STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Articles 19 and 71 of the Environmental Conservation Law of the State of New York ("ECL"), and Part 201 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

- by -

SOLOW MANAGEMENT CORPORATION,

Respondent.

ORDER

DEC Case Nos. R2-20020425-119 and R2-20020425-120

Staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondent Solow Management Corporation by service of a motion for order without hearing in lieu of complaint.[1]

In the motion, which serves as the complaint in this matter, Department staff alleged that respondent violated statutory and regulatory requirements governing air emissions sources at two buildings owned and operated by respondent, one at 265 East 66th Street, and the other at 501 East 87th Street, New York, New York (the "facilities"). The facilities contain stationary-combustion boilers capable of burning both natural gas and fuel oil. Department staff charged that respondent failed to obtain the necessary approvals from the Department to operate the boilers, and then operated without those approvals for several years. For the violations alleged, Department staff sought a civil penalty in the amount of $191,375.

Respondent opposed the motion, and the matter was

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[1] The motion also alleged violations by Sheldon H. Solow, individually and as president and owner of respondent Solow Management Corporation. By agreement of the parties, Sheldon Solow in his individual capacity was removed as a named respondent, and it was requested that his name be removed from the caption (see Matter of Solow Mgmt. Corp., ALJ Ruling, Feb. 23, 2005, at 4). The caption on this order has been modified accordingly.

assigned to Administrative Law Judge ("ALJ") Maria E. Villa. In a ruling dated February 23, 2005, the ALJ held that respondent was liable for the violations alleged, but reserved on the issue of penalty, pending further briefing and oral argument (see Matter of Solow Mgmt. Corp., ALJ Ruling on Motion for Order Without Hearing, Feb. 23, 2005).

After briefing and oral argument, the ALJ issued the attached hearing report. I adopt the ALJ's February 23, 2005 ruling on the issue of liability, and adopt in part the ALJ's hearing report as my decision in this matter, subject to the following comments.

The ALJ reviewed the penalty that Department staff proposed in light of the arguments presented by the parties, applicable statutory provisions and Department guidance. Based on that review, the ALJ has recommended that the penalty proposed by Department staff be reduced to $136,335. I accept the ALJ's recommended penalty of $136,335 as supported by the record and justified. In accepting the ALJ's recommendation, however, I do not pass upon the question whether violation no. 2 -- respondent's failure pursuant to 6 NYCRR 201-6.3 to timely inform the Department of its election to obtain an emissions cap or to file a Title V air permit application -- is a continuing violation (see ALJ Hearing Report, at 33-35). The civil penalty imposed in this case is authorized by the ECL, whether or not violation no. 2 is a continuing violation. Accordingly, this question need not be decided at this time.

I also concur that in addition to the civil penalty, respondent must pay the statutorily-imposed unpaid regulatory fees in the amount of $25,990.18.

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 is granted in part.

II. Respondent Solow Management Corporation is adjudged to have committed the following violations:

A. From September 27, 1992, to June 8, 1997, respondent violated the versions of 6 NYCRR 201.2(b) and ECL article 19 in existence at the time by operating the boilers at the facilities without Department-approved certificates;

B. Respondent failed to timely file complete Title V air permit applications by June 9, 1997 or, in the alternative, to elect to accept an emissions caps, in violation of 6 NYCRR 201-6.3; and

C. From June 9, 1997, to August 19, 2002, respondent violated 6 NYCRR 201-6.1(a)(1) and ECL article 19 by operating the boilers at the facilities without Title V air permits or air facility registration certificates.

III. Respondent Solow Management Corporation is hereby assessed a civil penalty in the amount of one hundred thirty-six thousand three hundred thirty-five dollars ($136,335). The civil penalty shall be due and payable within thirty (30) days after service of this order upon respondent. Payment shall be made in the form of a cashier's check, certified check or money order payable to the order of the "New York State Department of Environmental Conservation" and mailed to the Department at the following address: John F. Byrne, Esq., Assistant Regional Attorney, New York State Department of Environmental Conservation, Division of Legal Affairs, Region 2, One Hunters Point Plaza, 47-40 21st Street, Long Island City, New York 11101.

IV. Within thirty (30) days after service of this order upon respondent, respondent shall pay unpaid regulatory fees in the amount of twenty-five thousand, nine hundred ninety dollars and eighteen cents ($25,990.18). Payment shall be made in the form of a cashier's check, certified check or money order payable to the order of the "New York State Department of Environmental Conservation" and mailed to the Department at the following address: John F. Byrne, Esq., Assistant Regional Attorney, New York State Department of Environmental Conservation, Division of Legal Affairs, Region 2, One Hunters Point Plaza, 47-40 21st Street, Long Island City, New York 11101, for forwarding to the appropriate regulatory fee program unit.

V. All communications from respondent to the Department concerning this order shall be made to John F. Byrne, Esq., Assistant Regional Attorney, New York State Department of Environmental Conservation, Division of Legal Affairs, Region 2, One Hunters Point Plaza, 47-40 21st Street, Long Island City, New York 11101.

VI. The provisions, terms and conditions of this order shall bind respondent Solow Management Corporation, and its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: /s/
Denise M. Sheehan
Commissioner

Dated: December 22, 2006
Albany, New York

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Articles 19 and 71 of the Environmental Conservation Law of the State of New York (ECL), and Part 201 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) – by – **SOLOW MANAGEMENT CORPORATION** and **SHELDON H. SOLOW**, Individually and as President and Owner of Solow Management Corporation, Respondents.	Report on Motion for Order without Hearing (Civil Penalty) DEC Case Nos. R2-20020425-119 and R2-20020425-120

PROCEEDINGS

In a submission dated August 5, 2003, Staff of the New York State Department of Environmental Conservation ("Department Staff") moved for an order without hearing against Respondents Solow Management Corporation ("SMC") and Sheldon H. Solow, both in his individual capacity and as president and owner of Solow Management Corporation (collectively, "Respondents"). Department Staff's motion asserted that Respondents violated Articles 19 and 71 of the Environmental Conservation Law ("ECL") and Part 201 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR").

The violations alleged relate to the statutory and regulatory requirements governing air emissions sources at two buildings owned and operated by Solow Management Corporation, one at 265 East 66th Street and the other at 501 East 87th Street in New York City. The buildings are collectively referred to herein as the "Facilities." The Facilities contain stationary-combustion boilers capable of burning both natural gas and fuel oil. In its motion, Department Staff contended that Respondents

failed to obtain the necessary approvals from the Department to operate the boilers, and then operated without those approvals for several years. As a result, Department Staff sought a total civil penalty for both Facilities of $191,375.

The ALJ issued a ruling on the motion for order without hearing on February 23, 2005 (Matter of Solow Mgmt. Corp., ALJ Ruling, 2005 WL 476202 (Feb. 23, 2005)).[1] The ALJ concluded that Respondent SMC was liable for the violations alleged in Department Staff's motion, but reserved as to the amount of civil penalty to be recommended to the Commissioner pending further briefing and possibly oral argument.

Following the issuance of the ruling on the motion for order without hearing, the parties engaged in settlement discussions, which were ultimately unsuccessful. The parties exchanged discovery, provided written submissions to the ALJ, and on May 31, 2006, the ALJ heard oral argument with respect to the penalty to be recommended to the Commissioner. John Byrne, Esq., Assistant Regional Attorney, appeared on behalf of Department Staff. Department Staff offered the testimony of two witnesses: Sam Lieblich, Regional Air Pollution Control Engineer, and Robert G. Bolt, an Environmental Engineer II in the Department's Region 2 office. SMC was represented by Daniel Riesel, Esq., of the law firm of Sive, Paget & Riesel, P.C., in New York City.

At the oral argument, Department Staff moved to include in the record additional documentation concerning the economic benefit component of the penalty. SMC also requested leave to provide additional information with respect to the degree of culpability. The ALJ reserved as to the receipt into the record of this information, and by memorandum dated June 6, 2006, advised that the documents would be considered. The parties were provided with an opportunity to respond to one another's submissions, and those responses were received on July 14, 2006 (referred to herein as "SMC's Supplemental Submission" and "Department Staff's Supplemental Submission," respectively).

[1]By agreement among the parties, Sheldon Solow, in his individual capacity, was removed as a named respondent. See Matter of Solow Mgmt. Corp. at 4, 2005 WL 476202,* 2. Until the ALJ's ruling on liability and report with respect to the civil penalty in this proceeding are adopted by the Commissioner, Mr. Solow's name remains in the caption, but references to "Respondent" in this report on the recommended civil penalty amount refer only to Respondent Solow Management Corporation, or "SMC."

SUMMARY OF RECOMMENDATION

As more fully set forth below, this hearing report on the civil penalty to be assessed recommends that the Commissioner adopt Department Staff's penalty calculation, except as modified below. The civil penalty amounts recommended in this report are as follows:

265 East 66th Street Facility

Violation No. 1:	$18,565	
Violation No. 2:	$10,000	
Violation No. 3:	$37,425	
Total penalty for this Facility:		$66,990

501 East 87th Street Facility

Violation No. 1:	$19,820	
Violation No. 2:	$10,000	
Violation No. 3:	$37,425	
Total penalty for this Facility:		$68,245

Economic Benefit: $3,100

Total Recommended Civil Penalty: $136,335

In addition, SMC is responsible for $25,990.18 for regulatory fees in arrears during the period of non-compliance, from 1992 to 2001. A breakdown of the recommended penalty is attached to this report. See Table 1, entitled "Recommended Penalty."

DISCUSSION AND RULING

The Department's Civil Penalty Policy

In post-argument briefing, both Department Staff and SMC discussed the factors set forth in the Department's Civil Penalty Policy (the "Policy"), issued June 20, 1990. The Policy is an enforcement directive that "establishes the Department's policy and guidance for developing penalties" for violations of the ECL and the Department's regulations. Policy, at 2. As a threshold matter, the Policy provides that

> [t]he penalty amounts calculated with the aid of this document in adjudicated cases must, on the average and consistent with consideration of fairness, be significantly higher than the penalty amounts which DEC accepts in consent orders which are entered into voluntarily by respondents.

Id. at 2, 3. The Policy states further that in an adjudicatory hearing, Department Staff should request a specific penalty amount, "and should provide an explanation of how that amount was determined, with reference to

1. the potential statutory maximum;
2. this guidance document;
3. any program specific guidance document(s);
4. other similar cases; and
5. if relevant, any aggravating and mitigating circumstances which staff considered."

Id. at 5.

Department Staff's Penalty Calculation

The ruling on liability determined that Department Staff established three violations, specifically, that SMC:

(1) failed to obtain a certificate to operate the boilers at the Facilities between 1992 and 1997, in violation of the then-applicable statutory and regulatory provisions;

(2) failed to timely file a complete application under Title V of the federal Clean Air Act by June 9, 1997, or to accept an emission cap in order to avoid the Title V permit requirements; and

(3) failed to obtain a Title V permit or State Facility Permit or Air Facility Registration Certificate. It was undisputed that the Facilities are major stationary sources that operated without the necessary authorization from June 9, 1997 to August 19, 2002.

Department Staff maintained that the $191,375 total penalty for the three violations was appropriate in light of the factors articulated in the Policy. As part of its motion for order without hearing, Department Staff provided a submission entitled "Penalty Calculations," outlining the penalties for each separate violation at each of the Facilities. The penalty calculation submission also included Department Staff's arguments justifying the penalty, as well as a matrix comparing the maximum penalty available under the ECL for each of the three violations at both Facilities with the penalty sought by Department Staff. For reference, a chart setting forth Department Staff's penalty calculation is attached. See Table 2, entitled "Department Staff's Proposed Penalty."

The penalty calculation for Violation No. 1 was based upon the allegations in the complaint that SMC violated the 1972 and 1993 versions of ECL Section 71-2103.[2] The 1972 version of ECL Section 71-2103 provided for a civil penalty of up to $10,000 for each first violation of ECL Article 19 and the 6 NYCRR Part 201 regulations, as well as an additional penalty of $500 for each day the violation continued. The statute also provided for criminal sanctions and injunctive relief, where appropriate. The version that became effective on August 4, 1993 also provided for a $10,000 civil penalty, but increased the per day penalty to $10,000 for each day of continuing violation. The current version of ECL Section 71-2103, which took effect on May 15, 2003, provides for a civil penalty of up to $15,000 for each violation of Article 19, as well as an additional penalty of $15,000 for each day of continuing violation.

Department Staff's complaint charged SMC with three separate violations of ECL Articles 19 and 71 and 6 NYCRR Part 201 at both of the Facilities. For Violation No. 1, Department Staff sought a penalty of $38,395, which was 0.134% of the statutory maximum of $28,535,500. For Violation No. 2 (the second cause of action in the complaint), Department Staff maintained that SMC should pay $76,100, or 0.203% of the statutory maximum of $37,420,000. With respect to Violation No. 3 (the third cause of action), Department Staff's penalty amount of $76,880 amounted to 0.202% of the $37,940,000 maximum penalty possible under the statute.

[2]While the complaint alleges violations of various iterations of Article 71, that provision of the ECL does not impose an affirmative duty upon SMC. Rather, Article 71 articulates the penalties that the Department may impose for violations of other statutory requirements in the ECL.

Department Staff observed that the total penalty recommended by Department Staff would be less than 1% of the statutory maximum for each of the three violations alleged. As noted above, the grand total of all penalties sought by Department Staff in its motion was $191,375.

Department Staff pointed out that SMC operated the boilers at both Facilities for a number of years without applying for a certificate to operate, or subsequently, a Title V permit or State Facility Permit or Air Facility Registration Certificate. Department Staff also noted that on March 30 and 31, 1998, SMC received notice letters from the Department explaining the regulatory requirements, but failed to apply for Air Facility Registration Certificates for the Facilities until July 24, 2002, over four years after receiving the letters.

According to Department Staff, SMC did not come into compliance until August 19, 2002, after receiving a notice of violation dated April 22, 2002. Department Staff went on to assert that "[a]ssessment of a significant penalty against Respondents will send a strong reminder to the regulated community" and noted that Respondents had not indicated that they lacked the resources to pay a penalty. Penalty Calculations, at 18, ¶ 3. The next section of this report is based upon the discussion in the February 23, 2005 ALJ ruling on liability for the violations alleged and the penalties sought for each violation.

First Cause of Action (Violation No. 1)

SMC owns and operates the Facilities. The East 66th Street Facility has three stationary combustion installation Burnham (Spencer) boilers, each rated at 17.92 mmBtu/hr., and capable of burning #4 fuel oil as well as natural gas. The boilers have a total "potential to emit"[3] of 117.6 tons per year of oxides of nitrogen ("NO_x").

The two stationary combustion installation Federal FLW 3036 boilers at the East 87th Street Facility have a total potential to emit of 45.6 tons per year of NO_x and are each rated at 10.4

[3]"Potential to emit" is defined at 6 NYCRR Section 200.1(bl) as "[t]he maximum capacity of an air contamination source to emit any regulated air pollutant under its physical and operational design."

mmBtu/hr. The boilers at this Facility are capable of burning natural gas or #6 fuel oil.

The first cause of action ("Violation No. 1") cited the March 1985 and August 1994 versions of 6 NYCRR Section 201.2(b), which provided, in pertinent part, that no person shall operate an air contamination source without having a valid Department-issued certificate to operate. SMC is a "person," within the meaning of 6 NYCRR Section 200.1(bk)[sic], and the boilers at the Facilities constitute "an air contamination source or emission source" pursuant to 6 NYCRR Section 200.1(f).

