STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Articles 17, 19 and 27 of the Environmental Conservation Law, Article 12 of the Navigation Law and Parts 201, 225, 360, 612, 613, and 614 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

ORDER

- by -

DEC File No.
R9-20080609-39

PACOS CONSTRUCTION COMPANY, INC.,

Respondent.

This administrative enforcement proceeding concerns the failure of respondent Pacos Construction Company, Inc., to comply with petroleum bulk storage, air pollution and solid waste regulations that apply to a petroleum bulk storage facility that respondent owns and operates at 852 Main Street, Dunkirk, New York ("facility"), and respondent's discharge of petroleum at that facility.

Staff of the New York State Department of Environmental Conservation ("Department" or "DEC") commenced this administrative enforcement proceeding against respondent, by serving by certified mail a notice of hearing and complaint dated October 14, 2008. Respondent received the papers on October 15, 2008. Accordingly, service of process was accomplished pursuant to section 622.3 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR").

Department staff's complaint sets forth three causes of action arising from the illegal discharge of petroleum at the facility, the failure to contain and report the discharge, the disposal of discarded petroleum bulk storage ("PBS") tanks at the facility, and various other violations of applicable air and PBS regulations. Respondent failed to answer the complaint. Department staff subsequently served a motion for default judgment dated January 13, 2010, together with accompanying papers, on January 14, 2010.

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

As set forth in the default summary report, the ALJ determined that the complaint states a claim upon which relief may be granted with respect to respondent's:

1. failure to renew the facility's registration, which expired on July 1, 2006, as required by 6 NYCRR 612.2(a)(2);[1]
2. failure to properly color code the fill ports for tanks identified as number 1, 2, 3 and 6, in violation of 6 NYCRR 613.3(b);
3. failure to have a gauge for tanks 1 and 2, as required by 6 NYCRR 613.3(c)(3)(i);
4. failure to label properly tanks 1, 2 and 3, in violation of 6 NYCRR 613.3(c)(3)(ii);[2]
5. failure to maintain properly the fill port catch basin for tank 6, in violation of 6 NYCRR 613.3(d);
6. failure to monitor the cathodic protection system on tank 6, in violation of 6 NYCRR 613.5(b)(2);
7. failure to monitor tank 6 for traces of petroleum, in violation of 6 NYCRR 613.5(b)(3);
8. failure to perform monthly inspections on tank 2, in violation of 6 NYCRR 613.6(a);[3]
9. failure to properly label tank 6 at the fill port, in violation of 6 NYCRR 614.3(a);
10. failure to properly coat tanks 1 and 2, in violation of 6 NYCRR 614.9(c);
11. failure to equip tank 6 with overfill protection equipment, in violation of 6 NYCRR 614.14(g);[4]
12. failure to notify the Department of the removal of tank 6 in 2007, in violation of 6 NYCRR 613.9(c);
13. failure to have, as to tanks 1 and 2, a valve or cap on the dike drain, and failure to control stormwater collected in the dike, in violation of 6 NYCRR 613.3(c)(6)(iii);

---

[1] The complaint cites to 6 NYCRR 612.2(a)(1) which applies to the initial registration of petroleum bulk storage tanks. The ALJ has appropriately corrected this citation to 6 NYCRR 612.2(a)(2), which applies to registration renewals, thereby conforming the pleadings to the proof. Because the discussion of this violation in the complaint and supporting papers placed respondent on notice of the violation regarding its failure to renew the facility's registration, no prejudice results from the ALJ's correction.

[2] Department staff's papers included the notice of violation dated June 28, 2006 that was mailed from Brian Graber, DEC Region 9, Environmental Engineer 1 to Pacos Construction Company, Inc. Staff's papers were missing page 4 of the 5 page notice of violation letter, which referenced the facility's violation of 6 NYCRR 613.3(c)(3)(ii). On February 16, 2010, the ALJ requested from staff a copy of the missing page, and staff transmitted electronically the entire notice of violation to the ALJ. The ALJ also directed staff to send a complete copy of the notice of violation to respondent to ensure that respondent had a complete set of the motion papers, which staff sent under cover of a letter dated February 17, 2010.

