STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1010

In the Matter

-of-

the Alleged Violations of Article 12 of the New York State Navigation Law and Part 32 of Title 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York

-by-

**RELIABLE HEATING OIL, INC.,**

Respondent.

DEC Case No. R2-20121116-725

# DECISION AND ORDER OF THE COMMISSIONER

October 30, 2013

DECISION AND ORDER OF THE COMMISSIONER

This administrative enforcement proceeding concerns allegations by staff of the New York State Department of Environmental Conservation (Department) that, on January 20, 2012, respondent Reliable Heating Oil, Inc. (respondent) violated several provisions of the New York State Navigation Law (NL) arising out of the misdelivery and discharge of approximately 150 gallons of fuel oil into the basement of a residence located at 132 Cleveland Street, Brooklyn, New York. The matter was assigned to Administrative Law Judge (ALJ) Richard R. Wissler of the Department's Office of Hearings and Mediation Services. ALJ Wissler prepared the attached default summary report, which I adopt as my decision in this matter, except as set forth below.

Staff served upon respondent by certified mail a notice of hearing and complaint dated March 13, 2013, and respondent received them on March 16, 2013. 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).

The complaint alleges three causes of action: (i) respondent's actions on January 20, 2012 resulted in the unlawful discharge of petroleum in violation of NL § 173; (ii) respondent's failure to report the January 20, 2012 unlawful discharge of petroleum was a violation of NL § 175 and the statute's implementing regulation, section 32.3 of title 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York (17 NYCRR); and (iii) respondent's failure to immediately undertake containment of the unlawful petroleum discharge on January 20, 2012, constituted a violation of NL § 176 and its implementing regulation, 17 NYCRR 32.5.

The complaint seeks an order: (i) finding respondent in violation of the cited statutory and regulatory provisions; (ii) ordering respondent to complete remediation of the unlawful petroleum discharge pursuant to a plan approved by the Department; (iii) imposing a civil penalty in an amount "no less than" thirty thousand dollars ($30,000); and (iv) granting such other and further relief as the Commissioner may deem just and proper.

Pursuant to the provisions of 6 NYCRR 622.8, in the notice of hearing annexed to and served with the complaint, Department staff scheduled a pre-hearing conference in the matter for April 15, 2013, at the Department's Region 2 offices in Long Island City, New York. Respondent failed to answer the complaint and failed to appear for the pre-hearing conference.

Department staff served respondent with a notice of motion for default judgment and order dated April 15, 2013, which respondent received on April 17, 2013. The motion was based upon respondent's failure to answer the complaint and failure to appear for the pre-hearing conference. The motion for default sought relief identical to that sought in the complaint. Respondent did not file a response to the motion for default. The matter was placed on the docket of matters heard during the Region 2 calendar call of June 21, 2013, at which time Department staff orally moved for a default in the matter, submitting for the record, in support of the motion, the various documents required by 6 NYCRR 622.15 as well as other documents from the Department's file in this matter. Respondent did not appear at the June 21, 2013 calendar call.

The ALJ has recommended that Department staff's motion for default be granted (see Default Summary Report, at 7), and I concur that staff is entitled to a default judgment pursuant to 6 NYCRR 622.15.

Pursuant to NL § 192, anyone who violates article 12 of the Navigation Law (which includes NL §§ 173, 175 and 176) or any regulations promulgated thereunder (which includes 17 NYCRR 32.3 and 32.5) is liable for a civil penalty of up to twenty-five thousand dollars ($25,000) for each such violation (see NL § 192). Where such violation is of a continuing nature, each day during which it continues is a separate and distinct offense (see id.). Given that the violation in this case was continuing at least to the date of the complaint, respondent is potentially liable for a total maximum penalty of $10,425,000.