From September 27, 1992 to June 8, 1997, SMC owned, operated and/or maintained the three boilers at the East 66th Street Facility without first obtaining a Department certificate to operate. From January 14, 1992 to June 8, 1997, SMC owned, operated and/or maintained the two boilers at the East 87th Street Facility without a Department certificate to operate. Department Staff asserted that each day that SMC failed to obtain a certificate to operate the boilers at the Facilities constituted a continuing violation of former Section 201.2(b) of 6 NYCRR and ECL Articles 19 and 71. Complaint, ¶¶ 12 and 14.

The Department mailed notice letters via certified mail, return receipt requested, to the Facilities in late March 1998, addressed to "Solow Management Corp., Attn: Environmental Manager, 9 West 57th Street, Manhattan, New York, 10019." The letters explained the compliance options available, and required a reply from SMC on a "Choice of Option" form included with the notice letters. As part of its motion, Department Staff provided copies of the signed return receipts and the notice letters. SMC did not reply to the letters.

On April 22, 2002, the Department's Region 2 Division of Air mailed Notices of Violation ("NOVs") to SMC for both Facilities, as well as a proposed order on consent to resolve the violations. The NOVs were addressed to "Solow Management, 9 West 57th Street, New York, New York 10019," and indicated that the Facilities were inspected on August 11, 1999. SMC did not sign and return the order on consent for either Facility.

SMC has not asserted financial inability to pay the $15,000 penalty for each Facility, which was the amount sought in the Orders on Consent. As part of its motion, Department Staff provided a newspaper article indicating that Respondent Sheldon

Solow has a net worth of $800 million, as well as a January 22, 2003 Dun & Bradstreet Report indicating that SMC employs 200 people and has a composite credit rating of "fair."

In justification for the penalty sought for Violation No. 1, Department Staff asserted that SMC operated the Facilities for approximately five years without obtaining the requisite authorizations from the Department. According to Department Staff, the period of violation for the East 66th Street Facility was from September 27, 1992 to June 8, 1997. Department Staff's penalty calculation, after assessing $10,000 for the first day of violation at the Facilities, was based upon a violation of the 1972 version of the statute from September 27, 1992 to August 3, 1993 (310 days), at $5 per day, for a total of $1,550. For the violations of the 1993 statute, in effect from August 4, 1993 to June 8, 1997, Department Staff calculated a penalty of $7,020 based upon 1,404 days of violation at $5 per day. Thus, the amount of penalties for this Facility for the first violation alleged amounted to $10,000, plus $1,550 and $7,020, for a total of $18,570.

The East 87th Street Facility calculations assumed a continuing violation of the 1972 statute from January 14, 1992 to August 3, 1993 (561 days) at $5 per day, for a total of $2,805, and a continuing violation of the 1993 statute from August 4, 1993 to June 8, 1997 (1,404 days) at $5 per day, for a total of $7,020. Again, Department Staff assessed $10,000 for the first day of violation at the Facility. The penalties calculated by Department Staff for this Facility were $10,000, plus $2,805 and $7,020, for a total of $19,825. The total penalty Department Staff sought for Violation No. 1 for both Facilities was $38,395.

Second Cause of Action (Violation No. 2)

In its second cause of action, Department Staff alleged that SMC violated the June 1996 version of 6 NYCRR Part 201, which subjected all major stationary sources to federal Title V permitting requirements.[4] Complaint, ¶ 20. The Facilities are

[4]Pursuant to 6 NYCRR Section 201-2.1(b)(21)(iii)(*a*), in severe non-attainment areas, a facility is a major stationary source or major source of air contamination subject to the Title V permitting requirements if its potential to emit oxides of nitrogen is 25 tons per year or greater.

located in a severe non-attainment area[5] and have the potential to emit 25 tons per year or more of NO_x. Both Facilities are therefore major stationary sources or major sources of air contamination. SMC failed to comply with the provisions of the June 1996 version of 6 NYCRR Part 201, which required SMC to submit complete permit or registration applications to the Department on or before June 9, 1997. In its motion, Department Staff contended that each day subsequent to June 9, 1997 that SMC failed to file a complete permit or registration application was a continuing violation of the regulation and ECL Articles 19 and 71. Id.

Department Staff's penalty calculation for Violation No. 2 at the East 66th Street Facility assumed a 1,870-day continuing violation (from June 9, 1997 to July 24, 2002) of the June 1996 versions of 6 NYCRR Section 201-6.3 and ECL Article 19, as well as the 1993 version of ECL Article 71. On July 24, 2002, SMC filed a "Choice of Options" form for both Facilities. Department Staff sought a $10,000 penalty for the first day of violation, and $15 for each day the violation continued ($28,050).[6] According to Department Staff, the violation at the East 87th Street Facility occurred during the same 1,870-day period, and as a result, the recommended penalty amount is identical, and totals $28,050. The total penalty for both Facilities, including $10,000 for the first day of violation, came to $76,100.

Third Cause of Action (Violation No. 3)

The third violation set forth in Department Staff's complaint alleged that SMC operated the boilers at the Facilities without a Department-issued permit or registration for a period of over five years, from June 9, 1997 to August 19, 2002. Complaint, ¶¶ 27 and 28. The ruling on liability determined that SMC's operation of the Facilities without the requisite approvals

[5]Section 200.1(av) defines a non-attainment area, in pertinent part, as "[a]ny area of the State not meeting a National Ambient Air Quality Standard (NAAQS) for a specific air contaminant. Non-attainment areas in New York State are as follows: (1) Severe ozone non-attainment area. The area including the New York City metropolitan area . . .."

[6]In its penalty calculation, Department Staff pointed out that the penalty sought for Violation No. 1 was $5 per day, while the penalty amount was increased to $15 for Violation Nos. 2 and 3. According to Department Staff, this is because the latter violations are more recent, and SMC's first violation should have apprised SMC of its compliance obligations.

violated the June 1996 version of 6 NYCRR Part 201, specifically, Section 201-6.1(a)(1), as well as ECL Articles 19 and 71. As noted above, SMC completed and submitted a Choice of Option form for a Registration for each Facility on July 24, 2002. On August 19, 2002, the Department's Region 2 Division of Air issued Air Facility Registration Certificates, and both Facilities were then in compliance.

The civil penalty calculation for Violation No. 3 was based upon Department Staff's position that from June 9, 1997 to August 19, 2002 (a total of 1,896 days), both Facilities violated the June 1996 version of 6 NYCRR Section 201-6.1(a)(1) and ECL Article 19, in addition to the 1993 version of ECL Article 71. Department Staff sought a $10,000 penalty for both Facilities for the first day of violation, and $15 per day thereafter ($28,440). The total penalty Department Staff sought for the two Facilities for this violation amounted to $76,880.

SMC's Proposed Penalty

SMC argued that the requested civil penalty was oppressive and excessive, and further, that the scope of the complaint and the magnitude of the penalty requested reflected retaliatory animus on Department Staff's part, because the parties failed to reach a settlement. SMC pointed out that the Facilities never violated any emission performance standard, and were entitled to cap by rule and avoid the Title V permit requirements for the Facilities' operations. SMC argued that the "paperwork" violation alleged by Department Staff did not harm the environment and did not result in any economic gain or benefit to SMC.

In its response to Department Staff's motion for order without hearing, SMC asserted that the first and third causes of action should be dismissed, and that a hearing should be held to determine the amount of any penalty to be assessed for the second violation alleged. SMC argued that the allegations in the complaint did not involve "any contemptuous or even intentional conduct on the part of Respondents." Affirmation of Daniel Riesel, ¶¶ 2 and 11. SMC characterized the violations at issue as "a single, inadvertent administrative error," and argued that the per-day penalties Department Staff sought were "particularly inequitable given Staff's unexplained lack of diligence, and the prejudice it has caused SMC." SMC's Brief, at 3.

Respondent pointed out that although SMC's failure to obtain a certificate to operate began in 1992 and ended in 1997, the violation was first alleged in 2003 in Department Staff's complaint. According to SMC, Department Staff had not offered any explanation for the delay which rendered the proposed penalty of $38,395 for Violation No. 1 fundamentally unfair. SMC contended that "it is inequitable for SMC to be subjected to $5-per-day penalties over a five-year period, when that period could and should have been greatly reduced with even a modicum of diligence on DEC's part." SMC's Reply Brief, at 5.

SMC concluded that Department Staff's per-day penalty calculation for Violation No. 1 was baseless, noting that nearly half of the $38,395 penalty amount was attributable to such penalties calculated over 1,800 days. SMC took the position that $2,000 was a more appropriate penalty under the circumstances, in light of Department Staff's delay and failure to adhere to the Civil Penalty Policy or provide examples of other situations where the higher penalty was imposed.

SMC raised similar arguments with respect to the Second Violation. According to SMC, Department Staff's workload does not excuse its delay in issuing the notices of violation, particularly because although Department Staff inspected the facilities in the late 1990s, SMC did not receive the NOVs until several years later. SMC underscored the inconsistency in Department Staff's unwillingness to mitigate the penalty amount in light of Department Staff's administrative failure, while at the same time being unwilling to excuse the administrative failure of SMC's consultant. SMC argued that this "steadfast refusal to propose a penalty amount reflective of the *entirety* of the circumstances presented herein not only bolsters SMC's view regarding Staff's retaliatory animus, but also strips the presumption of regularity from Staff's penalty calculation." SMC's Reply Brief, at 11 (emphasis in original).

SMC proposed that the penalty for Violation No. 2 should be $17,720, because this amount, in SMC's view, "fairly reflect[s] the laches and Civil Penalty Policy factors presented in this case." SMC's Brief, at 4. SMC maintained that the $10,000 first day of violation penalties should be reduced to $3,250 for each Facility ($6,500 for both) and the per-day penalty should be adjusted downward from $15 to $3 per day for 1,870 days, for a total per-day penalty of $11,220 for both Facilities. According to SMC, its proposed penalty would "act as a deterrent while

equitably accounting for both the DEC CPP factors" and the fact that over three years elapsed from the time Department Staff inspected the Facilities in 1999 and the date that SMC was notified of the violations. SMC's Reply Brief, at 20-21.

SMC maintained that any assessment of a separate penalty for Violation No. 3 would be multiplicitous of Violation No. 2, and therefore contrary to law. SMC's proposed penalty assumed that Violation No. 3 would be dismissed, or no penalty would be assessed for that violation. SMC went on to state that "[p]ut another way, SMC will not agree that any combined penalty amount over $19,720 for the First, Second or Third Violations is equitable." SMC's Brief, at 20, n. 8. The arguments offered by Department Staff and SMC with respect to the specific Civil Penalty Policy factors are discussed in greater detail below.

Civil Penalty Policy

Economic Benefit

The Department's Civil Penalty Policy incorporates both a "benefit" and a "gravity" component. According to the Policy, the benefit component is intended to deter violators, and "remove any economic benefit that results from a failure to comply with the law." Policy, at III. The benefit component "is an estimate of the economic benefit of delayed compliance, including the present value of avoided capital and operating costs and permanently avoided costs which would have been expended if compliance had occurred when required." Id. at IV(C)(1). According to the guidance, this component should also take into account "any other economic benefits resulting from noncompliance such as avoided liquidated damages under contracts and enhanced value of business or real property." Id. The Policy goes on to provide that "[e]very effort should be made to calculate and recover the economic benefit of non-compliance." Id.

The Policy states further that "[i]n general, DEC should not settle for less than the economic benefit of non-compliance," except in instances when the commitment of Department resources is not justified because the magnitude of the benefit component is insignificant, when there is a compelling public interest in reducing or suspending the economic benefit component of the penalty, or when litigation practicalities indicate that an adjustment to the economic benefit component is appropriate. Id.

Positions of the Parties

Department Staff noted that the predominant component of the penalty sought in this proceeding reflects the gravity of the violations, rather than the economic benefit enjoyed by SMC. Initially, Department Staff calculated the economic benefit component of the total civil penalty for the two Facilities to be $3,100. In its motion papers, Department Staff stated that the annual fee for a certificate to operate was $150, and that because SMC operated the boilers at both Facilities for five years (1992-1997) without first obtaining those certificates, SMC avoided $1,500 in regulatory fees. Department Staff went on to assert that because SMC operated the boilers from 1997 to 2002 without an annual $160 registration fee, SMC avoided costs of $1,600.

In addition, Department Staff pointed out that SMC alleged that SMC hired an outside consultant, Environmental Management Services ("EMS"), to obtain the necessary registrations for the two Facilities. Because the registrations were never obtained, Department Staff reasoned that SMC did not pay a fee to its consultant for this service. According to Department Staff, "[t]his put Respondent in an advantageous position over other facility owner/operators who, unlike Respondent, hired and paid fees to outside consulting firms to obtain Registrations for said owners/operators." Department Staff's Brief, at 4.

Department Staff offered similar reasoning with respect to the economic benefit SMC allegedly enjoyed by not obtaining certificates to operate in a timely manner, and estimated that SMC avoided costs of several thousand dollars because SMC did not pay its consultants to obtain the requisite approvals. Finally, Department Staff pointed out that the Policy contemplates that a present value factor will be applied when a violation spans a number of years, stating that "Department Staff's best educated guess is that this would add several thousand dollars to the benefit component of the total civil penalty, based on the number of years over which these violations occurred." Department Staff's Brief, at 5.

In response, SMC maintained that Department Staff had not demonstrated that SMC enjoyed any economic benefit as a result of the First Violation, and that the penalty should therefore be reduced significantly. SMC also pointed to the examples of avoided costs listed in the Policy. According to SMC, by failing

to register its Facilities between 1992 and 1997, SMC did not avoid or delay the installation of equipment or operation or maintenance of any air systems, the hiring of staff, or development of proper procedures. SMC maintained further that "[i]t is uncontested that SMC always operated its Facilities in a manner that would have been consistent with registration." SMC's Brief, at 13.

In addition, SMC argued that Department Staff did not offer any evidence that the fees in question were in fact $150 annually during the 1992-1997 time period. According to SMC, the lack of any affidavit or documentary evidence to support Department Staff's position mandated reduction of the penalty, because SMC obtained no economic benefit as a result of the First Violation. SMC went on to argue that the economic benefit from delayed or avoided costs alleged by Department Staff was *de minimis*, amounting to five years of registration fees, or $1,500, "the very 'benefit' that Staff previously conceded was *negligible*." Respondents' Reply Brief, at 6 (emphasis in original).

At the oral argument, Department Staff moved to introduce documentation concerning the economic benefit component. Tr. at 6. According to Department Staff, the initial penalty calculation mistakenly underestimated the amount of the economic benefit component, because the regulatory fees allegedly avoided were considerably higher, in fact $2,000 annually for one of the Facilities (East 66th Street).[7] Tr. at 8. According to Department Staff, the regulatory fees for the East 87th Street facility were $100 annually. Department Staff calculated the economic benefit for the East 66th Street Facility to be $26,361.59 (assuming 6 per cent interest compounded annually), and $1,318.07 for the East 87th Street Facility. Tr. at 11.

[7]Pursuant to ECL Section 72-0302(1)(b), "all stationary combustion installations which are not included under paragraph a of this subdivision and which have a maximum operating heat input greater than fifty million British thermal units [Btu] per hour as stated on the most recent application for a certificate to operate" must submit an annual State air quality control fee of $2,000. Section (1)(c) provides for a regulatory fee of $100 for a stationary combustion installation with a maximum operating heat input less than fifty million British thermal units.