[3] The notice of violation dated June 28, 2006 cites only tank 2 for the failure to perform monitoring inspections. With respect to tanks 1 and 3, the notice of violation cites tanks 1 and 3 for a failure to maintain the inspection reports or for insufficiency, referencing this as a violation of 6 NYCRR 613.6(c). The violation of this regulatory provision is not alleged in the complaint, and no discussion of the failure to maintain the inspection reports or their insufficiency is presented. Accordingly, I agree with the ALJ (see Default Summary Report, at 3 fn4) and decline to find a violation of this regulatory provision with respect to tanks 1 and 3.

[4] The complaint incorrectly noted that this violation applied to tank 1, but Department staff corrected the misprint in its proposed order, and the pleadings are hereby conformed to the proof.

14. discharge of petroleum around tanks 1 and 2, in violation of Navigation Law § 173 and the failure to report the discharges around tanks 1 and 2, in violation of 6 NYCRR 613.8 and Navigation Law § 175;
15. failure to properly remediate and dispose of all impacted soils and/or groundwater, in violation of NL §§ 176 and 181;
16. failure to clean the waste product out of several discarded petroleum bulk storage tanks and to cut the tanks so as to render them free of petroleum vapors, in violation of 6 NYCRR 613.9(b);
17. disposal of tanks at the facility without a permit, in violation of 6 NYCRR 360-1.5(a); and
18. burning waste fuel (mixture of ethylene glycol and waste oil) in a 5,000 gallon aboveground storage tank at the facility without a permit, in violation of 6 NYCRR 201[5] and 225-2.5(a).

In its complaint, Department staff also requested that respondent undertake various corrective measures and remediation activities to address the violations.

In reviewing staff's papers, it is evident that Department staff has provided respondent numerous opportunities to address the violations at the facility, has advised respondent of the actions that it needs to take, and has devoted considerable time in communicating with respondent regarding facility compliance measures. Notwithstanding the significant and persistent efforts of Department staff, respondent has failed to address the outstanding violations and bring its facility into compliance.

In its complaint, Department staff requested that respondent pay a civil penalty in an amount "not to exceed the statutory maximum," which Department staff computes as exceeding 64 million dollars (see Affirmation of Teresa J. Mucha, Esq., in Support of Motion for Default Judgment and Order dated January 13, 2010 ["Affirmation"], ¶ 17). Subsequently, in its default motion, Department staff requested a civil penalty in the amount of $43,585. Department staff based this penalty upon a detailed review of various factors, including the economic benefit that respondent realized from non-compliance, respondent's lack of cooperation in addressing the violations, the duration of the violations and the relative significance of these violations in the regulatory scheme (see Affirmation, ¶¶ 13-31).

The ALJ, however, has recommended that the staff-requested penalty be increased to $87,000 with $43,000 of that amount being suspended. The general rule is that a default judgment cannot exceed the amount demanded in the complaint, absent notice to respondent that a greater penalty would be sought (see Matter of 134-15 Rock Management Corp., Order of the Commissioner, December 4, 2008, at 4; see also CPLR 3215[b]). In this instance, however, Department staff requested a penalty "not to exceed the statutory maximum" in its complaint, which would allow for a penalty of more than 64 million dollars. Although Department staff subsequently requested $43,585, under the circumstances here, adjustments may be made according to whether the penalty is (a) consistent with the Department's program specific guidance documents, (b) warranted by the circumstances of the case, and (c) generally consistent

[5] The ALJ identified the specific regulation as 6 NYCRR 201-1.2.

with penalties imposed in other hearings in cases involving similar circumstances (see Matter of Alvin Hunt d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 8-9).

Department staff calculated its penalty of $ 43,585 on the following basis:

- $22,900, for the violations of the Department's petroleum bulk storage regulations;
- $ 4,000, for the violations of the Navigation Law;
- $ 1,000, for the violations of the Department's air regulations;
- $ 1,000, for the violations of the Department's solid waste regulations;
- $ 9,000, to account for respondent's benefit from its noncompliance; and
- $ 5,685, which represents a 15% upward adjustment of the preceding components ($37,900) based on aggravating factors (see Affirmation, ¶ 13).

