

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Alleged Violations of Article 71 of the  
New York State Environmental Conservation Law (ECL),

-by-

**ORDER**

NYSDEC File No.  
R2-20130905-379

**RRACI REAL ESTATE CORP.,**

Respondent.

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This administrative enforcement proceeding concerns allegations that respondent Rraci Real Estate Corp. (Rraci or respondent) has violated Order on Consent, DEC File No. R2-20070410-170, dated May 16, 2007 (2007 order) that addressed a petroleum spill at 2039 Blackrock Avenue, Bronx, New York (site). Staff of the New York Department of Environmental Conservation (Department or DEC) alleges that respondent failed to comply with the corrective action plan (CAP) that was part of the consent order. The CAP required respondent to: (i) perform a soil boring adjacent to the former underground storage tank at the site within thirty days of the effective date of the 2007 order; (ii) submit a remediation action plan (RAP) within sixty days of the effective date of the 2007 order; and (iii) implement the RAP within forty-five days of Department staff's approval of it.

Department staff seeks an order requiring respondent to pay a penalty of no less than \$50,000 and to undertake a full site investigation and remediation pursuant to a Department-approved schedule.

By notice of motion for order without hearing in lieu of complaint dated October 23, 2013, Department staff commenced this enforcement proceeding by serving on respondent, via certified mail return receipt requested, a notice of motion and supporting statements and exhibits (see Affirmation of Service of John K. Urda, Esq., dated December 13, 2013 [Urda Affirmation]). The United States Postal Service (USPS) delivered the staff's motion papers to respondent on October 25, 2013 (see USPS Tracking Statement annexed to Urda affirmation as Exhibit A).

Respondent Rraci has not responded to staff's motion and the time to do so has passed.

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

As set forth by ALJ Goldberger, Department staff has supported its motion for an order without hearing with an affirmation from the Assistant Regional Attorney dated October 23, 2013. That affirmation describes the 2007 order and respondent's failure to adhere to its terms. In addition, Department staff has submitted the affidavit of DEC Region 2 Engineering Geologist 1 Ryan M. Piper which describes the oil spill at the site, the history of Department staff's efforts to obtain remediation of the site, and the failure of respondent Rraci to comply with the 2007 order.

The ALJ recommends that I impose a civil penalty in the amount of fifty thousand dollars (\$50,000), and I concur with that recommendation for the reasons discussed in the summary report.<sup>1</sup> In particular, the ALJ has underscored the serious nature of the violations relating to the continued contamination at the site (see Summary Report, at 4). The amount requested is authorized (see ECL 71-1929[1]<sup>2</sup>) and appropriate. I further concur with the ALJ that respondent should be required to pay the penalty within thirty (30) days of service of this order upon respondent.

Department staff has also requested that I order respondent to comply with the 2007 order and fully investigate and remediate the spill immediately, pursuant to a Department-approved schedule. Respondent has a continuing obligation to comply with the 2007 order and, as the ALJ noted, no further order directing compliance with the terms of the 2007 order is necessary (see ALJ Summary Report, at 4; see also Matter of West 63 Empire Assoc. LLC, Order of the Commissioner, August 9, 2012, at 2). Accordingly, respondent continues to be subject to the terms and conditions of the 2007 order and further language reiterating respondent's obligation to comply with the 2007 order is unnecessary.

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

- I. Pursuant to 6 NYCRR 622.12, Department staff's motion for an order without hearing in lieu of complaint is granted.
- II. Respondent Rraci Real Estate Corp. is adjudged to have violated Order on Consent, DEC File No. R2-20070410-170, dated May 16, 2007, and ECL 71-1929(1) by failing to comply with the corrective action plan (CAP) that was part of the consent order.
- III. Respondent Rraci Real Estate Corp. is hereby assessed a civil penalty in the amount of fifty thousand dollars (\$50,000). The civil penalty shall be due and payable within thirty (30) days after service of this order upon respondent. Payment shall be made in

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<sup>1</sup> Department staff had requested a penalty of "no less than" \$50,000 (see Urda Affirmation, at 6). For the reasons set forth in my decision in Matter of Reliable Heating Oil, Inc., Decision and Order, October 30, 2013, at 2-3, I am constrained by due process concerns to limit the penalty to the specific dollar amount referenced in the motion.

<sup>2</sup> The ALJ's statement in footnote 1 of the Hearing Report that ECL 71-1929 does not set forth enforceable requirements is rejected. ECL 71-1929(1), in part, imposes a civil penalty on any person who violates or who "fails to perform any duty imposed by" orders of the Commissioner (see, e.g., Matter of Raphy Benaim, et al., Order of the Commissioner, January 27, 2014, at 4 [failure to comply with stipulation is violation of ECL 71-1929]).

the form of a cashier's check, certified check or money order payable to the order of the "New York State Department of Environmental Conservation" and mailed to the Department at the following address:

John K. Urda, Esq.  
Assistant Regional Attorney  
NYSDEC Region 2  
47-40 21<sup>st</sup> Street  
Long Island City, New York 11101.