As stated in Finding of Fact No. 2 in the ruling on Department Staff's motion for order without hearing, the East 66th Street Facility has three stationary combustion installation Burnham Spencer boilers each rated at 17.92 million Btu per hour, for a total of 53.76 million Btu per hour for that Facility. See Matter of Solow Mgmt. Corp., ALJ Ruling at 23, 2005 WL 476202, * 15 (Feb. 23, 2005).

Department Staff stated that despite this revised regulatory fee calculation, it was not seeking to increase the penalty sought, nor was it seeking to amend the complaint. Tr. at 12-13. Department Staff took the position that the information it introduced in its motion "is something [the ALJ] should know about where [sic] you do decide what the final penalty is to award in these two cases." Tr. at 21.

In response, SMC argued that Department Staff's position was "a tacit admission that the Staff's proposed penalty is nothing more than punishment for the Respondent's asserting its right to be heard and have its day in Court." SMC's Supplemental Submission, at 3. Furthermore, SMC pointed out that Department Staff incorrectly asserted that the $2,000 fee provision was in effect in 1992, citing to the annotations to ECL Section 72-0302(1)(b) that state that this particular provision became effective on August 4, 1993, retroactive to January 1, 1993.

SMC went on to argue that to the extent that any economic benefit component of the penalty is considered, the doctrine of laches should be applied. According to SMC, "the interval between the Department's actual or constructive knowledge of Respondent's failure to file and Staff's penultimate action of commencing this enforcement proceeding, should be taken into consideration under both the doctrine of laches and as a mitigating aspect of the Department's Civil Penalty Policy." SMC's Second Supplemental Brief, at 4. SMC argued that Department Staff knew of each failure to file, as evidenced by the testimony of Department Staff's witness that Department Staff had access to the records maintained by the New York City Department of Environmental Protection ("DEP"). Those records indicated that SMC had always filed for and received air permits from the City. At the oral argument, Department Staff's witness Mr. Bolt testified that after 1992, when the State assumed responsibility for the program, "the facility continued to file with the City and obtained the City's permits." Tr. at 102-03, 107. According to SMC, "if the Department had promptly followed up after its 1999 inspection, the Respondent would have been able to greatly reduce its exposure, as it did after the Notice of Violation was sent" in 2002. Id.

SMC also pointed out that Department Staff ascribed the delay in initiating enforcement action against SMC to the Department's workload, but disagreed that the economic benefit component of the penalty should be reduced as a result of this

delay. SMC reiterated that Department Staff had access at all times to current New York City records which reflected the Facilities' permitted status and operation pursuant to City approvals, and maintained that SMC "should not be penalized because of the Department's inadequate staffing." SMC's Supplemental Submission, at 5.

Discussion

As noted above, the economic benefit component of Department Staff's requested civil penalty is $3,100 for both Facilities. Department Staff's submissions at the oral argument established that the actual amount of avoided costs in this case are at least $25,000. While SMC argued that the non-payment of regulatory fees does not fall within the Policy's examples of permanently avoided costs, and thus should not be a part of the economic benefit analysis, the language of the Policy makes clear that the examples cited are not an exclusive list. The Policy states that the benefit component "is an estimate of the economic benefit of delayed compliance," including permanently avoided costs which would have been expended if compliance had taken place when required, and "should also include any other economic benefit resulting from noncompliance." Policy, at IV(C)(1). This encompasses the unpaid regulatory fees at issue in this case.

With respect to SMC's laches argument, Department Staff noted that laches is an equitable defense that may not be interposed against the State when acting in a governmental capacity to enforce a public right or protect a public interest. Department Staff cited to Matter of Breeze Hill Farm, ALJ Hearing Report, at 19, 1993 WL 393562, * 17 (July 21, 1993) (citations omitted) to support its position. Nevertheless, Matter of Breeze Hill does not stand for the proposition that delay by Department Staff cannot be considered in assessing an appropriate penalty. As stated in the ruling on liability in this proceeding,

> [i]t is well-settled that laches is an equitable remedy that cannot be used "to prevent the State from enforcing its laws, or an agency from carrying out its duties." Matter of City of Hudson Indus. Dev. Agency, ALJ Ruling, Aug. 24, 1998, at 5-6, 1998 WL 1780962, at *6, citing Matter of Cortlandt Nursing Home v. Axelrod, 66 N.Y.2d 169, 177, n. 2 (1985). Nevertheless, "whether or not

> NYSDEC's actions/inactions warrant consideration in calculating a penalty can be addressed later if liability is found." City of Hudson, at 6, *6, citing Landmark Colony at Oyster Bay v. Bd. of Supervisors of Nassau Cty., 113 A.D.2d 741 (2nd Dept. 1985). This approach should be followed in this case.

Matter of Solow, supra, at 13, 2005 WL 476202, * 9.

The Cortlandt decision, discussed in greater detail in the ruling on liability, articulated four factors to be evaluated in determining whether delay by a State actor was reasonable, among them the actual prejudice to SMC and the cause of the delay, as well as the public policy interests underlying the statute and regulations implicated by the violations. See Matter of Breeze Hill Farm, supra, at 17-19, * 15 (evaluating the Cortlandt factors and concluding that delay was not unreasonable). In Matter of Breeze Hill, the ALJ noted that the respondents contended that "the delay in bringing this case speaks for itself in determining the importance the Department Staff placed on the alleged violations, and about its view of the public interest." Id. at 17, * 15.

SMC has raised similar arguments here, but in essence those arguments assume that Department Staff had an affirmative duty to notify SMC of its obligation to obtain the required approvals to operate the boilers at the two Facilities. This interpretation of the Civil Penalty Policy is not in accord with the language of the guidance, which makes clear that "[p]arties undertaking activities regulated by DEC have a duty to familiarize themselves with applicable legal requirements. Ignorance of the law or rules is never a mitigating factor. Indeed, in many situations, ignorance of the law may amount to negligence." Policy, at IV(E)(1); see Matter of Proffes, Order, at 4-5, 2001 WL 176028, * 3 (Feb. 7, 2001) (declining to adopt penalty reduction recommended by ALJ, who "dismisse[d] many violations under his view that Respondent was not aware of the regulations").

Moreover, as Department Staff points out, there was no notice requirement in the Part 201 regulations in effect during the time period covered by Violation No. 1. In addition, the guidance SMC cites for the proposition that Department Staff was obliged to issue Notices of Violation before initiating enforcement action does not support SMC's position. See Air

Pollution Control Enforcement Guidance Memorandum, Appendix IV, § 4 (Mar. 21, 1991). The guidance states that an effort should be made to issue Notices of Violation to promote voluntary compliance and to lay the groundwork for an effective deterrence program of enforcement, but also states that the issuance of such Notices "is categorically not a requirement of law." Id. SMC did not offer anything to the contrary at the oral argument. Finally, Department Staff offered credible evidence that in March of 1998, it mailed notice letters to SMC that were received at SMC's West 57th Street offices. SMC did not respond to that correspondence.

Accordingly, the delay attributable to Department Staff's inaction should not reduce the economic benefit amount of the penalty. While SMC argues that the revised economic benefit calculation "is based upon the number of days that the Respondent failed to file its applications; each elapsed day increases the penalty even though the offense is essentially the singular failure to file," the amounts in the revised calculation in fact are based solely upon the unpaid annual regulatory fees. SMC would have been liable for those regulatory fees even if it had timely applied for the requisite approvals, and the arguments advanced to the contrary are not persuasive. Moreover, none of the benefit component adjustments are applicable to this proceeding. Under the circumstances, the $3,100 economic benefit portion of Department Staff's civil penalty is appropriate.

Department Staff did not include the $3,100 economic benefit in the $191,375 penalty requested in the complaint's *ad damnum* clause, and stated at oral argument that no amendment to the complaint was sought. Nevertheless, because Department Staff's complaint sets forth the maximum penalty that may be imposed pursuant to the statute, SMC had notice that a larger penalty could be assessed. Complaint, at ¶¶ 30 and 31. Accordingly, the Commissioner may elect to include this amount in the total penalty, and this report recommends that the $3,100 be imposed.

Outstanding Regulatory Fees

Furthermore, there is authority for the proposition that regulatory fees in arrears, such as those at issue here, cannot be compromised by the Department. As Commissioner Cahill noted in Matter of Newell, Declaratory Ruling DEC 72-11 (May 23, 1996), the Department's regulatory fee program was instituted to carry out the legislature's express statutory mandate, and such fees

may not be waived. Matter of Newell, at 4-5. The Declaration of Policy establishing environmental program fees states that

> those regulated entities which use or have an impact on the state's environmental resources should bear the costs of the regulatory provisions which permit the use of these resources in a manner consistent with the environmental, economic and social needs of the state.

ECL Section 72-0101; see Matter of Newell, at 4. Accordingly, the regulatory costs associated with the operation of the Facilities during the period of non-compliance are SMC's responsibility, and cannot be compromised as part of this proceeding.

Moreover, as was the case with the mining program fees at issue in Matter of Newell, the ECL Article 72, Title 3 Air Quality Program fee provisions do not include any explicit language that would authorize the Department to vary the program fee. Id. The only such provision appears in Section 72-0303(8), which states that "[t]he department may reduce the fee charged for categories of stationary sources, taking into account the financial resources of such sources." As discussed below, SMC has not argued that it is financially unable to pay the penalty sought, and therefore SMC's financial resources similarly are not an issue with respect to the regulatory fees in arrears. Accordingly, SMC must pay regulatory fees in the amount of $25,990.18 for the period of time that the Facilities were not in compliance.

Attached to this report is a table that provides a breakdown of those fees for the Commissioner's consideration, including an adjustment to Department Staff's calculation that assumed a $2,000 fee for the East 66th Street Facility for calendar year 1992. See Table 3, entitled "Fee Chart." As SMC noted, the amendment to the statute that increased the fee for a stationary combustion installation having a maximum operating heat output equal to or greater than fifty million British thermal units per hour from $1,000 to $2,000 became effective on August 4, 1993, retroactive to January 1, 1993. See annotations to ECL Section 72-0302(1)(b). As a result, the fee for the East 66th Street Facility for 1992 was $1,000, rather than $2,000. As was the case with Department Staff's calculation, Table 3 assumes an

interest rate of 6% compounded annually on regulatory fees in arrears. The figures set forth may be referred to the Department's Regulatory Fee Unit to be verified for accuracy.

Civil Penalty Policy: Gravity Component

The Policy states that

> [r]emoving the benefit of non-compliance only places the violator in the same position in which it would have been if compliance had been achieved on time. Both deterrence and fundamental fairness require that the penalty include an additional amount to ensure that the violator is economically worse off than if it obeyed the law. This additional penalty amount should reflect the seriousness of the violation and is referred to as the "gravity component."

Policy, at III. The Policy calls for "an explicit analysis" addressing the two gravity component factors: consideration of the potential harm and actual damage caused by the violation; and an assessment of the relative importance of the type of violation in the regulatory scheme. Id. at IV(D)(1)(a) and (b).

Potential Harm and Actual Damage

The "potential harm and actual damage" factor "focuses on whether and to what extent the respondent's violation resulted in or could potentially result in loss or harm to the environment or human health." Id. at IV(D)(2)(a). According to the guidance, the penalty should be proportional to the potential harm or actual damage. Id. Consideration of the violation's importance in the context of the regulatory scheme requires an evaluation of "the importance of the violated requirement in achieving the goal of the underlying statute." Id. at IV(D)(2)(b). The Policy states that

> [u]ndertaking any action which requires a DEC permit, without first obtaining the permit, is always a serious matter, not a mere "technical" or "paperwork" violation, even if the activity is otherwise in compliance. Failure to first obtain required permits

> deprives DEC of the opportunity to satisfy its obligation of review and control of regulated activities. Failure to assess significant penalties for such violations would be unfair to those who voluntarily comply with the law by satisfying the requirements of the permit process.

Id.

Although Department Staff acknowledged that it lacked information that the violations caused actual damage, Department Staff went on to point out that the Facilities' potential to emit gave rise to the potential to harm. Department Staff cited the second and third findings of fact in the ruling on liability, which found that the East 66th Street Facility has a total annual potential to emit of 117.6 tons of oxides of nitrogen ("NO_x"), and the East 87th Street Facility has a total annual potential to emit of 45.6 tons of NO_x. Both are therefore major facilities pursuant to Title V of the Clean Air Act because each is capable of emitting greater than 25 tons of NO_x annually. Matter of Solow, supra, at 23, 14, fn. 4, 2005 WL 476202, * 15, 6, fn. 4. It is undisputed that NO_x is an ozone precursor, and the New York City metropolitan area is a severe non-attainment area for ozone.

SMC noted that the Policy indicates that the penalty should be proportional to the potential harm and/or actual damage resulting from the violation, pointing out that Department Staff conceded that there is no evidence of actual damage, a release of any highly toxic pollutants, or despoliation of any sensitive natural areas or resources. SMC maintained that the failure to register did no actual harm or damage to the environment, and "there was no potential harm because the Facilities have never violated any registration requirements." SMC's Brief, at 13. SMC argued further that Department Staff failed to provide any evidence of potential harm. This argument overlooks the fact that SMC's failure to register the Facilities undermined Department Staff's ability to monitor the Facilities and ensure compliance.

The measures of potential harm and actual damage to the environment set forth in the Policy include the amount and toxicity of the pollutant released to the environment, the amount and degree of misuse of a substance of concern, or the amount and degree of actual or potential damage to natural resources. In

addition, the guidance states that "[t]he sensitivity of affected environmental sectors is relevant." Policy, at IV(D)(2)(a). While the first three examples do not appear to be implicated here, it is undisputed that Respondent engaged in unpermitted operation of two major facilities, within the meaning of Title V of the Clean Air Act, in an ozone non-attainment area. Department Staff's proposed penalty is therefore consistent with the gravity of the violation, and no reduction is warranted.

Importance to the Regulatory Scheme

With respect to this factor, Department Staff cited to the Policy language quoted above concerning the importance of the permitting requirements to the Department's obligation to review and control the activities of regulated entities. Policy, at IV(D)(2)(b). According to Department Staff, this language "makes clear that even if the Facilities had not violated any emission-performance or other standard by the operation of their boilers, or if the Facilities' operations remained unchanged before and after issuance of Department Registrations for the Facilities, or if there was no actual harm to the environment, or if there was no economic gain or benefit to the Respondent, Respondent's failure to first obtain Department certificates to operate, and subsequently Registrations, for the Facilities is a serious matter, calling for the assessment of a significant penalty, and not a mere 'paper work' violation." Department Staff's Brief, at 7 (emphasis in original).

At the oral argument, SMC maintained that the failure to file did not have any meaningful effect on the regulatory scheme. Tr. at 56. According to SMC, there was no evidence of negligence. Id. at 55-56. SMC noted further that the Department had access to the Facilities and conducted at least one inspection in 1999, and the Facilities were operating pursuant to permits issued by the City of New York. Tr. at 53-54.

In light of the Policy's statement that "[r]egistration, filing or reporting requirements are critical to the Department's understanding of the universe of regulated entities," SMC's assertions with respect to this factor are afforded less weight than Department Staff's arguments, and do not support a reduction in the proposed penalty. At the oral argument, Department Staff's witness, Mr. Lieblich, testified that the filing of the application is necessary to ensure that the Department can plan its program and allocate resources appropriately. Tr. at 58-59.