I agree with the ALJ that the penalty should be increased and, based on my consideration of the violations, the penalty that I am imposing is virtually equivalent to that recommended by the ALJ.

Respondent's failure to promptly and fully address the violations at the facility, notwithstanding numerous opportunities to do so and its default in this proceeding, warrants an upward adjustment of the penalty component for violations of the Department's petroleum bulk storage regulations.[6] The Department's Program Policy (DEE-22), entitled "Petroleum Bulk Storage Inspection Enforcement Policy" issued on May 21, 2003 (the "Policy"), provides guidance on penalties for violations of the PBS regulations. According to the Policy, the penalty amounts calculated with the aid of the Policy "must, on the average and consistent with the conditions of fairness be significantly higher [in adjudicated matters] than the penalty amounts which DEC accepts in consent orders which are entered into voluntarily by respondents." The penalties that Department staff is requesting for these violations reflect, for the most part, the average range of penalties as referenced in the Policy for settlement purposes. In the circumstances of this matter, and respondent's longstanding failure to correct the violations and its failure to cooperate with Department staff, an increase in the penalty amount for each PBS violation is warranted. Based on my review, I determine that a doubling of the average penalty amount to $43,800,[7] as set forth in the Policy's penalty schedule for settlement purposes, is appropriate and justified.

Furthermore, respondent's discharge of petroleum around two of the tanks, its failure to report those discharges, and its failure to properly remediate the areas where the discharges

[6] Even where respondent undertook some corrective measures, those were minimal, incomplete and late (see Complaint, ¶ 54).

[7] Department staff proposed a penalty of $22,900 for the violations of the Department's PBS regulations. The correction of the registration citation from 6 NYCRR 612.2(a)(1) to 612.2(a)(2) does not affect that initial calculation. In addition, staff cited a violation of 6 NYCRR 613.6(a)(monthly inspections) for tanks 1 and 3, in addition to tank 2. For the reason set forth by the ALJ, I concur with her finding a violation of 6 NYCRR 613.6(a) for tank 2 only (see Default Summary Report, at 3 fn4). Consequently, staff's calculation for the monthly inspection component of the PBS penalty is reduced by $1,000, thereby reducing staff's penalty from $22,900 to $21,900. Although Department staff referenced the penalty for the failure to install a gauge on tanks 1 and 2 as $500 per tank (rather than the correct figure of $250), Department staff's calculation properly assigned a total penalty amount of $500 (see Affirmation, ¶ 30).

occurred are violations of the Navigation Law. The ALJ has recommended a penalty of $15,000, but in light of the seriousness of violations relating to non-reporting and failure to remediate, I am increasing the penalty to $20,000. In particular, releases of petroleum must be reported on a timely basis to the Department to ensure that potential environmental impacts are appropriately addressed. With respect to the violations of the Department's air regulations (unpermitted permit burning of waste fuel), the ALJ increases the penalties to $8,600 which I adopt. The unauthorized burning of waste fuel can result in serious air contamination impacts, and is unacceptable. The ALJ also increases the penalties for the violation of the Department's solid waste regulations (onsite disposal of tanks) to $8,600. However, based upon my review of staff's papers, the type of material disposed and lack of information on the environmental impact of this disposal, I am imposing a penalty of only $5,000. As computed by Department staff and recommended by the ALJ, I also impose a penalty of $9,000 to address respondent's economic benefit from its long period of noncompliance.

Based on this recalculation, the components of the penalty are as follows:

- $43,800, for the violations of the Department's petroleum bulk storage regulations;
- $20,000, for the violations of the Navigation Law;
- $ 8,600, for the violations of the Department's air regulations;
- $ 5,000, for the violations of the Department's solid waste regulations; and
- $ 9,000, to account for respondent's economic benefit from its noncompliance.