The complaint and the motion for a default judgment and order in this case request a civil penalty of "no less than" thirty thousand dollars ($30,000) for respondent's violations. (Complaint, Wherefore Clause ¶ 5; Affirmation of John K. Urda in Support of Motion for Default Judgment and Order, April 15, 2013 [Urda Aff.], at ¶¶ 11, 23). Citing the fact that the site is not yet fully remediated, the ALJ has recommended that a civil penalty in the amount of ninety thousand dollars ($90,000) be assessed, of which sixty thousand dollars ($60,000) would be suspended contingent upon respondent's completion of the remediation of the site pursuant to a plan approved by the Department (see Default Summary Report, at 7).

I agree with staff that, given the maximum possible penalty as set forth above, the "requested minimum penalty [of $30,000] is reasonable" (Urda Aff., at ¶ 11). I do not, however, adopt the ALJ's recommendation to increase the civil penalty, and will not in this case assess a penalty in an amount greater than the "requested minimum" stated in the complaint, for the reasons set forth below.

The issue of whether to increase the civil penalty amount requested in a complaint can arise in various situations. For example, where a respondent has entered an appearance in a matter and the matter goes to hearing, facts revealed at the hearing may lead Department staff to request an increase in the requested penalty. This would be accomplished by filing a motion or making an oral application to amend the pleadings to increase the penalty amount requested in the complaint (see 6 NYCRR 622.5[b]; 622.6[c][1]). In such circumstances, the respondent would be on notice of staff's request to amend the complaint to increase the penalty, and would have an opportunity to respond and oppose such request.

Where, however, a matter does not go to hearing because respondent has failed to appear, different circumstances are presented. Here, respondent was on notice of the specific dollar amount of civil penalty referenced in staff's complaint, with the indeterminate modifier "no less than."[1] The use of the phrase "no less than $30,000" in the complaint introduces an ambiguity that does not provide adequate notice to respondent as to any specific civil penalty amount greater than $30,000 that staff may be seeking for the alleged violations. In this case, the phrase "no less than $30,000" could mean any figure between $30,000 and $10,425,000.

[1] To obtain a default judgment, staff must, among other things, provide proof of service of the complaint on respondent (6 NYCRR 622.15[b][1]), as was done here.

To increase the civil penalty above the specific amount cited in the complaint, without notice to a respondent – even one who has defaulted – implicates due process concerns (see e.g. 6 NYCRR 622.5[b] [a party may seek to amend its pleadings "absent prejudice to the ability of any other party to respond"]). Indeed, it is a general principle that a default judgment cannot exceed the amount that is demanded in the complaint, absent notice to a respondent that a greater penalty would be sought (see e.g. Matter of 134-15 Rock Management Corp., et al., Order of the Commissioner, December 10, 2008, at 4; P&K Marble, Inc. v. Pearce, 168 AD2d 439, 439-40 [2d Dept 1990]; see also CPLR 3215[b]).

Department staff's motion papers include a section entitled "Basis for Penalty" which cites the relevant statutory provisions relating to penalties, as well as the Department's Civil Penalty Policy (DEE-1, June 20, 1990) and Bulk Storage & Spill Response Enforcement Policy (DEE-4, March 15, 1991) (see Urda Aff., at ¶¶ 11-23). Staff's papers also state correctly that, even though staff has requested "*no less than* $30,000 … the Commissioner may determine that an additional amount is warranted" (id. at ¶ 23 [italics in original]). Staff's papers do not, however, provide any analysis to assist me in deciding whether to increase the assessed civil penalty above that "minimum" of $30,000, or to determine what an appropriate increase would be. Merely using the phrase "no less than $30,000" is insufficient to guide me in assessing a specific civil penalty appropriate to the facts of this case, particularly where, as here, respondent has defaulted.

The record before me contains no evidence that staff requested leave to amend its complaint to request a civil penalty greater than $30,000, or that any such request was communicated to respondent. Further, although I certainly agree that the facts of this case might warrant a penalty greater than the "requested minimum," and agree with the ALJ that including a suspended penalty component may provide an incentive to respondent to perform the remedial actions required by a Commissioner's order, I am constrained by due process concerns to limit the penalty to the specific dollar amount referenced in the complaint. I therefore do not adopt the ALJ's recommendation to assess a civil penalty of ninety thousand dollars ($90,000) that includes a suspended portion in the amount of sixty thousand dollars ($60,000).