Mr. Lieblich went on to state that the Department "needs to know basically what sources or what facilities are operating so that we can assess the environmental impact of those facilities and pass proper regulations." Id. at 59.

As the Policy makes clear, a "preliminary gravity penalty component" is derived by addressing both of the factors (the potential harm and actual damage caused by the violation, and the relative importance of the type of violation in the regulatory scheme). Policy, at IV(D)(1). Neither of those factors operate to reduce the penalty in this case. Although SMC asserts that the proposed penalty is disproportionate to the actual harm, and notes that the Policy requires that the penalty be proportional to the actual harm or potential damage, the total penalty sought by Department Staff is less than one percent of the possible maximum. Policy, at IV(D)(2)(a). Given the seriousness of the violation, Department Staff's preliminary gravity component calculation is consistent with the Civil Penalty Policy.

Gravity Component Adjustments

The gravity component may be adjusted based upon several considerations, including culpability, violator cooperation, history of non-compliance, ability to pay, and other "unique factors." Id. at (E)(1)-(5). Each of those factors is discussed below. It is appropriate at this point to address SMC's assertion that the penalty sought by Department Staff reflects, among other things, retaliatory animus towards SMC because SMC chose to proceed to hearing rather than resolve its liability pursuant to an order on consent. As the ALJ noted in Matter of Arma Textile Printers, Inc.,

> [c]ertainly the Commissioner and Administrative Law Judges are bound to consider the expenditure of administrative resources as a factor in determining an appropriate penalty in enforcement proceedings, and guidance in determining an appropriate penalty may be sought by reference to prior similar enforcement matters. However, it must be kept in mind that Respondents frequently choose the hearing route because they genuinely believe that there are significant mitigating factors

> in their particular case that do not justify imposition of a large penalty amount.

ALJ's Report, at 8-9, 1987 WL 55385, * 9 (May 29, 1987).

In this case, SMC has not demonstrated that a significant reduction in the proposed penalty is warranted, based upon the gravity component adjustments. Moreover, the Policy states that "[t]he penalty amounts calculated with the aid of this document in adjudicated cases must, on the average and consistent with consideration of fairness, be significantly higher than the penalty amounts which DEC accepts in consent orders which are entered into voluntarily by respondents." Policy, at 1, ¶ 4. The penalty proposed by Department Staff accounts for violations at both Facilities over a substantial period of time. Under the circumstances, SMC has failed to demonstrate a retaliatory motive on the part of Department Staff, and the weight of the mitigating factors asserted by SMC is minimal.

Culpability

The Policy states that a violator's culpability "will only be considered in order to increase a penalty." Policy, at (E)(1). The Policy indicates further that while most ECL violations carry strict liability, "this does not render the violator's culpable mental state irrelevant in assessing the amount of a penalty." Id. According to the guidance, "[t]he absence of negligence, recklessness or intentional misconduct would indicate that no addition to the penalty based on this adjustment is appropriate. Where the violation is intentional, reckless, or (in some situations) negligent, significant upward adjustment of the penalty is appropriate." Id.

The Policy goes on to state that "[p]arties undertaking activities regulated by DEC have a duty to familiarize themselves with applicable legal requirements. Ignorance of the law or rules is never a mitigating factor. Indeed, in many situations, ignorance of the law may amount to negligence." Id. According to the Policy, two factors should be considered in assessing the degree of intent, recklessness or negligence. Those factors are "1. how much control the violator had over the events constituting the violation; and 2. the foreseeability of the events constituting the violation." Id. See Matter of Arma, supra, ALJ's Report at 9, 1987 WL 55385, * 9 (finding respondent liable, and civil penalty requested by Department Staff

appropriate, for unpermitted operation of air emissions sources). In Matter of Arma, the ALJ noted that "[i]gnorance of the law is no defense, and in this case it is not even a mitigating factor. In these circumstances, Respondent's violation of operating without the required certificates must be considered willful and/or negligent, and therefore subject to a relatively large penalty." Id.

Department Staff took the position that SMC was negligent in failing to obtain certificates to operate and subsequently, the registrations for the Facilities, in a timely manner, and argued for a substantial upward adjustment of the penalty amount as a result. According to Department Staff, SMC's conduct was negligent, not willful, but "was serious based on the two (2) points of control and foreseeability." Department Staff pointed out that it had already reduced the penalty for Violation No. 1 by calculating the commencement of the penalty period from 1992 rather than January 1, 1990.

With respect to the degree of willfulness or negligence of the First Violation, SMC observed that Department Staff acknowledged that SMC's failure to register "was, at worst, a negligent filing error as opposed to a willful act." Respondents' Reply Brief, at 7. SMC went on to argue that Department Staff's assertion that SMC should have been aware of the registration requirements by 1992 was undercut by Department Staff's submissions indicating that the Department failed to notify New York City DEP permittees in 1992 that a new NYSDEC certificate would be required.

At the oral argument, SMC offered to introduce additional documentation concerning the activities undertaken by its consultant, EMS, in obtaining Registrations for the Facilities. The ALJ allowed this further submission, and also offered an opportunity for Department Staff to reply. The documents Respondent provided consisted of a January 13, 1999 memorandum from EMS to SMC, as well as a January 21, 1999 letter from EMS to SMC. The memorandum referred to "air permit issues" and the letter stated that EMS was "currently in the process of filing air registration permits" with the Department. The consultant went on to say that "I have compiled a spreadsheet listing the facilities. Please take the time to fill in the yearly consumption values and return via fax to our office." The next paragraph stated that "[i]n order to choose which option to file, we need the annual consumption for oil . . . and gas." Both the

memorandum and the letter were addressed to Marcus Benner. SMC argued that these documents provided further evidence that any failure to file was inadvertent, "and in the real world sense, not the 'fault' of our client." June 2, 2006 letter from D. Riesel, Esq. to ALJ Villa, at 2.

SMC asserted that its conduct did not rise to the level of intentional recklessness or willful disregard of its obligations, such that the penalty should be significantly increased, as Department Staff maintained. SMC pointed out that lower proportional penalties have been assessed in situations where a respondent has evidenced a greater degree of culpability. See, e.g., Matter of David Wilder, Supplemental Order of the Acting Commissioner, 2005 WL 2407517 (Sept. 27, 2005) (respondent penalized $50,000 (as well as a penalty of $2 per 20 pounds of waste tires removed by the Department for a possible maximum assessed penalty of $750,000); total potential penalty of $93,641,500 for five years of unpermitted operation of waste tire facility; respondent failed to fulfill remediation agreement, jeopardized public safety by obstructing emergency vehicle access, and was convicted in town court for operating violations); Matter of Bradley Corporate Park, Decision and Order of the Commissioner, 2004 WL 228520 (Jan. 21, 2004) (possible penalty of $459,000 for 153 separate violations for construction and placing fill in regulated wetland; penalty of $120,000 assessed against respondent with history of non-compliance that knowingly damaged the environment); Matter of Korfund Dynamics Corp., Decision and Order of the Commissioner, 1992 WL 97732 (Jan. 6, 1992) (respondent assessed a penalty of $100,000 out of a possible $4,637,500 for failing to pay penalties as required pursuant to order on consent, and failed to reduce emissions); Matter of Mount Hope Asphalt Corp., Decision and Order of the Commissioner, 1995 WL 582478 (Sept. 7, 1995) (respondent penalized $73,400 out of a possible $14,000,000 for violations of Navigation Law, permit to construct air pollution source, and unpermitted operation of a solid waste management facility).

SMC also noted that Department Staff did not provide examples of similarly situated respondents, as requested in the ruling on liability. Department Staff did submit a listing of cases in its closing brief where the violations were settled by an order on consent, and stated that it made no representation that the respondents were similarly situated to SMC. Department Staff took the position that similarly situated respondents were those "for which the dollar amount of any penalties imposed by

the Department since June 9, 1997 for violations of Title V Permit application requirements came after a hearing and imposition of a penalty by Order of the DEC Commissioner." Department Staff's Reply Brief, at 70 (emphasis in original). Department Staff went on to state that to the best of its knowledge, "there are no Commissioner's Orders issued after hearings regarding Title V permit application requirements." Id. In the absence of examples precisely on point, the penalty amount in cases where respondents evidenced recklessness or willful disregard may be taken into account. Here, Department Staff acknowledged that SMC's conduct did not rise to this level, although Department Staff argued that SMC's conduct was negligence of a high degree.

Nevertheless, as the language of the Policy makes clear, a respondent's control over the events constituting the violation, as well as the foreseeability of those events, determine the degree of negligence in assessing culpability. Here, SMC's consultant's failure must be attributed to SMC itself. Respondent's oversight led to a serious violation of significant duration. Moreover, any lack of notification by the Department does not diminish SMC's duty to familiarize itself with the environmental statutes and regulations applicable to its Facilities, and to operate those Facilities accordingly, particularly where, as here, Respondent is a sophisticated entity represented by competent counsel. Under the circumstances, an increase in the penalty to reflect the magnitude and duration of SMC's negligence is reasonable. Accordingly, Department Staff's adjustment to the proposed penalty with respect to this factor should be adopted.

Violator Cooperation

The guidance indicates that a violator's cooperation may be considered when there has been prompt reporting of non-compliance, and such cooperation may result in mitigation of the penalty. Policy, at IV(E)(2). The Policy states that this is particularly appropriate when a violator has promptly corrected the environmental problems attributable to non-compliance, and is willing to enter into a binding and enforceable agreement to undertake appropriate remediation. Id.

The Policy goes on to note that:

> [o]rdinarily, a contractor's failure to perform as required by the contract is not a basis for penalty adjustment. A violator bears the responsibility of selecting a contractor that will perform required tasks satisfactorily and of monitoring the contractor's performance to assure compliance.

Id.

According to Department Staff, a significant upward adjustment is appropriate to reflect SMC's failure to report its non-compliance, as well as the approximately four month delay before SMC came into compliance following issuance of the Notices of Violation. Department Staff contended that SMC's cooperation in obtaining the Registrations for the Facilities was "limited, at best," and "non-existent" with respect to obtaining the certificates to operate. Department Staff's Brief, at 12. Department Staff pointed out SMC's obligation to monitor the activities of its consultant, and that consultant's subsequent failure to perform, and went on to argue that SMC was uncooperative in failing to respond to the Department's demand that SMC enter into orders on consent with respect to each Facility and pay the amount requested to resolve the matter.

SMC took issue with Department Staff's argument that no penalty reduction was warranted due to SMC's degree of cooperation. According to SMC, when it learned of the First Violation in 2002, it was impossible to obtain the certificates of registration because the applicable regulation was no longer in effect after 1997. SMC argued that the penalty should be reduced to reflect the fact that once its management learned of the violation, SMC admitted its error and addressed the current, Second Violation by promptly filing the emissions cap form.

The Policy's discussion of this factor refers to self-reporting of environmental violations. It is undisputed that SMC did not discover and report the Facilities' unpermitted status. Nevertheless, Department Staff's argument for a significant upward adjustment of the penalty based on this factor is not compelling. As SMC pointed out, by the time SMC became aware of its obligation to obtain the certificates to operate, it was

unable to obtain those certificates because that regulatory program was no longer in effect. The four-month lapse of time between SMC's receipt of the Notices of Violation and its filing of the Emission Cap election form is not unreasonable, and is an insufficient basis for a significant upward adjustment due to SMC's non-cooperation. As SMC explained, during that time it was investigating the Notices of Violation, reviewing the proposed consent orders with counsel, undertaking settlement negotiations, and preparing and filing the forms.

In light of these facts and the record of this proceeding, and given the specific circumstances of this case, a significant upward adjustment of the penalty is not warranted. Accordingly, the Commissioner may wish to consider some reduction in the penalty proposed by Department Staff to account for this factor. Because Department Staff's penalty calculation did not specify the dollar amount that the penalty was increased to reflect SMC's non-cooperation, this report recommends that the $10,000 for the first day of violation for Violation No. 3 be reduced by $1,000 per facility, to $9,000.

History of Non-Compliance

SMC argued for a reduction in the penalty, pointing out that it has no history of noncompliance, and that Department Staff acknowledged that SMC has "a spotless enforcement record." Respondents' Reply Brief at 9. Department Staff noted that

> [t]his factor applies to respondents who have committed previous environmental violations and have not been deterred by previous enforcement responses. In those cases, the penalties for subsequent enforcement actions should be more severe. Department Staff knows of no previous enforcement actions against Respondent SMC. Therefore, there is no upward adjustment of the penalty here with regard to enforcement of the two instant cases against Respondent.

Department Staff's Brief, at 14-15. In its reply brief, Department Staff took the position that there should be neither an upward nor a downward adjustment of the penalty to account for this factor.

It is undisputed that SMC has no history of non-compliance. Nevertheless, the language of the Policy refers only to "upward non-compliance history adjustments," indicating that this factor is only employed to increase the penalty, and that an unblemished compliance history does not entitle a respondent to a reduction. Policy, at IV(E)(III). Consequently, this factor should not affect the recommended penalty amount.

Ability to Pay

In its brief, Department Staff pointed out that SMC had never asserted an inability to pay the penalty sought. Department Staff's Brief, at 15. At oral argument, SMC stated that ability to pay is not a mitigating factor, and accordingly it will not be considered here. Tr. at 53.

Unique Factors

According to Department Staff, there are no unique factors to be considered in this proceeding, and thus, no upward or downward adjustment of the penalty is warranted. At the oral argument, SMC stated that

> [t]he unique circumstances are, here is an owner who is told by his consultant that we're getting the permits, the unique circumstances here also include the fact that there is no danger, there never was a danger.

Tr. at 53. Both of these arguments have been addressed above, and were rejected. SMC's obligation to obtain the necessary approvals to operate the Facilities was not abrogated by SMC's retention of EMS, and EMS's failure to perform the services for which it was retained must be attributed to SMC. Moreover, the lack of evidence of any actual harm notwithstanding, the continued unpermitted operation of two major stationary sources in a non-attainment area is a violation of considerable magnitude, and is properly considered in arriving at the gravity component of the penalty.

Multiplicity

As noted above, SMC argued that Department Staff, by charging Violation No. 2 (failure to file the Emission Cap form) and Violation No. 3 (operation without a Title V permit),

improperly sought duplicate penalties for the same transaction. SMC characterized this as another indication of Department Staff's retaliatory animus, both because of the magnitude of the requested penalty and the fact that SMC was never notified of these violations until SMC was served with the complaint.

SMC argued that such pleading amounted to "multiplicity," or the charging of a single offense in several counts. As SMC pointed out, this approach is generally disfavored because separate violations carry separate sanctions. In Blockburger v. United States, the United States Supreme Court held that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." 284 U.S. 299, 304 (1932). The application of this test requires an examination of the statutes in question, and if clear legislative intent indicates that multiple punishments are authorized, they may be imposed. See Missouri v. Hunter, 459 U.S. 359, 368 (1983). When separate offenses are defined, the test does no more than raise a presumption that multiple sentences are authorized, a presumption that can be overcome based upon clear indication of contrary legislative intent. See Albernaz v. United States, 450 U.S. 333, 340 (1981). The Department uses the Blockburger analysis in situations where separate penalties are sought for multiple violations arising out of a single course of conduct. See Matter of Wilder, supra.