This results in a civil penalty in the amount of $86,400. The ALJ recommends that a portion of the penalty be suspended contingent upon respondent's compliance with the relief directed by this order, which allows for respondent to undertake the necessary corrective actions. Although respondent's past derelictions do not warrant any suspension of the penalty, based on the ALJ's recommendation, I am suspending $42,815 of the penalty of $86,400, contingent on respondent's completion of the corrective measures and the filing of the work plan required by this order. The suspended amount of the penalty represents that portion of the penalty which is above the penalty that Department staff requested. With respect to the non-suspended portion of the penalty ($43,585), I am directing respondent to submit payment of the civil penalty within 30 days of service of the order upon it.

The corrective measures and remediation activities requested that Department staff requested are authorized and warranted. The ALJ, in her report, has proposed deadline dates for the submission of a remediation work plan and the undertaking of other remedial activities. These dates are reasonable and appropriate, and are incorporated into this order.

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 Pacos Construction Company, Inc., is adjudged to be in default and to have waived the right to a hearing in this enforcement proceeding. Accordingly, the allegations in Department staff's complaint against respondent are deemed to have been admitted by respondent.

III. Respondent Pacos Construction Company, Inc., is adjudged to have violated Navigation Law §§ 173, 175, 176 and 181 and 6 NYCRR 201-1.2, 225-2.5(a), 360-1.5(a), 612.2(a)(2), 613.3(b), 613.3(c)(3)(i) & (ii), 613.3(c)(6)(iii), 613.3(d), 613.5(b)(2) & (3), 613.6(a), 613.8, 613.9(b), 613.9(c), 614.3(a), 614.9(c) and 614.14(g).

IV. Respondent is hereby assessed a civil penalty in the amount of eighty-six thousand four hundred dollars ($86,400), of which forty-two thousand eight hundred fifteen dollars ($42,815) is suspended on the condition that respondent: (a) completes the corrective measures set forth in paragraph V of this order within thirty (30) days of the service of this order upon respondent; (b) submits the work plan required by paragraph VI of this order within forty-five (45) days of the service of this order upon it; and (c) pays the non-suspended portion of the civil penalty in accordance with the terms of this order.

The non-suspended portion of the civil penalty, forty-three thousand five hundred eighty-five dollars ($43,585), is due and payable within thirty (30) days after service of this order upon respondent. Payment of the civil penalty shall be by cashier's check, certified check or money order drawn to the order of the New York State Department of Environmental Conservation and mailed or hand delivered to

Teresa J. Mucha, Esq.
Assistant Regional Attorney
NYS Department of Environmental Conservation, Region 9
270 Michigan Avenue
Buffalo, New York 14203-2915.

Should respondent fail to complete the corrective measures or submit the work plan within the required time periods, the suspended portion of the penalty shall become immediately due and payable and is to be submitted in the same form and to the same address as the non-suspended portion of the penalty.

V. Respondent, within 30 days of the service of this order upon it, shall:

A. submit a completed PBS application, with a $500 registration fee, to Department staff to renew the facility's PBS registration;

B. properly color code the fill ports for tank 3 and submit a photograph confirming the coding of the fill ports;

C. provide to Department staff copies of the monthly inspection reports for tanks 1, 2 and 3 that cover the period from September 1, 2009 to the date of respondent's receipt of this order;

D. ensure proper labeling of tanks 1, 2 and 3 and provide photographs confirming that labeling;

E. clean the dike for tanks 1 and 2 and provide photographs confirming the completion of that work; and

F. properly dispose of the scrap tanks at the facility, as well as any contents thereof, at an appropriate disposal facility. Respondent shall provide Department staff with written receipts documenting that proper disposal within fifteen (15) days of the disposal.

VI. Respondent shall, within (forty-five) 45 days of the service of this order upon it, submit an approvable work plan to Department Staff for the investigation and remediation of petroleum contamination at the site in the areas surrounding tanks 1 and 2. In addition, the work plan shall include a plan for investigation of any areas where tanks have been removed since the date of the facility's last valid PBS registration (the "removal areas"), including but not limited to the removal area of tank 6, unless respondent can, within thirty (30) days of service of this order, furnish appropriate documentation to Department staff demonstrating that no contamination exists at the removal areas. Any such documentation may include, but is not limited to, sample reports, analytical results and disposal receipts. If contamination is identified at any removal area, Respondent must immediately add an approvable supplement to the work plan that addresses the remediation at that removal area.