- IV. All communications from respondent to the Department concerning this order shall be made to John K. Urda, Esq., at the address provided for in paragraph III of this order.
- V. The provisions, terms and conditions of this decision and order shall bind respondent Rraci Real Estate Corp., 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: November 4, 2014  
Albany, New York

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

-----X Summary Report

In the Matter of the Alleged Violations of the  
New York State Environmental Conservation Law

NYSDEC File No.  
R2-20130905-379

- by -

**RRACI REAL ESTATE CORP.,**

Respondent.

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Proceedings

By notice of motion for order without hearing in lieu of complaint dated October 23, 2013, the staff of the New York State Department of Environmental Conservation (DEC or Department) commenced this enforcement proceeding against respondent Rraci Real Estate Corp. (Rraci) for alleged violations of a 2007 order on consent.<sup>1</sup> By certified mail return receipt requested, the Department staff served its notice of motion and supporting statements and exhibits on the respondent. *See*, Affirmation (Aff.) of John K. Urda dated December 13, 2013. The United States Post Office delivered the staff's motion papers to the respondent on October 25, 2013. *See*, USPS Tracking Statement annexed to Urda affirmation as Exhibit (Ex.) A.

As of this date, Rraci has not responded to the staff's motion and the time to do so (by November 13, 2013) has passed. On December 5, 2013, Chief Administrative Law Judge James T. McClymonds assigned the matter to me.

Staff's Charges

Assistant Regional Attorney John K. Urda submitted to the Office of Hearings and Mediation Services (OHMS) Department staff's motion for order without hearing consisting of the notice of motion dated October 23, 2013; Mr. Urda's affirmation dated October 23, 2013; the New York State Department of State (DOS) Division of Corporations Entity Information re: Rraci Real Estate Corp. (Ex. A); a deed dated May 17, 1999 for the subject property - 2039 Blackrock Avenue, Bronx, NY (Ex. B); the order on consent dated May 16, 2007 (Ex. C); an e-mail dated November 26, 2012 between John Urda and Steve DePalma re: Rraci Real Estate Corp (Ex. D); affidavit of DEC Region 2 Engineering Geologist Ryan M. Piper dated October

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<sup>1</sup> The caption of the staff's notice of motion indicates that the alleged violations are of Environmental Conservation Law Article 71. The staff sets forth as its cause of action allegations that the respondent failed to comply with the 2007 order on consent and was therefore in violation of ECL § 71-1929 and the order on consent. ECL § 71-1929(1) sets forth penalties for violations of Article 17 and rules, regulations or orders issued thereunder but does not set forth enforceable requirements.

23, 2013; NYSDEC spill report dated October 30, 2006 (Ex. A); and letter dated December 8, 2006 from Engineer Piper to Hajdin Praci (Ex. B).<sup>2</sup>

In its motion, which serves at the complaint in this matter, the staff has alleged that the respondent has failed to comply with the terms of the 2007 order on consent by failing to comply with the corrective action plan (CAP) that was part of the consent order. The CAP required the respondent to: (i) perform a soil boring adjacent to the former underground storage tank at the site within thirty days of the effective date of the order; (ii) submit a remediation action plan (RAP) within sixty days of the effective date of the order; and (iii) implement the RAP within forty-five days of the Department staff's approval of it. Based upon this alleged violation, the Department staff seeks an order requiring the payment of a penalty of at least \$50,000 and a full site investigation and remediation pursuant to a Department-approved work plan.

### Respondent's Position

Rraci has failed to submit a response to staff's motion and therefore, there is no record of its position.

### **FINDINGS OF FACT**

Because the respondent has not responded to staff's motion, the only facts before me are those presented by Department staff.

1. The respondent is an active New York State corporation that in April 2007 owned a petroleum bulk storage facility at an apartment building located at 2039 Blackrock Avenue, Bronx, New York. Urda Affirmation (Aff.), Ex. C; Piper Aff., Ex. A.
2. On May 16, 2007, the respondent entered into a consent order with the Department to settle violations of §§ 613.3(c) and 613.6(c) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) for failure to properly label an aboveground storage tank and to maintain inspection reports for this tank. Urda Aff., Ex. C.
3. The consent order required the respondent to a) perform a soil boring within thirty days of the effective date of the consent order; b) submit a remediation action plan to the Department within sixty days of the effective date of the consent order; and c) implement the RAP within forty-five days of the Department staff's approval of it.
4. The consent order and the underlying enforcement action were precipitated by an oil spill that was discovered at the site on October 26, 2006. Piper Aff., Ex. A.
5. Rraci has failed to perform the required soil boring and failed to submit the RAP. Piper Aff., ¶ 10.