SMC maintained that Department Staff's motion for order without hearing violated this principle, "by seeking penalties not only for SMC's admitted failure to file the Emissions Cap election form (Second Violation) but also for operation without having made that filing (Third Violation)." SMC's Brief, at 23. SMC went on to argue that Department Staff's failure to allege Violation No. 3 in the Notices of Violation "confirms that the Third Violation is 'superfluous' and cannot be the basis of additional penalties." Id. According to SMC, Violation No. 3 "merely reiterates the obligation to file the Emissions Cap election form imposed by the Second Violation," and cannot form the basis of a separate penalty. Id. at 24. SMC took the position that Violation No. 2 would always trigger Violation No. 3, and that "there is nothing in the plain language, structure or purpose of these two violations [sic] that would justify subjecting the Third Violation to a separate penalty from the Second Violation." Id.

Department Staff argued that the two violations alleged were separate and distinct, and pointed out that Section 201-6.3[8] (the basis for Violation No. 2) and Section 201-6.1(a)(1)[9] (the basis for Violation No. 3) are separate subsections within Part 201. Department Staff argued that the elements of proof for each violation differed, because Violation No. 2 required proof that SMC failed to file applications for a Title V permit or State Facility Permit or Registration for the Facilities by June 9, 1997, while Violation No. 3 required proof that SMC operated the Facilities without those approvals. In further support of its position, Department Staff hypothesized that if at some point subsequent to June 9, 1997 the Facilities' boilers were inoperable, Department Staff would not be able to assess a penalty for the Facilities' continued unpermitted operation (Violation No. 3) but SMC would still be liable for its failure to file. Department Staff stated that research had not revealed any clear legislative intent that separate penalties for each Facility for the violation of each subsection were not authorized.

Department Staff's arguments with respect to the multiplicity question are persuasive. Although the regulations in question do not expressly authorize the imposition of multiple penalties, the elements of proof are not identical. Section 201-6.3 required that SMC be subject to Subpart 201-6, and timely submit complete information in a form acceptable to the Department indicating whether SMC would obtain an emission cap. The elements of the charged violation of Section 201-6.1(a)(1) include the operation of a major stationary source by SMC without first having obtained a Title V permit. "Where one regulation contains at least one element that the second does not, but the

[8]Section 201-6.3 provides, in relevant part, that "[o]wners and operators of facilities subject to this Subpart shall submit a complete application, as defined in Part 621 of this Title and this Subpart, for initial issuance of a title V permit, or renewal, in accordance with the timeframes established under paragraphs (1) through (9) of this subdivision. Facility owners and/or operators may also elect to accept an emission cap in accordance with Subpart 201-7 of this Part in order to avoid the title V facility permit requirements of this Subpart. Owners and/or operators of existing facilities subject to title V facility permitting on the effective date of this regulation must submit information indicating whether they will obtain an emission cap or a title V permit in accordance with the transition provision of section 210-6.2 of this Subpart."

[9]Section 201-6.1 states, in pertinent part, that "[e]xcept as otherwise set forth herein, no person shall operate any of the following stationary sources without obtaining a title V permit. (1) Any major stationary source . . .."

second regulation contains no element not included in the first, or where two regulations contain identical elements, a single violation is presumed and a single penalty authorized, absent a clear indication of contrary legislative intent." Matter of Wilder, CALJ's Report, at 11, 2005 WL 2407517, * 11 (Sept. 27, 2005) (citing Matter of Q.P. Service Station Corp., Decision and Order, at 4, 2004 WL 2384332, * 7-9 (Oct. 20, 2004)). That is not the case with respect to the two regulatory subsections at issue here. In this case, each regulation contains at least one element that the other does not. Moreover, there is no showing of any legislative intent indicating that multiple penalties are not authorized for violations of the two regulatory provisions. As a result, SMC's argument that these causes of action are the same must fail.

Accordingly, the multiplicity doctrine is not implicated, and separate penalties for both Violation No. 2 and Violation No. 3 may be imposed. Nevertheless, as discussed in greater detail below, Department Staff's position that per-day penalties should be imposed for continuing violations of both regulatory subsections is not appropriate, in light of the particular circumstances of this case.

Continuing Violation

SMC's ongoing operation of the Facilities without a Title V permit, as charged in Violation No. 3, is a continuing violation for which per-day penalties may properly be imposed. See, e.g., Matter of MB Recycling Unlimited, Inc., Order, at 2, 1993 WL 393533, * 2 (Aug. 2, 1993) (operation of solid waste management facility without necessary permits was a continuing violation of Section 360-1.7(a)(1)(ii) for which per-day penalties were imposed); Matter of Corcoran, Order, at 2, 1992 WL 177436, * 2 (Jun. 22, 1992) (respondent assessed a penalty for mining without a permit and unpermitted operation of a solid waste management facility; continuing violation found).

Violation No. 2, however, charges SMC with failing to timely file the Emissions Cap election form, and a determination of the penalty to be assessed requires consideration of the continuing violation doctrine. "A 'continuing offense' is, in general, one that involves a prolonged course of conduct; its commission is not complete until the conduct has run its course." United States v. Rivera-Ventura, 72 F.3d 277, 281 (2d Cir. 1995). Generally, the use of the doctrine is limited, because its

application expands the statute of limitations beyond its original, plain language terms. Matter of Rhone-Poulenc Basic Chemicals Div., USEPA Order, 1998 WL 289239 (Apr. 27, 1998), citing Toussie v. United States, 397 U.S. 112, 115 (1970) (defendant's failure to register for the draft within five days of his eighteenth birthday was not a continuing offense). In the environmental context, whether a violation is complete for purposes of the statute of limitations is not dispositive of the question whether daily penalties may be assessed for the violation of that obligation. Matter of Umetco Minerals Corp., USEPA Docket No. CAA-(133)VIII-92-03, 1996 WL 691531 3-4 (Mar. 29, 1996) (citations omitted) (denying motion for accelerated decision that failure to submit emissions report was not a continuing violation).

Because research has not revealed any decisions on point, the framework established by the United States Environmental Protection Agency ("USEPA") Environmental Appeals Board ("Board") is instructive in analyzing whether a violation is continuing in nature. The Board looked first to "the statutory language that serves as the basis for the particular violation at issue, including an examination of the legislative history as necessary, and second, reviewing regulations and preambles in cases where the substance of a requirement is found in a regulation rather than a statute." In re Mayes, Final Decision and Order, USEPA EAB (RCRA), 2005 WL 528542 at 7 (Mar. 3, 2005) (citations omitted). In this case, the substance of the requirement is found in Section 201-6.3(a), not in the statute.

The Board then examined the regulatory language to discern the intent and purpose of the particular legal requirements in question. In that regard, the Board cited In re Lazarus, Inc., Final Decision and Order, USEPA EAB (TSCA), 7 E.A.D. 318, 1997 WL 603524 (Sept. 30, 1997), a case involving alleged violations of polychlorinated biphenyl regulations promulgated under the Toxic Substances Control Act ("TSCA"). In Lazarus, the Board noted that "[w]ords and phrases connoting continuity and descriptions of activities that are typically ongoing are indications of a continuing nature. In contrast, a continuing nature may be negated by requirements that must be fulfilled within a particular time frame." 1997 WL 603524 at 21.

While the federal agency's determinations are not controlling, the record in this case supports the conclusion that SMC's failure to timely file the election form did not constitute

a continuing violation. Section 201-6.3(a) requires an owner or operator of a facility subject to Subpart 201 to apply for a Title V permit or submit an application to cap by rule, by a date certain. SMC was required to either apply for a Title V permit, or accept an emission cap, but was not required to do both. Under the specific facts and circumstances of this proceeding, including the recommended amount of per-day penalties for unpermitted operation as a continuing violation of Section 201-6.1 (Violation No. 3), per-day penalties for a continuing violation of Section 201-6.3(a) (Violation No. 2) would not be warranted. This report recommends that SMC be assessed only the maximum penalty for the first day of violation for each Facility, for a total penalty of $20,000 for Violation No. 2.

CONCLUSION

SMC should be assessed a penalty of $136,335. SMC is also liable for unpaid regulatory fees in the amount of $25,990.18.

/s/
Maria E. Villa
Administrative Law Judge

Dated: Albany, New York
December 6, 2006

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TABLE 1: RECOMMENDED PENALTY

Facility	Penalty for First Day of Violation	Penalty for Days of Continuing Violation	Total Penalty
East 66th Street – Violation No. 1	$10,000 (Sept. 27, 1992)	$1,545 (309 days @ $5 per day for the period from Sept. 28, 1992[1] to Aug. 3, 1993), plus $7,020 (1,401 days @ $5 per day for the period from Aug. 4, 1993 to June 8, 1997) for a total of $8,565	$18,565
East 66th Street – Violation No. 2	$10,000 (June 9, 1997)	$0	$10,000
East 66th Street – Violation No. 3	$9,000 (June 9, 1997)	$28,425 (1,895 days @ $15 per day for the period from June 10, 1997 to Aug. 19, 2002)	$37,425
East 87th Street – Violation No. 1	$10,000 (Jan. 14, 1992)	$2,800 (560 days @ $5 per day for the period from Jan. 15, 1992 to Aug. 3, 1993), plus $7,020 (1,404 days @ $5 per day for the period from Aug. 4, 1993 to June 8, 1997) for a total of $9,820	$19,820
East 87th Street – Violation No. 2	$10,000 (June 9, 1997)	$0	$10,000
East 87th Street – Violation No. 3	$9,000 (June 9, 1997)	$28,425 (1,895 days @ $15 per day for the period from June 10, 1997 to Aug. 19, 2002)	$37,425

Total penalty for both Facilities for Violation No. 1: $38,385
Total penalty for both Facilities for Violation No. 2: $20,000
Total penalty for both Facilities for Violation No. 3: $74,850 (includes reduction of first day of violation penalty from $10,000 to $9,000)

Total for East 66th Street Facility (all three violations): $65,990
Total for East 87th Street Facility (all three violations): $67,245
Economic benefit component: $3,100

GRAND TOTAL: $136,335

As discussed in the report, SMC must also pay regulatory fees in arrears in the amount of **$25,990.18**.

[1] Department Staff's per-day calculations have been adjusted because, consistent with the plain language of ECL Section 71-2103, the first day of continuing violation is the day after the first day of violation, not the same day. Accordingly, the per-day penalty for each day of continuing violation has been reduced by one day for each Facility and each violation, except in the case of Violation No. 2. As discussed in the report, a penalty for the first day of violation should be assessed for SMC's failure to file, but penalties for a continuing violation should not be imposed for Violation No. 2.

TABLE 2: DEPARTMENT STAFF'S PROPOSED PENALTY[1]

Facility	Penalty for First Day of Violation	Penalty for Days of Continuing Violation	Total Penalty
East 66th Street – Violation No. 1	$10,000 (Sept. 27, 1992)	$1,550 (310 days @ $5 per day for the period from Sept. 27, 1992[2] to Aug. 3, 1993), plus $7,020 (1,401 days @ $5 per day for the period from Aug. 4, 1993 to June 8, 1997) for a total of $8,570	$18,570
East 66th Street – Violation No. 2	$10,000 (June 9, 1997)	$28,050 (1,870 days @ $15 per day for the period from June 9, 1997 to July 24, 2002)	$38,050
East 66th Street – Violation No. 3	$10,000 (June 9, 1997)	$28,440 (1,896 days @ $15 per day for the period from June 9, 1997 to Aug. 19, 2002)	$38,440
East 87th Street – Violation No. 1	$10,000 (Jan. 14, 1992)	$2,805 (561 days @ $5 per day for the period from Jan. 14, 1992 to Aug. 3, 1993), plus $7,020 (1,404 days @ $5 per day for the period from Aug. 4, 1993 to June 8, 1997) for a total of $9,825	$19,825
East 87th Street – Violation No. 2	$10,000 (June 9, 1997)	$28,050 (1,870 days @ $15/day for the period from June 9, 1997 to July 24 ,2002)	$38,050
East 87th Street – Violation No. 3	$10,000 (June 9, 1997)	$28,440 (1,896 days @ $15 per day for the period from June 9, 1997 to Aug. 19, 2002)	$38,440

Total penalty for both Facilities for Violation No. 1: $38,395 (potential statutory maximum: $28,535,500)
Total penalty for both Facilities for Violation No. 2: $76,100 (potential statutory maximum: $37,420,000)
Total penalty for both Facilities for Violation No. 3: $76,880 (potential statutory maximum: $37,940,000)

Total for East 66th Street Facility (all three violations): $95,060
Total for East 87th Street Facility (all three violations): $96,315

GRAND TOTAL: $191,375

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1 Although Department Staff calculated a $3,100 economic benefit component of the penalty, this amount was not included in the total penalty of $191,375 sought in the complaint's *ad damnum* clause (Paragraph II, page 11). See Table 3, "Fee Chart" and discussion, infra.

2 Department Staff's per-day calculations should be adjusted because, consistent with the plain language of ECL Section 71-2103, the first day of continuing violation is the day after the first day of violation, not the same day. Accordingly, the per-day penalty for each day of continuing violation should be reduced by one day for each Facility and each violation, except in the case of Violation No. 2. As discussed in the report, a penalty for the first day of violation should be assessed for SMC's failure to file, but penalties for a continuing violation should not be imposed for Violation No. 2.

TABLE 3: FEE CHART

Year	Regulatory Fees Due	Amount in Arrears	Interest on Amount in Arrears (6% compounded annually)	Annual Fee	Amount in Arrears Plus Annual Fee
1992	East 66th Street Facility: $1,000 (no certificate to operate)	–	–	$1,000	$1,000
	East 87th Street Facility: $100 (no certificate to operate)	–	–	$100	$100
1993	East 66th Street Facility: $2,000 (no certificate to operate)	$1,000	$60	$2,000	$3,060
	East 87th Street Facility: $100 (no certificate to operate)	$100	$6	$100	$206
1994	East 66th Street Facility: $2,000 (no certificate to operate)	$3,060	$183.60	$2,000	$5,243.60
	East 87th Street Facility: $100 (no certificate to operate)	$206	$12.36	$100	$318.36
1995	East 66th Street Facility: $2,000 (no certificate to operate)	$5,243.60	$314.62	$2,000	$7,558.22
	East 87th Street Facility: $100 (no certificate to operate)	$318.36	$19.10	$100	$437.46
1996	East 66th Street Facility: $2,000 (no certificate to operate)	$7,558.22	$453.49	$2,000	$10,011.71
	East 87th Street Facility: $100 (no certificate to operate)	$437.46	$26.25	$100	$563.71
1997	East 66th Street Facility: $2,000 (no certificate to operate)	$10,011.71	$600.70	$2,000	$12,612.41
	East 87th Street Facility: $100 (no certificate to operate)	$563.71	$33.82	$100	$697.53
1998	East 66th Street Facility: $2,000 (no registration)	$12,612.41	$756.74	$2,000	$15,369.15
	East 87th Street Facility: $100 (no registration)	$697.53	$41.85	$100	$839.38
1999	East 66th Street Facility: $2,000 (no registration)	$15,369.15	$922.15	$2,000	$18,291.30
	East 87th Street Facility: $100 (no registration)	$839.38	$50.36	$100	$989.74

2000	**East 66th Street Facility: $2,000 (no registration)**	**$18,291.30**	**$1,097.48**	**$2,000**	**$21,388.78**
	East 87th Street Facility: $100 (no registration)	**$989.74**	**$59.38**	**$100**	**$1,149.12**
2001	**East 66th Street Facility: $2,000 (no registration)**	**$21,388.78**	**$1,283.33**	**$2,000**	**$24,672.11**
	East 87th Street Facility: $100 (no registration)	**$1,149.12**	**$68.95**	**$100**	**$1,318.07**

Grand Total: $25,990.18 ($24,672.11 (East 66th Street Facility) plus $1,318.07 (East 87th Street Facility)).