VII. Upon service of this order upon respondent Pacos Construction Company, Inc., respondent shall immediately cease the burning of waste oil and ethylene glycol material in any aboveground storage tank at the facility until such time as respondent receives appropriate permits from the Department that authorizes such burning.

VIII. All communications from respondent to the Department concerning this order shall be directed to Teresa J. Mucha, Esq., Assistant Regional Attorney, New York State Department of Environmental Conservation, Region 9, 270 Michigan Avenue, Buffalo, New York 14203-2915.

IX. The provisions, terms and conditions of this order shall bind respondent Pacos Construction Company, Inc., and its agents, successors and assigns, in any and all capacities.

New York State Department of
Environmental Conservation

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

Dated: Albany, New York
February 23, 2010

STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

----------X

In the Matter of the Alleged Violations of Articles 17, 19, and 27 of the Environmental Conservation Law, Article 12 of the Navigation Law, and Parts 201, 225, 360 and 612-614 of Title 6 of the New York Compilation of Codes, Rules and Regulations by:

DEFAULT SUMMARY REPORT

DEC File No. R9-20080609-39

PACOS CONSTRUCTION COMPANY, INC.,

Respondent.

----------X

Proceedings

This proceeding involves the petroleum bulk storage (PBS) facility owned by Pacos Construction Company, Inc. (Pacos) and located at 852 Main Street, Dunkirk, New York. The New York State Department of Environmental Conservation (DEC or Department) staff inspected the facility in June 2006 and documented the respondent's failures to respond to a series of letters and a notice of violation during the period from June 2006 through June 2008. On July 25, 2008, staff re-inspected the facility and noted that with few exceptions, the facility remained out of compliance. On October 14, 2008, by certified mail, DEC staff served a notice of hearing and complaint upon Pacos. Patrick Pacos, the corporation's vice president, signed the return receipt card for the respondent that shows a delivery date of October 15, 2008. On October 31, 2008, Mr. Pacos contacted Teresa Mucha, a DEC Region 9 Assistant Regional Attorney, claiming that he had certain documentation regarding the violations and asking for a seven day extension to provide this material to DEC staff. Ms. Mucha granted the extension; but by letter dated November 26, 2008, Ms. Mucha advised Mr. Pacos that she had not received these materials or the answer to the complaint. In her letter, Ms. Mucha again extended the deadline to December 12, 2008 for the respondent to provide the documents.

The respondent failed to meet the December 2008 deadline and staff performed a third inspection of the facility on January 7, 2009. On that visit, staff found continuing violations and the need for corrective actions which were discussed with Mr. Pacos during that inspection. By letter dated January 20, 2009, Ms. Mucha wrote to Mr. Pacos confirming the conditions observed during the January 7 visit and the corrective actions required. The respondent failed to comply with these requirements and by letter dated May 13, 2009, Ms. Mucha provided the respondent with another opportunity to bring the facility into compliance by June 1, 2009 or face a motion for a default judgment. According to staff, no response was received and hence, staff moved for a default judgment by motion dated January 13, 2010. These papers that were sent to Chief Administrative Law Judge (CALJ) James T. McClymonds with a copy to Mr. Pacos on January

14, 2010 include: Notice of Motion for Default Judgment and Order; Motion for Default Judgment and Order; and Affirmation in Support of Motion for Default Judgment and Order with Exhibits A – J. The exhibits are:

A - Letter dated October 14, 2008 from Teresa J. Mucha, Assistant Regional Attorney to Patrick Pacos with notice of hearing and complaint;
B - Notice of Violation dated June 28, 2006;
C - Petroleum Bulk Storage Application for Pacos Construction Co. Inc.; PBS Facility Information Report;
D - Copy of certified mail receipt dated 10/15/06;
E - Letter dated November 26, 2008 from Ms. Mucha to Mr. Pacos with affidavit of service;
F - Letter dated January 20, 2009 from Ms. Mucha to Mr. Pacos; PBS Facility Information Report; PBS Application;
G - Letter dated May 13, 2009 from Ms. Mucha to Mr. Pacos; letter dated January 20, 2009 from Ms. Mucha to Mr. Pacos; PBS application; PBS Facility Information Report;
H - DEC Civil Penalty Policy dated June 20, 1990;
I - DEE-22: Petroleum Bulk Storage Inspection Enforcement Schedule – Penalty Schedule; and
J - Draft Order.