Based upon the record of this proceeding, and the discussion herein, I hold that a civil penalty of thirty thousand dollars ($30,000) and the remedial relief requested by Department staff and recommended by the ALJ, are authorized and appropriate.

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

I. Department staff's motion for a default judgment pursuant to 6 NYCRR 622.15 is granted. By failing to answer the complaint or appear at the pre-hearing conference scheduled in this proceeding, respondent Reliable Heating Oil, Inc. is in default and has waived its right to a hearing.

II. Moreover, based upon the allegations of the complaint and the proofs submitted by Department staff in support of its motion for default, respondent is adjudged to have violated

Navigation Law (NL) §§ 173, 175 and 176, and 17 NYCRR 32.3 and 32.5, arising out of respondent's January 20, 2012, misdelivery of 150 gallons of fuel oil to a residence located at 132 Cleveland Street, Brooklyn, New York. Specifically, respondent's violations include: discharging the fuel oil into the basement of the residence, a violation of NL § 173; failing to report the resultant spill to the Department, a violation of NL § 175 and 17 NYCRR 32.3; and failing to take immediate steps to contain the discharge, a violation of NL § 176 and 17 NYCRR 32.5.

III. Within thirty (30) days of the service of this decision and order upon respondent, respondent Reliable Heating Oil, Inc. shall submit to the Department an approvable plan for the complete remediation of the spill at 132 Cleveland Street, Brooklyn, New York.

IV. Within fifteen (15) days of the service of this decision and order upon respondent, respondent Reliable Heating Oil, Inc. shall pay a civil penalty in the amount of thirty thousand dollars ($30,000) by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation.

V. The penalty payment referenced in paragraph IV of this decision and order shall be sent to the following address:

Office of Legal Affairs
New York State Department of Environmental Conservation Region 2
One Hunters Point Plaza
47-40 21st Street
Long Island City, New York 11101-5407
Attn: John K. Urda, Esq.

VI. Any questions or other correspondence regarding this decision and order, other than those relating to the penalty payment, shall be addressed to:

Hiralkumar Patel
Environmental Engineer 1
Spill Prevention and Response Programs, Division of Environmental Remediation
New York State Department of Environmental Conservation Region 2
One Hunters Point Plaza
47-40 21st Street
Long Island City, New York 11101.

VII. The provisions, terms and conditions of this decision and order shall bind respondent Reliable Heating Oil, Inc., and its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Joseph J. Martens
Commissioner

Dated: Albany, New York
October 30, 2013

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 12 of the New York State Navigation Law and Title 17, Part 32 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

DEFAULT SUMMARY REPORT

-by-

DEC Case No. R2-20121116-725

RELIABLE HEATING OIL, INC.,

Respondent.

## Procedural History

Reliable Heating Oil, Inc, ("respondent") is an active domestic corporation registered in the State of New York engaged in the retail delivery of heating oil to residential customers. Staff of the New York State Department of Environmental Conservation ("Department" or "DEC"), by certified mail received by respondent on March 16, 2013, served respondent with a notice of hearing and complaint dated March 13, 2013, containing three causes of action alleging various violations of New York State Navigation Law ("NL") arising out of the misdelivery and discharge of approximately 150 gallons of fuel oil into the basement of a residence in Brooklyn, New York, on January 20, 2012. The first cause of action in the complaint alleges that respondent's actions on January 20, 2012, resulted in the unlawful discharge of petroleum in violation of NL 173. The second cause of action in the complaint alleges that respondent's actions on January 20, 2012, and its failure to report the unlawful discharge were a violation of NL 175 and the statute's implementing regulation, Section 32.3 of Title 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("17 NYCRR"). The third cause of action in the complaint alleges that respondent's failure to immediately undertake containment of the unlawful petroleum discharge on January 20, 2012, constituted a violation of NL 176 and its implementing regulation, 17 NYCRR 32.5. The complaint seeks an order of the Commissioner finding respondent in violation of the cited NL statutory and 17 NYCRR regulatory provisions; ordering respondent to complete remediation of the unlawful petroleum discharge pursuant to a plan approved by the Department; imposing a civil penalty in an amount no less than $30,000.00; and granting such other and further relief as the Commissioner may deem just and proper.

