law, and Parts 612, 613, and 614 Title 6 of the New York Compilation of Codes, Rules and Regulations

DEFAULT SUMMARY REPORT

File No. R2-20080116-28

by:

MIRON LUMBER CO., INC.,

Respondent.

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Proceedings

On May 7, 2008, by certified mail, staff of the New York State Department of Environmental Conservation's (DEC or Department) Region 2 office served the respondent Miron Lumber Co., Inc. (Miron) and its counsel with a notice of hearing and complaint. In the complaint, staff alleged violations of Article 17 of the Environmental Conservation Law (ECL), its implementing regulations, and the Navigation Law related to the bulk storage of petroleum at a facility owned and operated by the respondent located at 256-272 Johnson Avenue, Brooklyn, New York. The respondent and its counsel received the notice of hearing and complaint on May 8, 2008. Pursuant to § 622.15 of Title 6 of the New York Compilation of Codes, Rules and Regulations (6 NYCRR), on June 20, 2008, by certified mail, Region 2 staff served the respondent and its counsel with a notice of motion for default judgment and filed a copy of this motion with the Department's Office of Hearings and Mediation Services (OHMS). The respondent and its counsel received this motion on June 23, 2008. The Chief Administrative Law Judge James T. McClymonds assigned this matter to me on June 26, 2008. By facsimile transmission, on July 3, 2008, Ms. Heather Caraccio of the office of John A. Servider, Esq., the respondent's counsel, sent a letter stating that Mr. Servider was on vacation until July 14, 2008 and would be filing in opposition to the default motion upon his return.

Discussion

According to the Department's regulations, a respondent's failure to file a timely answer to a complaint constitutes a default and waiver of respondent's right to a hearing. 6 NYCRR §§ 622.12(b), 622.15(a). In these circumstances, Department staff may move for a default judgment, such motion to contain:

(1) proof of service of the notice of hearing and complaint or motion for order without hearing;
(2) proof of the respondent's failure to file a timely answer; and
(3) a proposed order. 6 NYCRR § 622.15(b).

Attached to the affirmation of John K. Urda, Assistant Regional Attorney, are Sheila Warner's affidavit of service of the notice of hearing and complaint dated May 7, 2008 as well as copies of the certified mail receipts and United States Postal Service "track & confirm" indicating that the respondent and its counsel received the pleadings on May 8, 2008. See, Exhibit B. In his affirmation, Mr. Urda states that staff has not received an answer to the complaint and the time to file one has passed. See, Urda Affirmation, ¶ 7; 6 NYCRR § 622.4(a).

Staff has also submitted a proposed order annexed as Exhibit E to Mr. Urda's affirmation.

As noted above, Ms. Caraccio signed a letter on respondent's counsel's behalf noting that Mr. Servider expected to file an opposition to the default motion upon his return from vacation in mid-July. Section 622.6(c)(3) of 6 NYCRR provides that "[a]ll parties have five days after a motion is served to serve a response." Rule 2103 of the CPLR, which governs service of papers pursuant to 6 NYCRR § 622.6(a)(1), provides for an additional five days if service is by mail. Rule 2103(b)(2). Thus, Miron's response to staff's motion for default was due on June 30, 2008.

Section 622.15 of 6 NYCRR does allow for a respondent to move to reopen a default "upon a showing that a meritorious defense is likely to exist and that good cause for the default exists." However, Ms. Caraccio's faxed letter stating that the respondent intends to submit an opposition to staff's motion over 14 days late without any request for an extension of time or explanation for the delay beyond a vacation schedule, is insufficient.

Based upon the above submissions, the staff has met the requirements for a default.

Penalty

In his affirmation, Mr. Urda requests a penalty of no less than $50,000 in satisfaction of the 18 violations that are detailed in the complaint and in the motion papers. Staff calculated the statutory maximum for the penalties as $128,212,500. In addition to the monetary penalty request, the staff requests that the Commissioner order the respondent to comply with all the relevant petroleum bulk storage regulations that it has violated: register the facility, renew registrations, display registration certificates, color-code fill ports, label above ground tanks, equip above ground tank with gauge, reconcile inventory records, commence monthly inspection of above ground tanks, maintain inspection reports, label fill ports, and maintain as-built plans.

In addition to the regulatory violations that staff found in its inspection of November 7, 2007, staff also determined that the respondent is responsible for an illegal petroleum discharge that it has failed to remediate. Urda Aff., ¶ 48. While the staff's proposed order and motion papers do not set forth a request for injunctive relief to address this contamination, the complaint does. It asks for an order that directs the respondent to clean up and remove the subject contamination from the site under a Department-approved plan. See, complaint, p. 8, annexed as Exhibit A to Urda Aff.

ECL § 71-1929 provides for a penalty of up to $37,500 per day for each violation of Titles 1 through 11 inclusive and Title 19 of Article 17 or the rules and regulations implementing these laws. In addition, Navigation Law (NL) § 192 provides that any person who violates any provision of NL Article 12 is liable for penalties of up to $25,000 per day for each violation. As noted above, staff's request for a penalty no less than $50,000 is significantly less than the maximum calculated penalty under these laws. The 1990 Civil Penalty Policy requires that the gravity of the violations and the economic benefits of the non-compliance be assessed. The factors to consider with respect to gravity are (1) potential harm and actual damage caused by the violations and (2) relative importance of the type of violations in the context of the Department's overall regulatory scheme.

The violations established by staff are serious. Respondent has essentially ignored most of the regulations that govern the handling of petroleum at bulk storage facilities.

Adherence to these regulations is critical to the safe handling of the potential pollutant because without proper labeling, inventory, maintenance of gauges, etc. the likelihood of a spill into the environment is enhanced. Here, a spill did occur and because the respondent has not produced any evidence of an investigation of the spill, a plan to clean up the contamination, or a clean up, we can't know the extent of the damage to the environment.

While staff has not produced any information as to the amount of money the respondent saved by not complying with the applicable regulations, clearly an operation that maintains its equipment properly and retains staff to fulfill all the monitoring requirements is expending sums that the respondent has saved.

The Civil Penalty Policy also provides additional factors to adjust the gravity component. These are: (a) culpability; (b) violator cooperation; (c) history of non-compliance; (d) ability to pay; and (e) unique factors. The accepted facts put forward by staff indicate that the respondent is liable for the violations and that despite its agreement to investigate the spill and to register its facility by stipulation dated November 9, 2007, it has failed to meet these commitments. Because the respondent has not responded to the complaint or appeared to contest this motion, there is no evidence of a lack of ability to pay or any unique factors that would mitigate the relief staff seeks.

Recommendation and Conclusion

Staff's motion for a default judgment meets the requirements of 6 NYCRR § 622.15(b). In addition, I find staff's request for penalties (no less than $50,000) and injunctive relief (in the complaint) appropriate. Therefore, in accordance with 6 NYCRR § 622.15(c), this summary report is hereby submitted to the Commissioner, accompanied by a proposed order.

Dated: Albany, New York
July 7, 2008

_____/s/_____
Helene G. Goldberger
Administrative Law Judge

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