ALJ McClymonds assigned the matter to me on January 20, 2010. As of the date of this summary report, the DEC Office of Hearings and Mediation Services (OHMS) has not received any reply to staff's motion from the respondent.

Discussion

Section 622.15 of 6 NYCRR, "Default Procedures" provides, in pertinent part: "(b) The motion for a default judgment . . . must contain (1) proof of service upon the respondent of the notice of hearing and complaint or such other document which commenced the proceeding; (2) proof of the respondent's failure to appear or failure to file a timely answer; and (3) a proposed order." In her January 13, 2010 affirmation in support of staff's motion, Ms. Mucha affirms that "[o]n October 14, 2008 a Notice of Hearing and Complaint was served upon Respondent . . . by certified mail . . ." In addition, Ms. Mucha affirms that the office received the signed certified receipt showing it was signed by Mr. Pacos on October 15, 2008. A copy of this receipt is attached to Ms. Mucha's affirmation as Exhibit D.

Ms. Mucha also describes in detail in her affirmation the repeated efforts by staff to gain the respondent's compliance with the relevant regulations and the answer to the complaint by affording multiple extensions of time for both. However, according to Ms. Mucha, the respondent never complied with the pertinent requirements nor submitted an answer to the complaint.[1] Exhibit J to Ms. Mucha's affirmation is staff's proposed order.

[1] Staff does note an exception to this failure of compliance in paragraph 54 of its complaint. In a letter dated August 21, 2007 (over one year after the initial notice of violation), the respondent represented that it had color coded the fill ports, painted the tank surfaces, and installed gauges on tanks 1 and 2.

Staff has met the requirements for a default judgment.

Penalty

The staff's uncontested allegations demonstrate that the respondent has violated multiple regulations at its petroleum bulk storage facility. More particularly, staff alleges that the respondent:

1) failed to renew the facility's registration that expired on July 1, 2006, in violation of § 612.2(a)(2) of Title 6 of the New York Compilation of Codes, Rules and Regulations (6 NYCRR)[2];
2) failed to properly color code the fill ports for tanks identified as number 1, 2, 3, and 6, in violation of 6 NYCRR § 613.3(b);
3) failed to maintain a gauge on tanks 1 and 2, in violation of 6 NYCRR § 613.3(c)(3)(i);
4) failed to properly label tanks 1, 2, and 3, in violation of 6 NYCRR § 613.3(c)(3)(ii)[3];
5) failed to maintain the fill port catch basin for tank 6, in violation of 6 NYCRR § 613.3(d);
6) failed to monitor the cathodic protection system for tank 6, in violation of 6 NYCRR § 613.5(b)(2);
7) failed to monitor tank 6 for traces of petroleum, in violation of 6 NYCRR § 613.5(b)(3);
8) failed to perform monthly inspections for tanks 1, 2, and 3, in violation of 6 NYCRR § 613.6(a)[4];
9) failed to properly label the fill port for tank 6, in violation of 6 NYCRR § 614.3(a);
10) failed to properly coat tanks 1 and 2, in violation of 6 NYCRR § 614.9(c);
11) failed to install and maintain overfill protection equipment for tank 6, in violation of 6 NYCRR § 614.14(g)[5];
12) failed to notify the Department prior to removing tank 6, in violation of 6 NYCRR § 613.9(c);
13) failed to maintain valves or caps on the dike drain for tanks 1 and 2, in violation of 6 NYCRR § 613.3(c)(6)(iii);

[2] The complaint cites 6 NYCRR § 612.2(a)(1) for this violation in error. My correction conforms the complaint to the proof. The respondent was put on notice of the violation by virtue of the language in the complaint and therefore, there is no prejudice to it resulting from this correction. *See, Matter of Anthony Costa, et al*, Decision and Order (February 19, 2009, at 3, fn4).