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<sup>2</sup> The DOS Corporate Entities information on the respondent (Ex. A to the Urda Aff.) provides that the chief executive officer of the respondent is Hajdin Rraci. Thus, the December 8, 2006 letter misspelled Mr. Rraci's name.

## CONCLUSIONS OF LAW

By failing to perform any of the requirements of the 2007 consent order contained in the compliance schedule, the respondent has violated the terms of that consent order.

## DISCUSSION

Section 622.12 of 6 NYCRR provides for an order without hearing when upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party. And, “summary judgment is appropriate when no genuine, triable issue of material fact exists between the parties and the movant is entitled to judgment as a matter of law.” *Matter of Frank Perrotta*, Commissioner’s Summary Order, January 10, 1996. Section 3212(b) of the CPLR provides that a motion for summary judgment shall be granted, “. . . if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” Once the moving party has put forward its case, the burden shifts to the non-movant to produce sufficient evidence to establish a triable issue. *Matter of Locaparra*, Commissioner’s Decision and Order, June 16, 2003.

Pursuant to 6 NYCRR § 622.12(a), staff has supported its motion for an order without hearing with an affirmation from the Assistant Regional Attorney that describes the consent order and the respondent’s failure to adhere to its terms. In addition, the Department staff has submitted the affidavit of DEC Region 2 Engineering Geologist 1 Ryan M. Piper that describes the oil spill at the site, the history of the Department staff’s efforts to get remediation of the site, and the failure of Rraci to comply.

The respondent has not submitted any response to the Department staff’s motion and therefore has failed to provide any material fact that would require a hearing.

The staff has met its burden to show that the respondent has failed to meet the requirements of the consent order by failing to perform any of its requirements. *Matter of Edgar v. Jorling*, 225 AD2d 770, 771 (2d Dep’t 1996), *lv den.*, 89 NY2d 801 (1996); *Matter of 35-60 74th Street Realty LLC*, Commissioner’s Decision, June 4, 2013; 6 NYCRR § 622.12(c).

Accordingly, I find the respondent liable for violating the May 16, 2007 consent order.

### Penalties

In its notice of motion, Department staff requests that the respondent be ordered to pay a minimum civil penalty of \$50,000. In his affirmation, Mr. Urda states that this penalty is in accordance with penalties assessed by the Commissioner in other matters involving violations of consent orders and provides several citations in support. Urda Aff., ¶ 22. The penalty assessed in the 2007 consent order (and which I assume was paid because staff makes no mention of it) was \$350. ECL § 71-1929(1) provides for penalties of up to \$37,500 per day for each violation

of Article 17 or the rules, regulations, orders or determinations of the commissioner promulgated pursuant thereto.<sup>3</sup>

The 1990 Civil Penalty Policy provides that the starting point for calculation of penalties should be the maximum amount pursuant to the applicable statute. In this matter, that sum - calculated from the date that the respondent failed to perform the soil boring (June 17, 2007) - would be in the millions of dollars and therefore excessive. The other factors to consider in establishing a penalty pursuant to the Civil Penalty Policy are: the economic benefit of noncompliance, the gravity of the violations, and the culpability of the respondent's conduct. Though the respondent has saved money by not performing the required borings, by not preparing and submitting the required plans, and by not carrying out the remediation, the staff has not presented any specific calculations of the economic benefit that the respondent has gained by its inaction. The violations are serious as the respondent's inaction has potentially resulted in the continued contamination of a residential area possibly exposing residents to harm. The respondent is quite culpable as it knowingly entered into the consent order and has chosen to ignore its requirements despite staff's efforts to gain compliance. Accordingly, staff's suggested penalty of \$50,000 is appropriate.

### CONCLUSIONS

The respondent's failure to comply with the requirements of the compliance schedule contained in the 2007 consent order is in violation of the consent order.

### RECOMMENDATIONS

The respondent, Rraci Real Estate Company, should be assessed a penalty of \$50,000. This penalty should be paid within 30 days of service of the Commissioner's order. The staff has requested that the Commissioner order the respondent to comply with the 2007 consent order. While such order is not necessary because the obligation is ongoing, I recommend the Commissioner include in the order language reiterating that the 2007 Consent Order requirements remain in effect. *See, Matter of 35-60 74th Street Realty LLC, supra.*

Albany, New York  
December 16, 2013

\_\_\_\_\_/s/\_\_\_\_\_  
Helene G. Goldberger  
Administrative Law Judge

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<sup>3</sup> The 2007 consent order also sets forth penalties that are supposed to be available pursuant to ECL § 71-2103. However, this statute pertains to air pollution violations under ECL Article 19 and the amounts cited in the consent order are incorrect.