The notice of hearing annexed to and served with the complaint and received by respondent on March 16, 2013, indicated that an answer to the complaint was due within twenty days of service of the complaint. In addition, the notice of hearing stated that a pre-hearing conference would be held at the Department's offices in Long Island City, New York, on April 15, 2013, at 10:00 AM. Respondent failed to answer the complaint and failed to appear for the scheduled pre-hearing conference.

By certified mail received by respondent on April 17, 2013, Department staff served respondent with a notice of motion for default judgment and order dated April 15, 2013. The motion was based upon respondent's failure to answer the complaint and failure to appear for the pre-hearing conference scheduled in the notice of hearing served with the complaint. The motion for default stated that Department staff was seeking, by default, the identical relief it sought in the complaint. Respondent did not file a response to the motion for default, and, indeed, by telephone, on May 1, 2013, Mr. Vinny Burns, respondent's owner, advised Assistant Regional Attorney John K. Urda, Esq., that it did not intend to do so. (Hearing Record.) The matter was placed on the docket of matters heard during the Region 2 calendar call of June 21, 2013.

On June 21, 2013, the Region 2 calendar call was convened before the undersigned Administrative Law Judge at the Department's Region 2 office, 47-40 21st Street, Long Island City, New York. Pursuant to 6 NYCRR 622.15, Assistant Regional Attorney John K. Urda, Esq., on behalf of Department staff, orally moved for a default judgment against respondent based upon its failure to answer the complaint dated March 13, 2013, and its failure to appear for the pre-hearing conference scheduled in the notice of hearing served with that complaint. As part of its motion, Department staff submitted the following exhibits for the record:

Exhibit 1: The notice of hearing and complaint dated March 13, 2013.

Exhibit 2: The notice of motion and motion for default judgment and order dated April 15, 2013, with attachments including the affidavit of service, dated March 13, 2013, of the above notice of hearing and complaint.

Exhibit 3: An affirmation of service of the motion for default judgment and order by John K. Urda, Esq., dated May 3, 2013.

Exhibit 4: A printout of the New York State Department of State Division of Corporations Entity Information webpage for respondent Reliable Heating Oil, Inc., current as of June 20, 2013.

Exhibit 5: A delivery invoice of Reliable Heating Oil dated January 20, 2012.

Exhibit 6: A copy of DEC Spill Report Form for Spill Number 1112255 created on January 20, 2012.

Exhibit 7: A copy of a letter dated February 21, 2012, from Hiralkumar Patel of DEC to Reliable Heating Oil, to the attention of Vinny Burns.

## Default Provisions

In accordance with 6 NYCRR 622.4(a), a respondent upon whom a complaint has been served must file an answer to the complaint within twenty days of the date of receipt. A failure to timely file an answer to the complaint constitutes a default in the action. Moreover, pursuant

to 6 NYCRR 622.8(c), a respondent's attendance at a scheduled pre-hearing conference is mandatory and failure to attend constitutes a default in the action. The Department's default procedures in an enforcement action, found at 6 NYCRR 622.15, provide:

"(a) A respondent's failure to file a timely answer or, even if a timely answer is filed, failure to appear at the hearing or the pre-hearing conference (if one has been scheduled pursuant to section 622.8 of this Part) constitutes a default and a waiver of respondent's right to a hearing. If any of these events occurs the department staff may make a motion to the ALJ for a default judgment.

(b) The motion for a default judgment may be made orally on the record or in writing and 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."