[3] These violations were cited in the complaint and on the fourth page of the June 2006 notice of violation. This page was missing from the copy of the NOV that was submitted with staff's motion papers. On February 16, 2010, the ALJ asked for and obtained a copy of the complete NOV from the regional staff and directed Ms. Mucha to send a copy to the respondent as well to ensure that it had a complete set of the motion papers.

[4] In the June 2006 NOV, staff notes that the respondent failed to inspect tank 2 monthly in violation of 6 NYCRR § 613.6(a) and failed to keep monthly records of inspections for tanks 1 and 3, in violation of 6 NYCRR § 613.6(c). Inexplicably, staff combined these allegations in the complaint as a failure to perform monthly inspections for the three tanks. As these are not the same violation, I find a violation of 613.6(a) with respect to failure to perform monthly inspections of tank 2 only.

[5] As noted in staff's proposed order, the complaint incorrectly identifies tank 1 as failing to have overfill protection. The NOV notified the respondent that it was tank 6.

14) failed to prevent the discharge of petroleum and to report the discharge around tanks 1 and 2, in violation of Navigation Law §§ 173, 175, and 6 NYCRR § 613.8;
15) failed to remediate and dispose of all affected soils and/or groundwater, in violation of Navigation Law §§ 176 and 181;
16) failure to obtain an air permit prior to burning waste oil, in violation of 6 NYCRR §§ 201-1.2 and 225-2.5(a);[6]
17) failed to properly dispose of PBS tanks, in violation of 6 NYCRR § 613.9(b); and
18) failed to obtain a permit prior to disposal of PBS tanks on respondent's premises, in violation of 6 NYCRR § 360-1.5(a).

In the staff's first cause of action in the complaint, in ¶ 58, it is alleged that the respondent "failed to submit sampling and other similar data and disposal receipts to the Department confirming the lack of any contamination in the tank area as well as the proper disposal of the tank's contents and the tank itself." While the submission of such information would be appropriate to require as part of the relief in this matter, I have not found any regulatory provision that was violated in this instance. Nor did staff submit any citation for such violation. Therefore, I have not found the respondent liable for these omissions.

In its complaint, staff provided notice to the respondent that it could seek a penalty up to the maximum allowed by law. However, in the motion for a default judgment, staff seeks a penalty of only $43,585. Ms. Mucha provides in her affirmation a detailed analysis of the economic benefit afforded the respondent through its violations ($9,000) as well as an enumeration of the PBS penalties based upon the PBS Penalty Schedule ($22,900). Staff also asks for an upward penalty adjustment of 15% ($5,685) based upon the respondent's knowing and willful violation of the laws and regulations. Despite staff's acknowledgment of the potential environmental harm based upon the spill at respondent's facility and its flagrant violation of numerous violations of the PBS, solid waste, and air regulations, it has suggested what I consider to be a modest penalty.

The staff has documented over four years of violations at this facility along with repeated communications with the respondent to cajole compliance without bringing an enforcement proceeding. Despite the staff's generous extensions of time for the respondent to come into compliance, the respondent has failed to meet these requirements with the minor exceptions noted in footnote 1, *supra*. In her affirmation in support of staff's motion, Ms. Mucha notes that ". . . time is of the essence in addressing spills in order to reduce the adverse impacts caused by that action." Mucha Affirmation (Aff.), ¶ 25. Yet, the respondent continued to flaunt the petroleum bulk storage regulations, including an unremediated spill, for at least four years.

In addition, staff used the PBS Penalty Schedule which is meant as guidance for calculation of penalties when a respondent enters into a consent order with the Department. While it certainly can be used as a starting point in litigated matters, it should not be considered determinative.

[6] The staff cited 6 NYCRR Part 201 as one of the regulations the respondent violated as a result of burning waste oil without a permit. I have amended this citation to more specifically identify § 201-1.2 as the correct regulation. As noted in footnote 2, there is no prejudice to the respondent as a result of this correction because the company was put on notice of the substance of the allegation in the complaint, ¶¶ 66 – 67.