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Articles 19 and 71 of the Environmental Conservation Law of the State of New York (ECL), and Part 201 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR)	Ruling on Motion for Order without Hearing
– by –	
SOLOW MANAGEMENT CORPORATION	DEC Case Nos. R2-20020425-119 and R2-20020425-120
and	
SHELDON H. SOLOW, Individually and As President and Owner of Solow Management Corporation, Respondents.	

PROCEEDINGS

Staff of the New York State Department of Environmental Conservation ("Department Staff") moved for an order without hearing against Respondents Solow Management Corporation ("SMC") and Sheldon H. Solow, both in his individual capacity and as president and owner of Solow Management Corporation (collectively, "Respondents"). Department Staff's motion was dated August 5, 2003, and Respondents filed their opposition to the motion on August 27, 2003. Respondents also cross-moved to dismiss the proceeding, and, by permission of the administrative law judge ("ALJ"), Department Staff filed a response to the cross-motion on September 17, 2003.

Department Staff's motion asserted that Respondents violated Articles 19 and 71 of the Environmental Conservation Law ("ECL") and Part 201 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"). The violations alleged relate to the statutory and regulatory requirements governing air emissions sources at two buildings owned and operated by Solow Management Corporation, one at 265 East 66th Street and the other at 501 East 87th Street in New York City. The buildings are collectively referred to herein as the "Facilities." The Facilities contain stationary-combustion boilers capable of burning both natural gas and fuel oil. In its

motion, Department Staff contended that Respondents failed to obtain the necessary approvals from the Department to operate the boilers, and by operating without those approvals for several years.

Department Staff maintained that no material issue of fact exists and that the Department is entitled to judgment as a matter of law for the violations alleged. Department Staff sought an order from the Commissioner requiring Respondents to comply with the statutory and regulatory provisions allegedly violated, and assessing a civil penalty in the amount of $191,375.

The motion was made pursuant to 6 NYCRR Section 622.12(a), which provides that "[i]n lieu of or in addition to a notice of hearing and complaint, the department staff may serve, in the same manner, a motion for order without hearing together with supporting affidavits reciting all the material facts and other available documentary evidence." In addition to a notice of motion, a complaint, and a submission entitled "Penalty Calculations," the motion included the affidavit of Robert G. Bolt, an Environmental Engineer II in the Department's Region 2 office (the "Bolt Affidavit"), sworn to August 5, 2003.

Respondents' filing in opposition to the motion, and in support of their cross-motion to dismiss, included a memorandum of law dated August 26, 2003, as well as an August 22, 2003 affirmation of Daniel Riesel, Esq. (the "Riesel Affirmation"). Respondents' cross-motion sought an order of the Commissioner: (1) dismissing the complaint as to Respondent Sheldon H. Solow; (2) dismissing the first and third causes of action alleged in Department Staff's complaint; (3) denying the motion for order without hearing in its entirety; and (4) granting a hearing to address the penalty, if any, to be assessed for the second violation alleged in the complaint.

After obtaining permission from the ALJ, Department Staff opposed the cross-motion by the affirmation of Assistant Regional Attorney John Byrne, Esq., dated September 16, 2003 (the "Byrne Affirmation"). Respondents objected to portions of the Byrne Affirmation as beyond the scope allowed by the ALJ, and moved to strike pages 16-17 of the Byrne Affirmation from the record. Department Staff opposed this request by letter dated September 19, 2003.

The pages in question contain argument by Department Staff as to the Department's policy with respect to settlement negotiations undertaken by the parties. However, Respondents' motion to strike refers to Department Staff's reply to Respondents' laches argument, which appears on pages 3-4 (¶¶ 4-5) of Department Staff's opposition. Given this ambiguity, it is difficult to ascertain exactly which portion of Department Staff's opposition is the subject of Respondent's motion. Department Staff's letter opposing the motion to strike states only that Department Staff believes that the Byrne Affirmation is in full compliance with the ALJ's direction. In any event, Department Staff was authorized to respond to the cross-motion, and that cross-motion raised laches as a defense. Consequently, the motion to strike is denied, and the Byrne Affirmation will be considered in its entirety.

Efforts to resolve this matter were unsuccessful, and in September 2004 Department Staff requested a ruling on the motion.

POSITIONS OF THE PARTIES

Department Staff's motion alleged three violations, specifically, that Respondents:

(1) failed to obtain a certificate to operate the boilers at the Facilities between 1992 and 1997, in violation of the then-applicable statutory and regulatory provisions;

(2) failed to timely file a complete application under Title V of the federal Clean Air Act by June 9, 1997, or to accept an emission cap in order to avoid the Title V permit requirements; and

(3) failed to obtain a Title V permit or State Facility Permit or Air Facility Registration Certificate. Department Staff alleged that Respondents' Facilities are major stationary sources which operated without the necessary authorization for five years, from June 9, 1997 to August 19, 2002.

Respondents' cross-motion sought an order removing Sheldon Solow as a named respondent and dismissing the complaint as to him individually. Respondents argued that Department Staff's

motion provided no basis to involve Sheldon Solow in these proceedings in his individual capacity, noting that Department Staff failed to allege any facts that would warrant piercing the corporate veil in this instance. Riesel Affirmation, ¶¶ 13-15. In its submission in opposition to Respondents' cross-motion, Department Staff agreed to remove Sheldon Solow as a named Respondent in this action. Byrne Affirmation, ¶ 3. Respondents, by letter dated September 19, 2003, moved that "Mr. Solow be stricken from the caption and from these proceedings entirely." Respondents' motion is granted, and Mr. Solow, in his individual capacity, is removed as a named Respondent. Accordingly, this ruling will address only the liability of Respondent Solow Management Corporation, or "SMC." Until this recommendation is adopted by the Commissioner, Mr. Solow's name will remain in the caption, and this ruling will refer to the Respondents collectively.

Respondents went on to argue that the first and third causes of action should be dismissed, and that a hearing should be held to determine the amount of any penalty to be assessed for the second violation alleged. Respondents maintained that Department Staff's motion was the result of retaliatory animus resulting from unsuccessful settlement negotiations from approximately May to September 2002 over a "paperwork" violation that did not harm the environment and that did not result in any economic gain or benefit to Respondents. Respondents asserted that the allegations in the complaint did not involve "any contemptuous or even intentional conduct on the part of Respondents." Riesel Affirmation, ¶¶ 2 and 11. According to Respondents, the relief sought by Department Staff is unfounded and oppressive, and issues of material fact exist with respect to: (1) whether the first cause of action is barred by the doctrine of laches; (2) the basis for the third violation, which Respondents argue is essentially the same as the second violation; and (3) Department Staff's methodology in calculating the penalty sought.

The Facilities are currently in compliance. On August 19, 2002, Air Facility Registration Certificates for both Facilities were issued by the Department's Region 2 Division of Air.

Department Staff sought a total penalty of $191,375, and outlined the penalties calculated for each separate violation at both of the Facilities in a submission entitled "Penalty Calculations." The penalty calculation for violation No. 1 was based upon the allegations in the complaint that Respondents

violated the 1972 and 1993 versions of ECL Section 71-2103.[1] The 1972 version of ECL Section 71-2103 provided for a civil penalty of up to $10,000 for each first violation of ECL Article 19 and the 6 NYCRR Part 201 regulations, as well as an additional penalty of $500 for each day the violation continued. The statute also provided for criminal sanctions and injunctive relief, where appropriate. The version that took effect on August 4, 1993 also provided for a $10,000 civil penalty, but increased the additional penalty to $10,000 per day for each day of continuing violation. The current version of ECL Section 71-2103, which took effect on May 15, 2003, provides for a civil penalty of up to $15,000 for each violation of Article 19, as well as an additional penalty of $15,000 for each day of continuing violation.

Department Staff's complaint charged Respondents with three separate violations of ECL Articles 19 and 71 and 6 NYCRR Part 201 at both of the Facilities. The penalty calculation submission also contained arguments justifying the penalty, and included a matrix comparing the maximum penalty available under the ECL for each of the three violations at both Facilities with the penalty sought by Department Staff. For Violation No. 1, Department Staff sought a penalty of $38,395, which was 0.134% of the statutory maximum of $28,535,500. For Violation No. 2 (the second cause of action in the complaint), Department Staff maintained that Respondents should pay $76,100, or 0.203% of the statutory maximum of $37,420,000. With respect to Violation No. 3 (the third cause of action), Department Staff's penalty amount of $76,880 would be 0.202% of the $37,940,000 maximum penalty possible under the statute. Department Staff observed that the total penalty recommended by Department Staff would be less than 1% of the statutory maximum for each of the three violations alleged. As noted above, the grand total of all penalties sought by Department Staff in its motion was $191,375.

Department Staff went on to argue that the penalty sought is reasonable based upon several factors. First, Department Staff noted that the violations continued for a number of years, in that Respondents operated the boilers at both Facilities during that time without applying for a certificate to operate, or

[1]While the complaint alleges violations of various iterations of Article 71, that provision of the ECL does not impose an affirmative duty upon Respondents. Rather, Article 71 articulates the penalties that the Department may impose for violations of other statutory requirements in the ECL.

subsequently, a Title V permit or State Facility Permit or Air Facility Registration Certificate. Department Staff referred to Paragraph 10 of the Bolt Affidavit, which stated that on March 30 and 31, 1998, Respondent Solow Management Corporation received notice letters from the Department explaining the regulatory requirements, but failed to apply for Air Facility Registration Certificates for the Facilities until July 24, 2002, over four years after receiving the letters.

According to Department Staff, Respondents did not come into compliance until August 19, 2002, after receiving a notice of violation dated April 22, 2002. Department Staff went on to assert that "[a]ssessment of a significant penalty against Respondents will send a strong reminder to the regulated community" and noted that Respondents had not indicated that they lacked the resources to pay a penalty. Penalty Calculations, at 18, ¶ 3.

Respondents argued that the requested civil penalty was oppressive and excessive, and that the pursuit of such a penalty without a hearing was not supported by the facts. Respondents contended further that the scope of the complaint and the magnitude of the penalty requested resulted from "retaliatory animus directed at Respondents after Staff terminated settlement discussions." Riesel Affirmation, ¶ 25. According to Respondents, the Facilities never violated any emission performance standard, nor did they require a Title V permit. Riesel Affirmation, ¶ 21. Respondents took the position that given the size of the penalty, Respondents should be able to offer evidence as to its appropriateness, and that a hearing was therefore required.

DISCUSSION AND RULING

Motion for Order without Hearing and Respondents' Cross-Motion to Dismiss

Department Staff requested an order without hearing pursuant to 6 NYCRR Section 622.12. Section 622.12(d) provides that a contested motion for an order without hearing will be granted if, upon all the papers and proof filed, summary judgment is warranted under the New York Civil Practice Law and Rules ("CPLR") in favor of any party. Under the CPLR, 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. . . . [T]he motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." CPLR § 3212(b).

In seeking summary relief, the moving party "must make a prima facie showing of an entitlement to judgment as a matter of law sufficient to demonstrate the absence of any material issue of fact." Flacke v. NL Indus., 228 A.D.2d 888, 890 (3rd Dept. 1996); see Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). The burden then shifts to the non-moving party "to demonstrate, through evidence in admissible form, the existence of material questions of fact requiring a trial." State v. Williamson, 8 A.D.3d 925, 928(3rd Dept. 2004); citing Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003); Zuckerman, supra, at 562. That evidence is viewed in the light most favorable to the non-moving party. Williamson, supra, at 927-28; citing Trionfero v. Vanderhorn, 6 A.D.3d 903, 903 (3rd Dept. 2004).

In order for SMC to prevail on its cross-motion to dismiss, the documentary evidence submitted must conclusively establish SMC's defenses to the allegations in the complaint as a matter of law. Leon v. Martinez, 84 N.Y.2d 83, 88 (1994). The trier of fact must accept as true the material facts alleged in the complaint as well as in any submissions in opposition to the motion. CPLR § 3211; 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152 (2002); Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y.2d 409, 414 (2001). Moreover, Department Staff must be accorded "the benefit of every possible favorable inference." Sokoloff, 96 N.Y.2d at 414 (citations omitted).

Application of these standards to the record in this case leads to the conclusion that SMC's liability for the violations alleged has been established. There is no dispute that the Facilities were and are subject to regulation under 6 NYCRR Part 201 and Article 19 of the ECL. It is uncontroverted that SMC failed to timely file for the necessary approvals to operate its boilers, and continued to operate the Facilities for some time without those approvals. As discussed more fully below, SMC's response to the allegations in the complaint does not satisfy its burden, on a motion for order without hearing, to raise an issue of fact, and to refute those allegations. Furthermore, SMC's submissions in support of its cross-motion to dismiss fail to

conclusively establish SMC's entitlement to judgment in its favor as a matter of law.

Nevertheless, SMC should be allowed the opportunity to present argument with respect to the penalty amount. Section 622.12(f) of 6 NYCRR provides that "[t]he existence of a triable issue of fact regarding the amount of civil penalties which should be imposed will not bar the granting of a motion for order without hearing. If this issue is the only triable issue of fact presented, the ALJ must immediately convene a hearing to assess the amount of penalties to be recommended to the commissioner." Accordingly, an inquiry should be undertaken to this specific end.

First Cause of Action (Violation No. 1)

Department Staff's complaint alleged that Respondents own and operate the Facilities. Complaint, ¶¶ 3-6. According to the complaint, the East 66th Street Facility has three stationary combustion installation Burnham (Spencer) boilers, each rated at 17.92 mmBtu/hr., and capable of burning #4 fuel oil as well as natural gas. Complaint, ¶ 7. The complaint alleged further that the boilers have a total "potential to emit"[2] of 117.6 tons per year of oxides of nitrogen ("NO_x"). Id. With respect to the East 87th Street Facility, Department Staff's complaint stated that the two stationary combustion installation Federal FLW 3036 boilers have a total potential to emit of 45.6 tons per year of NO_x and are each rated at 10.4 mmBtu/hr. Complaint, ¶ 8. The boilers at this Facility are capable of burning natural gas or #6 fuel oil. Id.

The first cause of action ("Violation No. 1") cited the March 1985 and August 1994 versions of 6 NYCRR Section 201.2(b), which provided, in pertinent part, that no person shall operate an air contamination source without having a valid Department-issued certificate to operate. Complaint, ¶ 9. Department Staff alleged that Respondents were "persons," within the meaning of 6 NYCRR Section 200.1(bk)[sic], and that the boilers at the Facilities constitute "an air contamination source or emission source" pursuant to 6 NYCRR Section 200.1(f). Complaint, ¶ 10.

[2]"Potential to emit" is defined at 6 NYCRR Section 200.1(bl) as "[t]he maximum capacity of an air contamination source to emit any regulated air pollutant under its physical and operational design."