As the Commissioner stated in Matter of Alvin Hunt, d/b/a Our Cleaners (Decision and Order dated July 25, 2006, at 3), "The consequences of a default is that the respondent waives the right to a hearing and is deemed to have admitted the factual allegations of the complaint or other accusatory instrument on the issue of liability for the violations charged." Moreover, the Commissioner has stated, "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them [citations omitted]." (id. at 6.) Accordingly, the findings of fact as hereinafter indicated are based upon the exhibits submitted into the record, as identified above.

## Applicable Provisions of Article 12 of the Navigation Law And Its Implementing Regulations

"Section 173. Discharge of petroleum; prohibition
1. The discharge of petroleum is prohibited."

"Section 175. Notification by persons responsible for discharge
Any person responsible for causing a discharge shall immediately notify the department pursuant to rules and regulations established by the department, but in no case later than two hours after the discharge. Failure to so notify shall make persons liable to the penalty provisions of section 192 of this article."

"Section 176. Removal of prohibited discharges
1. Any person discharging petroleum in the manner prohibited by section one hundred seventy-three of this article shall immediately undertake to contain such discharge."

"Section 192. Enforcement of article; penalties

Any person who knowingly gives or causes to be given any false information as a part of, or in response to, any claim made pursuant to this article for cleanup and removal costs, direct or indirect damages resulting from a discharge, or who otherwise violates any of the provisions of this article or any rule promulgated thereunder or who fails to comply with any duty created by this article shall be liable to a penalty of not more than twenty-five thousand dollars for each offense in a court of competent jurisdiction. If the violation is of a continuing nature each day during which it continues shall constitute an additional, separate and distinct offense."

"17 NYCRR 32.3 Requirement of notification

Any person responsible for causing a discharge which is prohibited by section 173 of the Navigation Law shall immediately notify the department, but in no case later than two hours after the discharge."

"17 NYCRR 32.5 Discharge response

(a) Any person responsible for causing a discharge which is prohibited by section 173 of the Navigation Law shall take immediate steps to stop any continuation of the discharge and shall take all reasonable containment measures to the extent he is capable of doing so.

(b) The person responsible for causing a discharge which is prohibited by section 173 of the Navigation Law shall also take those measures or actions necessary for the cleanup and removal of the discharge, except that:

(1) all cleanup and removal activities shall be subject to the supervision and control of the department once a representative of the department has arrived on the scene…."

## Findings of Fact

1. Reliable Heating Oil, Inc. ("respondent") is an active domestic business corporation registered in the State of New York with offices at 24 Skidmore Road, Poughquag, New York 12570. Respondent is owned by one Vinny Burns. (Exhibits 1, 3, 5, 6 and 7.)

2. Respondent is engaged in the delivery of heating oil, including number 2 fuel oil, to residential customers. (Exhibits 1, 5, 6 and 7.)

3. On January 20, 2012, respondent delivered 150 gallons of number 2 fuel oil to a residential building located at 132 Cleveland Street, Brooklyn, New York. Respondent pumped the fuel oil through a cut, abandoned and disconnected fill pipe at the site. The misdelivered fuel oil was spilled upon the concrete floor of the basement of the residence at 132 Cleveland Street, Brooklyn, New York. (Exhibits 1, 5, 6 and 7.)

4. The delivery of January 20, 2012, indicated in Finding of Fact 3, above, should have been made to a residential building located at 142 Cleveland Street, Brooklyn, New York, and not to the residential building located at 132 Cleveland Street, Brooklyn, New York. (Exhibits 1 and 6.)

5. Respondent failed to report the resultant spill indicated in Finding of Fact 3, above, to the Department. (Exhibits 1 and 6.)

6. Following the misdelivery, a tenant at 132 Cleveland Street contacted respondent regarding the spill. Respondent subsequently arrived at the site. However, prior to respondent's arrival, the hazardous materials unit of New York City Fire Department ("FDNY") arrived at the scene and began cleanup of the spill, recovering approximately 20 gallons of fuel oil. FDNY reported the spill to the Department, DEC Spill Number 1112255. (Exhibits 1 and 6.)