Environmental Conservation Law (ECL) § 71-1929 provides for penalties of up to $37,500 per day for each violation of Titles 1-11 and 19 of Article 17. ECL § 71-2103 provides for a penalty of not less than $375 nor more than $15,000 for a first violation and an additional penalty not to exceed $15,000 for each day the violation continues for each violation of Article 19. ECL 71-2703(b) provides for a penalty not to exceed $7500 for each violation of Title 3 or 7 of Article 27 and an additional penalty of not more than $1500 for each day such violation continues. Navigation Law § 192 provides for a penalty of $25,000 for each offense and if the violation continues each day shall constitute an additional, separate offense. As noted by staff, these provisions allow for a penalty of more than $60 million, much more than the amount staff has requested. Mucha Aff., ¶ 17.

Each of these penalty provisions of the ECL and Navigation Law also allow for the Commissioner to order injunctive relief. Accordingly, I recommend that the penalty be assessed at $87,000 with $43,000 suspended contingent upon the respondent's compliance with the measures that staff has requested and which the Commissioner should order. This is a doubling of the staff's recommendation based upon the respondent's extreme recalcitrance to comply with the law; the length of time the violations have continued; and the breadth of the offenses that include violations of PBS, air, and solid waste laws. I have included a recommendation that part of the penalty be suspended to encourage compliance in light of the significant expense involved in carrying out the compliance measures.

My calculations for this amount are based upon the following:

$45,800 for violations of the PBS regulations;
$15,000 for violations of the Navigation Law;
$ 8,600 for violations of the Department's air regulations;
$ 8,600 for violations of the Department's solid waste regulations; and
$9,000 to account for respondent's economic benefit from noncompliance.

In addition, I recommend that the respondent be required to comply with the staff's directives as follows:

1) Submit a completed PBS application to the Department with a $500 fee to renew the facility's registration within thirty days of service of the Commissioner's Order;
2) Properly color code the fill ports for the tank identified as number 3 and submit a photograph confirming the completion of that work within thirty days of service of the Commissioner's Order;
3) Provide copies of the monthly inspection reports for tanks 1, 2 and 3 for the past six months within thirty days of service of the Commissioner's Order;
4) Properly label tanks 1, 2 and 3 and provide photographs to the Department confirming the completion of that work within thirty days of service of the Commissioner's Order;
5) Clean the dike for tanks 1 and 2 and provide photographs confirming the completion of that work within thirty days of service of the Commissioner's Order;

6) Provide sufficient documentation such as sampling reports, analytical results and disposal receipts, evidencing the lack of contamination in the area where any tanks have been removed since the last valid registration and proper disposal of the tank contents and tank itself within thirty days of service of the Commissioner's Order. If that documentation is not available, respondent must prepare a work plan to be submitted to the Department staff for its review and approval, within forty-five days from service of the Commissioner's Order. This work plan must provide for a site inspection to confirm the lack of any contamination. If contamination is detected, the respondent must remediate the area pursuant to an approved work plan;
7) Submit a work plan to DEC staff for its review and approval to remediate the petroleum contamination detected in the area of tanks 1 and 2 within forty-five days of service of the Commissioner's Order;
8) Immediately cease the burning of waste oil and ethylene glycol material in the above-ground storage tanks until such time that this activity is permitted by the Department; and
9) Dispose of the scrap tanks and their contents at an appropriate disposal facility and provide receipts evidencing the proper disposal within thirty days of service of the Commissioner's Order and provide documentation of such disposal within 15 days of completion of this work.

Conclusion

The respondent, Pacos Construction Company, Inc., is in default for failure to submit an answer to the staff's notice of hearing and complaint. The respondent is in violation of the cited provisions of Parts 201, 225, 360, 612, 613, and 614 of 6 NYCRR, ECL Articles 17, 19, and 27, and of the Navigation Law §§ 173, 175, 176 and 181. Based upon the lengthy period of time that has elapsed since the Department staff notified the respondent of the many serious violations at its facility and the respondent's failure to comply with the Department's directives, a substantial penalty is warranted. I recommend a penalty of $87,000 with $43,000 suspended contingent upon the respondent's compliance with the relief directed by the Commissioner as described above.

Dated: February 17, 2010
Albany, New York

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