The complaint went on to state that from September 27, 1992 to June 8, 1997, Respondents owned, operated and/or maintained the three boilers at the East 66th Street Facility without first obtaining a Department certificate to operate. Complaint, ¶ 11. The complaint alleged further that from January 14, 1992 to June 8, 1997, Respondents owned, operated and/or maintained the two boilers at the East 87th Street Facility without a Department certificate to operate. Complaint, ¶ 13. Department Staff asserted that each day that Respondents failed to obtain a certificate to operate the boilers at the Facilities constituted a continuing violation of former Section 201.2(b) of 6 NYCRR and ECL Articles 19 and 71. Complaint, ¶¶ 12 and 14.

According to the Bolt Affidavit, the Department mailed notice letters to the Facilities in late March 1998. Bolt Affidavit, ¶ 10. The Bolt Affidavit indicated that the notice letters explained the compliance options available, and required a reply from Respondents on a "Choice of Option" form included with the notice letters. Id.; Exhibits E and F. The notice letters were sent via certified mail, return receipt requested, and the exhibits to the Bolt Affidavit included copies of the signed return receipts and the notice letters. Bolt Affidavit, Exhibits E and F. The letters were addressed to "Solow Management Corp., Attn: Environmental Manager, 9 West 57th Street, Manhattan, New York, 10019." Id. The Bolt Affidavit stated that Respondents did not reply to the letters. Bolt Affidavit, ¶ 10.

The Bolt Affidavit also stated that on April 22, 2002, the Department's Region 2 Division of Air mailed Notices of Violation ("NOVs") to SMC for both Facilities, as well as a proposed order on consent to resolve the violations. Bolt Affidavit, ¶ 11 and Exhibit G. The NOVs were addressed to "Solow Management, 9 West 57th Street, New York, New York 10019," and indicated that the Facilities were inspected on August 11, 1999. Bolt Affidavit, Exhibit G. The Bolt Affidavit stated that Respondents did not sign and return the order on consent for either Facility. Bolt Affidavit, ¶ 11.

According to the Bolt Affidavit, Respondents have not asserted financial inability to pay the $15,000 penalty for each Facility, which was the amount sought in the Orders on Consent. Id. The Bolt Affidavit cited to a newspaper article indicating that Respondent Sheldon Solow has a net worth of $800 million, as well as a January 22, 2003 Dun & Bradstreet Report indicating

that SMC employs 200 people and has a composite credit rating of "fair." Bolt Affidavit, ¶ 11, Exhibits H and I.

In justification for the penalty sought for Violation No. 1, Department Staff asserted that Respondents operated the Facilities for approximately five years without obtaining the requisite authorizations from the Department. According to Department Staff, the period of violation for the East 66th Street Facility was from September 27, 1992 to June 8, 1997. Department Staff's penalty calculation, after assessing $10,000 for the first day of violation at the Facilities, was based upon a violation of the 1972 version of the statute from September 27, 1992 to August 3, 1993 (310 days), at $5 per day, for a total of $1,550. For the violations of the 1993 statute, in effect from August 4, 1993 to June 8, 1997, Department Staff calculated a penalty of $7,020 based upon 1,404 days of violation at $5 per day. Thus, the amount of penalties for this Facility for the first violation alleged amounted to $10,000, plus $1,550 and $7,020, for a total of $18,570.

The East 87th Street Facility calculations assumed a continuing violation of the 1972 statute from January 14, 1992 to August 3, 1993 (561 days) at $5 per day, for a total of $2,805, and a continuing violation of the 1993 statute from August 4, 1993 to June 8, 1997 (1,404 days) at $5 per day, for a total of $7,020. Again, Department Staff assessed $10,000 for the first day of violation at the Facility. The penalties calculated by Department Staff for this Facility were $10,000, plus $2,805 and $7,020, for a total of $19,825. The total penalty for Violation No. 1 sought by Department Staff for both Facilities was $38,395.

Respondents' cross-motion asserted that because so much time had elapsed between the alleged violations and Department Staff's prosecution of the enforcement action, it is extremely difficult for SMC to defend against Department Staff's first violation. SMC denied that violation, upon information and belief, noting that it "cannot ascertain if the requirements of the repealed versions of Part 201.2(b) were delegated to another agency with which SMC dealt between 1992 and 1997, or whether SMC satisfied its air-certificate obligations in some other manner." Riesel Affirmation, ¶ 17. As a result, SMC contended that the first violation is barred by the doctrine of laches, or, at a minimum, that a hearing should be held to resolve the factual issues surrounding the first violation. SMC also asserted that it was not afforded a hearing within a reasonable time, in violation of

Section 301(1) of the State Administrative Procedure Act ("SAPA").

Department Staff disputed SMC's claim that Respondents were not afforded a hearing within a reasonable time. Both SMC and Department Staff cited to Matter of Cortlandt Nursing Home v. Axelrod, 66 N.Y.2d at 178. Cortlandt articulates a four-part test to be used when a question arises as to whether an agency has violated SAPA. Id. The Court of Appeals in Cortlandt held that the following factors must be weighed by an administrative body in the first instance, and by the judiciary sitting in review, in determining whether a period of delay is reasonable within the meaning of SAPA 301(1): "(1) the nature of the private interest allegedly compromised by the delay; (2) the actual prejudice to the private party; (3) the causal connection between the conduct of the parties and the delay; and (4) the underlying public policy advanced by governmental regulation." Id. Any such determination is made on a case-by-case basis.

As to the first factor, SMC argued that Department Staff seeks improperly to deprive Respondents of their private and personal funds. Department Staff's opposition cited to Hansen v. DEC, 288 A.D.2d 473 (2nd Dept. 2001), in which the court upheld the Commissioner's order dismissing the respondent's SAPA Section 301(1) defense. In Hansen, the respondent was assessed a civil penalty of $60,000 for altering regulated tidal wetlands. 288 A.D.2d at 473. Respondents' arguments on this point are unpersuasive. Respondents have not been deprived of their private and personal funds by any delay; rather, they have operated the Facilities without a permit for a number of years, and without incurring any costs of compliance.

The second factor requires consideration of actual prejudice. Here, Respondents contended that their ability to defend themselves has been compromised because over time critical documents have been destroyed and key employees and consultants are no longer available to testify on SMC's behalf. In addition, SMC argued that Respondents cannot determine at this point if the requirements of the earlier versions of 6 NYCRR were delegated to another agency, such as the New York City Department of Environmental Protection ("DEP").

In its opposition, Department Staff effectively rebutted these arguments by noting that SMC failed to identify any of the critical documents in question, and that the former employee SMC

mentioned in its opposition was in SMC's employ as recently as October 2002. Department Staff pointed out that SMC offered no details as to any efforts SMC undertook to locate this employee. Moreover, Department Staff stated that it knows of no delegation to another agency. Under the circumstances, Respondents have not shown actual prejudice.

The third factor takes into consideration the causal connection between the conduct of the parties and the delay. Department Staff acknowledged that the length of time that elapsed between the time the violations occurred and the commencement of this proceeding cannot be attributed to Respondents. Department Staff went on to observe, however, that it adjusted its penalty calculations to account for the fact that although the Facilities were responsible for obtaining certificates of operation for the boilers from 1990 through 1997, when the earlier versions of 6 NYCRR Part 201 were in effect, the Facilities were in fact operating pursuant to a delegation agreement between the Department and DEP until 1992.[3] As a result, Department Staff used 1992, rather than an earlier date, to calculate penalties for this violation.

SMC pointed out that it only learned of the alleged first violation upon receipt of Department Staff's complaint, and that the factual basis for that violation was not alleged or referenced in the NOVs. According to SMC, the second violation, which Department Staff sought to settle for $30,000, is the only violation alleged in the NOVs. SMC referred to the Department's Air Pollution Control Enforcement Guidance Memorandum ("EGM"), dated March 21, 1991, which suggests that the Department notify regulated entities of suspected violations by issuing an NOV before commencing an enforcement proceeding. EGM, Appendix IV, § 4. Department Staff, in response, argued that SMC should not benefit by its failure to obtain certificates to operate the Facilities once the DEP renewals expired, and noted that the EGM

[3]Department Staff noted that a penalty start date of September 27, 1992 was used for the East 66th Street Facility and a starting date of January 14, 1992 was used for the East 87th Street Facility, rather than January 1, 1990, which Department Staff alleged was the actual first day of violation for both Facilities. According to Department Staff, this reflects the fact that Respondents renewed their New York City Department of Environmental Protection ("DEP") Certificate of Operation for three years for both Facilities during calendar year 1989, while a delegation agreement between the Department and DEP was still in effect. The Bolt Affidavit, at Paragraphs 5 and 6, indicated that this delegation agreement lapsed on January 1, 1990.

does not require the Department to negotiate before initiating litigation.

In opposition to Respondents' cross-motion, Department Staff took the position that laches is an affirmative defense that is legal in nature, not factual. Consequently, Department Staff argued that there was no need for a hearing to consider this affirmative defense, and contended further that the passage of time, standing alone, does not constitute substantial prejudice absent some showing of actual injury.

Respondents' assertions with respect to the third factor of the Cortlandt test are not sufficient to establish a SAPA violation, but these arguments are appropriately considered in determining the penalty to be assessed in this case. This is consistent with prior decisions. It is well-settled that laches is an equitable remedy that cannot be used "to prevent the State from enforcing its laws, or an agency from carrying out its duties." Matter of City of Hudson Indus. Dev. Agency, ALJ Ruling, Aug. 24, 1998, at 5-6, 1998 WL 1780962, at *6, citing Matter of Cortlandt Nursing Home v. Axelrod, 66 N.Y.2d 169,177, n. 2 (1985). Nevertheless, "whether or not NYSDEC's actions/inactions warrant consideration in calculating a penalty can be addressed later if liability is found." City of Hudson, at 6, *6, citing Landmark Colony at Oyster Bay v. Bd. of Supervisors of Nassau Cty., 113 A.D.2d 741 (2nd Dept. 1985). This approach should be followed in this case.

The fourth factor does not favor Respondents. The public policy underlying regulation of air contaminant sources and addressing violations of those regulations is more compelling than SMC's concerns with respect to the delay associated with the enforcement action in this case. SMC's argument as to the propriety of Department Staff's actions in seeking penalties for a regulation that is no longer in effect is unpersuasive, and is insufficient to establish that Department Staff's prosecution of the first violation contravenes SAPA.

Second Cause of Action (Violation No. 2)

In its second cause of action, Department Staff alleged that Respondents violated the June 1996 version of 6 NYCRR Part 201, which subjected all major stationary sources to federal Title V

permitting requirements.[4] Complaint, ¶ 20. Specifically, Department Staff alleged that the Facilities are located in a severe non-attainment area[5] and have the potential to emit 25 tons per year or more of NO_x. Id. Thus, Department Staff contended that both Facilities are major stationary sources or major sources of air contamination. Id. According to the complaint, Respondents failed to comply with the provisions of the June 1996 version of 6 NYCRR Part 201, which required SMC to submit complete permit or registration applications to the Department on or before June 9, 1997. Complaint, ¶ 23. Department Staff contended that each day subsequent to June 9, 1997 that SMC failed to file a complete permit or registration application was a continuing violation of the regulation and ECL Articles 19 and 71. Id.

Department Staff's penalty calculation for Violation No. 2 at the East 66th Street Facility assumed a 1,870-day continuing violation (from June 9, 1997 to July 24, 2002) of the June 1996 versions of 6 NYCRR Section 201-6.3 and ECL Article 19, as well as the 1993 version of ECL Article 71. Department Staff's Penalty Calculations submission, and paragraph 24 of the complaint, stated that July 24, 2002 was the date Respondents filed a "Choice of Options" form for both Facilities. Department Staff sought a $10,000 penalty for the first day of violation, and $15 for each day the violation continued ($28,050).[6]

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[4]Pursuant to 6 NYCRR Section 201-2.1(b)(21)(iii)(*a*), in severe non-attainment areas, a facility is a major stationary source or major source of air contamination subject to the Title V permitting requirements if its potential to emit oxides of nitrogen is 25 tons per year or greater.

[5]Section 200.1(av) defines a non-attainment area, in pertinent part, as "[a]ny area of the State not meeting a National Ambient Air Quality Standard (NAAQS) for a specific air contaminant. Nonattainment areas in New York State are as follows: (1) Severe ozone nonattainment area. The area including the New York City metropolitan area . . .."

[6]In its penalty calculation, Department Staff pointed out that the penalty sought for Violation No. 1 was $5 per day, while the penalty amount was increased to $15 for Violation Nos. 2 and 3. According to Department Staff, this is because the latter violations are more recent, and Respondents' first violation should have apprised them of their compliance obligations. Department Staff argued further that "Violations #2 and #3 are under the umbrella of the Title V Program of the Clean Air Act. Pursuant to 6 NYCRR Part 200, the Department has been delegated by the United States Environmental Protection Agency ("USEPA") both to issue air permits and to enforce all air permit requirements in New York State, including the requirement for an owner and/or operator to obtain an air permit for all its major sources of air contamination." Penalty Calculations, at 19. It is not clear from Department Staff's statement what bearing, if any, this latter reference has upon the increased penalty amount.

According to Department Staff, the violation at the East 87th Street Facility occurred during the same 1,870-day period, and as a result, the recommended penalty amount is identical, and totals $28,050. The total penalty for both Facilities, including $10,000 for the first day of violation, came to $76,100.

In their opposition, Respondents contended that in 1997, SMC directed its environmental consultant, Environmental Management Services, to file the emission cap election form with the Department for each of the Facilities, and that "[a]t all relevant times, SMC was under the reasonable belief that the Emission Cap election form had been submitted to DEC." Riesel Affirmation, ¶ 6, and Exhibit A. SMC maintained that its management never received the notice letters Department Staff sent in March 1998. Riesel Affirmation, ¶ 8. In their cross-motion, Respondents stated that they were unable to identify the signature on the return receipt cards Department Staff provided as part of its motion, and concluded that if the notice letters were sent, they were not delivered to management. Riesel Affirmation, ¶¶ 8 and 9.

SMC pointed out that once the filing deficiency was brought to its attention, SMC admitted its failure to timely file, and took steps to remedy the situation. Riesel Affirmation, ¶ 18. According to SMC, "an after-the-fact investigation conducted by SMC revealed that this one-time administrative oversight inadvertently was caused by Environmental Management Services, which had been retained specifically to ensure SMC's compliance with all applicable air regulations." Id.; Riesel Affirmation, Exhibit A.

Respondents noted that although the Facilities have the potential to emit 25 tons per year or more of NO_x, the boilers at the Facilities in fact each emit well under 12.5 tons of NO_x annually. According to Respondents, the Facilities' low emission rate is attributable, in part, to the use of natural gas for fuel. As a result, SMC argued that its failure to file the emission cap election form by June 9, 1997 caused no harm to the environment and did not result in any economic benefit to SMC, because the Facilities' operations would have been the same in any case. Riesel Affirmation, ¶ 20. SMC emphasized that it did not engage in willful misconduct, and did not conceal or

misrepresent its failure to file. Id. In addition, SMC noted that Department Staff has access to and regularly inspects the Facilities, pointing out that the Facilities were inspected on or about August 11, 1999, as noted in the April 22, 2002 Notices of Violation. Riesel Affirmation, ¶ 7. SMC took the position that given the magnitude of the penalty sought, a hearing should be held, particularly since Department Staff sought a considerably smaller sum ($15,000 per Facility) prior to commencing litigation. Riesel Affirmation, ¶ 23.