7. Between January 20, 2012 and February 15, 2012, respondent took certain corrective actions to remediate the spill including the application of oil absorbent material to the spill area and the installation of a ventilation fan. The fan, however, was removed sometime prior to February 15, 2012. (Exhibits 1 and 6.)

8. Department staff scheduled an inspection of the site with respondent for February 15, 2012, but respondent failed to attend. During this site visit, Department staff observed loose and contaminated oil absorbent material on the basement floor as well as oil soaked into the base of a wooden workbench. Inspection of the basement floor also revealed the presence of cracks. During the inspection, Department staff spoke with Vinny Burns, owner of respondent, by telephone from the site, and advised him that the contaminated oil absorbent material had to be removed as well as certain bags and drums still remaining at the site following the initial cleanup. Mr. Burns was also advised by Department staff that respondent had to make at least six soil borings at the site to determine the presence and extent of any petroleum in the soils beneath the basement floor, and that a work schedule for these borings had to be submitted to the Department by February 17, 2012. Respondent failed to submit the soil boring schedule. (Exhibits 1 and 6.)

9. By letter dated February 21, 2012, Department staff directed respondent to immediately remove the oil contaminated materials from the basement and install a ventilation system; perform soil borings to investigate the presence of soil contamination, with laboratory reports sent to the Department; and, should soil contamination be detected, excavate all contaminated soil and collect endpoint samples from the excavation limits, submitting the report to the Department not later than March 21, 2012. (Exhibits 1, 6 and 7.)

10. On March 23, 2012, Department staff determined that respondent had installed the ventilation system at the site but had not conducted any soil borings. (Exhibits 1 and 6.)

11. Sometime prior to April 10, 2012, respondent hired a contractor whose initial digging at the site revealed soil contamination to a depth of two and one half feet beneath the basement floor. Subsequent sampling at the site conducted by respondent's contractor during May 2012 revealed extensive petroleum contamination in four seven-foot deep soil borings. (Exhibits 1 and 6.)

12. On May 23, 2012, Department staff advised respondent that the site must be remediated. (Exhibits 1 and 6.)

13. Although the record contains evidence that some remedial work was performed at the site (see Exhibit 6, at 10), the site has not been fully remediated.

14. The notice of hearing in this matter and the complaint alleging the violations of Navigation Law sections 173, 175, and 176, and 17 NYCRR sections 32.3 and 32.5 was served by certified mail on respondent on March 13, 2013. A United States Postal Service ("USPS") Track & Confirm email indicates that respondent received the notice of hearing and complaint on March 16, 2013. (Exhibit 2, attached Exhibit B.)

15. The notice of hearing received by respondent on March 16, 2013, with the complaint stated that an answer to the complaint had to be filed within twenty days of the receipt of the complaint by respondent and that failure to file an answer to the complaint would constitute a default in the matter. Respondent failed to file an answer to the complaint. (Exhibit 1 and Hearing Record.)

16. The notice of hearing received by respondent on March 16, 2013, with the complaint stated that a pre-hearing conference would be held on April 15, 2013, at 10:00 AM, at the Department's Region 2 office, 47-40 21st Street, Long Island City, New York and that failure to appear at the pre-hearing conference would constitute a default in the matter. Respondent failed to appear for the scheduled pre-hearing conference. (Exhibit 1 and Hearing Record.)

17. The notice of motion for default judgment and order in this matter, dated April 15, 2013, was served on respondent by certified mail on April 15, 2013. A USPS Track & Confirm email indicates that respondent received the notice of motion for default judgment and order April 17, 2013. (Exhibits 2 and 3.)

18. The notice of motion for default judgment and order stated that any response to the motion was due within five days of receipt of the motion. On May 1, 2013, in a telephone conversation with Assistant Regional Attorney John K. Urda, Esq., Vinny Burns stated that respondent would not be filing a response to the motion. (Exhibit 2 and Hearing Record.)

## Discussion

The proofs submitted in this matter clearly show that respondent's misdelivery and discharge of approximately 150 gallons of fuel oil into the basement of a residence located at 132 Cleveland Street, Brooklyn, New York, on January 20, 2012, resulted in the unlawful discharge of petroleum in violation of NL 173. Moreover, respondent's failure to report that unlawful discharge was a violation of NL 175 and the statute's implementing regulation, 17 NYCRR 32.3. Finally, respondent's failure to immediately undertake containment of that unlawful petroleum discharge constituted a violation of NL 176 and its implementing regulation, 17 NYCRR 32.5.

The record shows that respondent was duly served with the notice of hearing and complaint on March 16, 2013. The record further shows that respondent failed to file an answer to the complaint and failed to appear for the scheduled pre-hearing conference on April 15, 2013. Moreover, the record shows that respondent was duly served with the notice of motion for default judgment and order on April 17, 2013, and that it failed to respond to the motion, indeed, through its owner, orally communicating to the Department that it did not intend to do so. The

Department is entitled to a default judgment in this matter on the complaint pursuant to the provisions of 6 NYCRR 622.15.

Department staff's proposed order and the minimum civil penalty it seeks of $30,000.00 are consistent with the Department's prior practice and penalty policy as well as applicable provisions of Navigation Law 192. In assessing the penalty in this matter, however, because the site is not yet fully remediated, it would be appropriate to assess a penalty larger than the minimum Department staff seeks, suspending the greater portion thereof upon remediation of the site to the satisfaction of the Department. Accordingly, I would recommend a penalty of $90,000.00 with $30,000.00 payable upon receipt of the Commissioner's order and $60,000.00 suspended upon satisfactory remediation of the site.

## Recommendation

Based upon the foregoing, I recommend that the Commissioner issue an order:

1. Granting Department staff's motion for default pursuant to the provisions of 6 NYCRR 622.15, based upon respondent's failure to answer to the complaint served in this matter and for failure to attend the pre-hearing conference as scheduled in the notice of hearing annexed to the complaint;

2. Finding respondent in violation of NL 173; NL 175 and 17 NYCRR 32.3; NL 176 and 17 NYCRR 32.5 arising out of respondent's January 20, 2012, misdelivery of 150 gallons of fuel oil to a residence located at 132 Cleveland Street, Brooklyn, New York, discharging the fuel oil into the basement of the residence, a violation of NL 173; failing to report the resultant spill to the Department, a violation of NL 175 and 17 NYCRR 32.3; and failing to take immediate steps to contain the discharge, a violation of NL 176 and 17 NYCRR 32.5;

3. Ordering respondent to complete remediation of the spill pursuant to a plan approved by the Department;

4. Imposing a civil penalty on respondent, pursuant to NL 192, of $90,000.00, with $30,000.00 payable upon execution of the order and $60,000.00 suspended upon remediation of the site;

5. Directing such other and further relief as he may deem just and proper.

_____/s/_____
Richard R. Wissler
Administrative Law Judge

Dated: Albany, New York
July 10, 2013

Index of Attached Exhibits Received

Edirol 040721093841

Exhibit 1: The notice of hearing and complaint dated March 13, 2013.

Exhibit 2: The notice of motion and motion for default judgment and order dated April 15, 2013, with attachments including the affidavit of service, dated March 13, 2013, of the above notice of hearing and complaint.

Exhibit 3: An affirmation of service of the motion for default judgment and order by John K. Urda, Esq., dated May 3, 2013.

Exhibit 4: A printout of the New York State Department of State Division of Corporations Entity Information webpage for respondent Reliable Heating Oil, Inc., current as of June 20, 2013.

Exhibit 5: A delivery invoice of Reliable Heating Oil dated January 20, 2012.

Exhibit 6: A copy of DEC Spill Report Form for Spill Number 1112255 created on January 20, 2012.

Exhibit 7: A copy of a letter dated February 21, 2012, from Hiralkumar Patel of DEC to Reliable Heating Oil, to the attention of Vinny Burns.