If a hearing were held, SMC asserted that it would introduce evidence "on the lack of merits of the Complaint," as well as proof that the failure to file was inadvertent, and attributable to a third party; that no environmental harm resulted from this "paperwork" violation; and that SMC did not benefit from the failure to file. Riesel Affirmation, ¶ 24. In addition, SMC proposed to offer evidence that the penalty sought "is not only contrary to the Department's established policies, but is against public policy." Id. In SMC's view, this enforcement action results from retaliatory animus directed at Respondents, after Department Staff terminated settlement discussions, "evidenced by the age, redundancy and inapplicability of the alleged violations, by the inclusion of Solow as a respondent in his individual capacity, by the disproportionate size of the penalties pursued by Staff, and by the pursuit of such relief without an administrative hearing." Riesel Affirmation, ¶ 25.

The arguments advanced by Respondents in connection with the second violation are not sufficient to grant Respondents' motion to dismiss. Pursuant to Section 622.11(b)(3), Respondents bear the burden of proof in this regard. It is undisputed that Respondents did not make timely application for the requisite approvals to operate the boilers at the Facilities. The fact that the emissions from the Facilities during the period in question were below the Title V threshold for a major facility is of no moment, because it is the Facilities' potential to emit that triggers the regulatory requirement to obtain such approvals. See Duquesne Light Co. v. EPA, 698 F.2d 456, 474 (D.C. Cir. 1983)(affirming EPA's definition of the phrase "potential to emit" as reasonable in light of the statute's language and remedial goals; noting that the term itself "is clear indication that Congress did not intend determinations of whether a source is 'major' to be based on actual emissions in day-to-day operations").

The violation is not trivial, as the Department's Civil Penalty Policy makes clear. See Civil Penalty Policy, issued Jan. 20, 1990, at page 8, Paragraph IV.D2(b), which states that "[u]ndertaking any action which requires a DEC permit, without first obtaining the permit, is always a serious matter, not a mere 'technical' or 'paper work' violation, even if the activity is otherwise in compliance. . . . Failure to assess significant penalties for such violations would be unfair to those who voluntarily comply with the law by satisfying the requirements of the permit process." Respondents' cross-motion did not include any documentation concerning the efforts by Respondents' consultants to properly file on SMC's behalf (for example, correspondence), and SMC's assertion that the March 1998 notice letters never reached management does not excuse SMC's failure to comply with the regulation, particularly since SMC does not claim that the notice letters were not sent to SMC's correct address. Respondents' arguments fall short of the evidence necessary to raise a material issue of fact on this motion for order without hearing, or to establish SMC's entitlement to dismissal of the second cause of action.

Nevertheless, Respondents' arguments should be taken into consideration in determining the penalty that should be assessed for this violation. Although the Civil Penalty Policy notes that penalty amounts in adjudicated cases "must, on the average and consistent with consideration of fairness, be significantly higher than the penalty amounts which DEC accepts in consent orders which are entered into voluntarily by respondents," given the circumstances of this case and the magnitude of the penalty sought, SMC should have the opportunity to present argument as to mitigating circumstances. Civil Penalty Policy at 1, ¶ 4, and 2, ¶ 2.

In this regard, the Commissioner's Decision and Order in Matter of Delford Indus., Inc., 1989 WL 84739 (Apr. 13, 1989) is instructive. In Delford, the ALJ's ruling relied on SAPA in finding "severe prejudice," and recommending dismissal of an opacity violation under 6 NYCRR Section 212.5, where Department Staff delayed ten months before notifying respondent of a violation which was discovered during an inspection. ALJ Ruling at 58-59, 1989 WL 84739, *59. The ruling cited to Air Pollution Variance Bd. of the State of Colorado v. Western Alfalfa Corp., in which the Colorado Supreme Court held that notice of an opacity violation given two weeks after the inspection failed to satisfy due process and fundamental fairness, and went on to

state that basic fairness required delivery of actual notice to a plant manager or officer or agent of the regulated entity within a short time after the inspection took place. 191 Colo. 455, 462, 553 P.2d 811, 816 (1976).

In his Decision and Order in Delford, Commissioner Thomas Jorling agreed that the ten-month delay in notifying the respondent of the opacity violation was unreasonable, but declined to adopt the ALJ's recommendation that the charge be dismissed because, in the Commissioner's view, the prejudice to respondent had not been established, and therefore, SAPA had not been violated. Delford, Commissioner's Decision, at 2-3, *2. Instead, the Commissioner determined that "under no circumstances would a penalty or other relief be appropriate" with respect to the violation. Id., at 2, *2. While Delford is not on all fours with the factual setting of this case, its reasoning supports the conclusion that further inquiry as to the penalty amount for this violation is appropriate.

This is particularly so where, as here, the penalty amount is tied to the length of time the violation continued. The Civil Penalty Policy states that "[i]n an adjudicatory hearing, Department staff should request a specific penalty amount, and should provide an explanation of how that amount was determined, with reference to (1) the potential statutory maximum; (2) this guidance document; (3) any program specific guidance document(s); (4) other similar cases; and (5) if relevant, any aggravating and mitigating circumstances which staff considered." Civil Penalty Policy at 4, ¶ IV. The NOVs indicating that the Facilities were inspected on August 11, 1999 are dated April 22, 2002. Bolt Affirmation, Exhibits G and H; Riesel Affirmation, Exhibit B. Thus, over three years elapsed from the time that the inspection took place to the date Respondents were notified of the violations. In addition, while Department Staff's submission with respect to the penalty calculations undertaken in this matter is coherent and detailed, that submission is devoid of examples of penalties assessed by the Region for similar violations. Such examples would be useful in determining the penalty amount to be recommended to the Commissioner.

Third Cause of Action (Violation No. 3)

The third cause of action set forth in Department Staff's complaint alleged that Respondents operated the boilers at the Facilities without a Department-issued permit or registration for

a period of over five years, from June 9, 1997 to August 19, 2002. Complaint, ¶¶ 27 and 28. Department Staff stated that SMC applied for a registration for the Facilities on July 24, 2002, and the Department issued Air Facility Registration Certificates for the Facilities on August 19, 2002. Id. The complaint alleged that Respondents' operation of the Facilities without the requisite approvals violated the June 1996 version of 6 NYCRR Part 201, specifically, Section 201-6.1(a)(1), as well as ECL Articles 19 and 71. Complaint, ¶ 29.

Department Staff's calculations for Violation No. 3 were based upon its position that from June 9, 1997 to August 19, 2002 (a total of 1,896 days), both Facilities violated the June 1996 version of 6 NYCRR Section 201-6.1(a)(1) and ECL Article 19, in addition to the 1993 version of ECL Article 71. Department Staff sought a $10,000 penalty for both Facilities for the first day of violation, and $15 per day thereafter ($28,440). The total penalty for the two Facilities for this violation amounted to $76,880.

SMC cross-moved to dismiss the third cause of action, arguing that the relief sought was duplicative and excessive. According to SMC, Department Staff's pursuit of penalties for the second violation (the failure to file an emission cap form between June 1997 and July 24, 2002) indicates that Department Staff concedes that SMC did not require a Title V permit for the period of time in question. As a result, SMC argued that the third violation, which involves the same period of time, should be dismissed. SMC asserted that while 6 NYCRR Section 201-6.1(a)(1) provides that certain sources cannot operate without a Title V permit, the regulation does not require that such sources obtain both a Title V permit and an Air Facility Registration Certificate. According to SMC, the second and third violations are based upon the same event: SMC's one-time failure to file the emission cap election form exempting the Facilities from the requirements of Title V. SMC pointed out that there was no evidence that the Facilities' emissions were above the Title V threshold for the period in question.

Section 201-6.1(a) of 6 NYCRR provides in relevant part that "[e]xcept as otherwise set forth herein, no person shall operate any of the following stationary sources without obtaining a title V permit. (1) Any major stationary source (as defined under Subpart 201-2 of this Part)." It is undisputed that the Facilities are major stationary sources. There are exceptions to

this requirement, including the option "to accept an emission cap in accordance with Subpart 201-7 of this Part in order to avoid the title V facility permit requirements of this Subpart." 6 NYCRR § 201-6.3(a). The regulation goes on to state that "[o]wners and/or operators of existing facilities subject to title V facility permitting on the effective date of this regulation must submit information indicating whether they will obtain an emission cap or a title V permit in accordance with the transition provisions of section 201-6.2 of this Subpart." Id.

Department Staff's opposition to Respondents' cross-motion to dismiss cited to no authority in support of its position, but rather attempted to draw a distinction between the second and third violations, asserting that the second cause of action alleges a violation of Section 201-6.3 (failure to submit a timely application), while the third cause of action is based upon an alleged violation of Section 201-6.1(a)(1) (operating without a Title V permit or other approval).

This argument does not appear to support Department Staff's entitlement to a penalty for a continuing violation of both provisions, because the regulation expressly contemplates that the owner or operator of an existing facility may apply for either a Title V permit or elect to accept an emission cap, but need not apply for both. Department Staff's interpretation would essentially assess penalties for a continuing violation of the failure to file for a Title V permit, the failure to file for an emission cap pursuant to Section 201-7.3, and the Facilities' unpermitted operation.

SMC's cross-motion to dismiss this cause of action was likewise devoid of citations to specific authority. SMC made reference to the factual circumstances surrounding the alleged violation, including the lack of any evidence of environmental harm as a result of the Facilities' unpermitted operation, and also raised equitable arguments with respect to the size of the penalty Department Staff seeks. This is not sufficient to grant SMC's motion to dismiss this cause of action. Accordingly, both parties will be afforded the opportunity to offer additional arguments, and a final determination is reserved at this point.

This is particularly true with respect to the period between SMC's filing on July 24, 2002 and the issuance of the Air Facility Registration Certificates for the Facilities on August 19, 2002. During that time, Department Staff was engaged in

reviewing SMC's submission. Although that submission was not timely in the first instance, once the application for an emission cap was received, SMC could do nothing more until Department Staff acted on that application. There is no suggestion in the record that the information SMC submitted on July 24, 2002 was deficient in any way. See Matter of McPartlin, Commissioner's Order, at 2, 1994 WL 734537, *2 (Dec. 29, 1994) (timely application for variance from stage II vapor requirement suspended further enforcement action while variance request was pending before the Department).

In Matter of McPartlin, the ALJ considered whether a separate penalty should be assessed for a violation of the provisions of an order on consent, as well as 6 NYCRR Section 230.2(c), requiring respondent to install a stage II vapor recovery system. ALJ Ruling, at 5-6, 1994 WL 734537, *6 (Dec. 29, 1994). The ALJ concluded that the two violations alleged shared the same elements: the requirement that a stage II equipment be installed, and the failure to install such equipment. Id. As a result, the ALJ recommended that only one penalty be imposed, with the violation of the prior order considered as an aggravating factor in connection with the violation of the regulation. Id.

The ruling cited to People v. Horne, 121 Misc.2d 389 (Sup. Ct., Kings Cty., 1983). In that case, the court construed Section 200.20(1) of the New York Criminal Procedure Law in holding that "[i]t thus appears that the charging of the same offense in separate counts of an indictment would violate New York law." 121 Misc.2d at 394. The ALJ reasoned that this principle was applicable to administrative proceedings, "testing whether one cause of action requires proof of a fact that the other does not." Matter of McPartlin, at 6, 1994 WL 734537, *6.

The Commissioner's order in McPartlin adopted this reasoning, but found that the two violations did not share identical elements of proof. Order at 1, 1994 WL 734537,*1. According to the Commissioner, the consent order contained a provision that required a showing that a transfer of gasoline without the stage II vapor recovery equipment occurred more than sixty days after the effective date of the order. Id. The Commissioner's order pointed out that this provision was not part of Section 230.2(c). Id.

McPartlin is factually distinguishable, but the rationale may be applicable to this proceeding. In this case, Department Staff sought penalties for a continuing violation as a result of both Respondents' failure to file pursuant to 6 NYCRR Section 201-6.3, and a violation of Section 201-6.1(a)(1) because the Facilities operated for some time without a Title V permit or other approval. Both the second and third violations are based upon Respondents' failure to apply for either a Title V permit or an emissions cap.

As was the case in McPartlin, Department Staff may argue that there is a distinction between the failure to notify the Department as to Respondents' election to seek an emissions cap and the failure to obtain that approval, but this may not be enough to establish a continuing violation of both provisions. See Matter of QP Service Station Corp., Commissioner's Decision and Order, at 4, 2004 WL 2384332, *2 (Oct. 20, 2004) (finding that "nothing in the plain language, structure, or purpose of the respective Parts [612 and 613] justifies treating the violation of section 613.9(c) [imposing a reporting requirement upon tank closure] as a distinct violation, subject to a separate penalty, from a violation of section 612.2(d)" [requiring notification to the Department when a facility is substantially modified].) An appropriate penalty should be determined based upon further argument by the parties.

RULING AND RECOMMENDATION

The motion for order without hearing is granted as to SMC's liability for the violations alleged in Department Staff's complaint. The parties will be afforded the opportunity to make further arguments as to the penalty amount to be recommended to the Commissioner. Specifically, such arguments are to address the number of violations and the application of the Department's Civil Penalty Policy to those violations.

ORDER ESTABLISHING UNCONTROVERTED FACTS

The following facts are uncontroverted. Pursuant to 6 NYCRR Section 622.12(e), these facts are established for all purposes in this proceeding, and any facts not so specified were not supported by the proof submitted and therefore will not be considered further:

1. Respondent SMC owns and operates a residential building, located at 265 East 66th Street, New York, New York (the "East 66th Street Facility"), and owns and operates a residential building located at 501 East 87th Street, New York, New York (the "East 87th Street Facility").

2. The East 66th Street Facility has three stationary combustion installation Burnham (Spencer) boilers, each rated at 17.92 mmBtu/hr. The boilers can burn natural gas as well as No. 4 fuel oil, and have a total annual potential to emit of 117.6 tons of oxides of nitrogen (NO_x).

3. The East 87th Street Facility has two stationary combustion installation Federal FLW 3036 boilers, each rated at 10.4 mmBtu/hr. The boilers are capable of burning natural gas as well as No. 6 fuel oil, and have a total annual potential to emit of 45.6 tons of NO_x.

4. Respondents failed to obtain certificates to operate the boilers at the Facilities, in violation of the versions of 6 NYCRR Section 201.2(b) and ECL Article 19 in effect from 1992 to 1997.

5. Respondents failed to timely file a complete Title V permit application by June 9, 1997, or alternatively, to elect to accept an emissions cap to avoid Title V permit requirements at both Facilities. From 1997 to 2002, Respondents operated the boilers at the Facilities without a Title V permit or an Air Facility Registration Certificate.

6. On April 22, 2002, the Department's Region 2 Division of Air mailed Notices of Violation to Respondent SMC for both Facilities. A proposed order on consent was attached to each of the Notices, which sought a $15,000 penalty for each Facility.

7. Respondent did not enter into an order on consent with respect to either Facility.

8. SMC completed and submitted a Choice of Option form for a Registration for each Facility on July 24, 2002. On August 19, 2002, the Department's Region 2 Division of Air issued Air Facility Registration Certificates for the Facilities.

SCHEDULING ORDER

Within fifteen days of receipt of this ruling, counsel for Department Staff shall identify for me in writing the dates on which SMC and Department Staff are available for a conference call to discuss further proceedings in this matter, including the possibility of oral argument pursuant to 6 NYCRR Section 622.10(b)(1)(viii).

/s/
Maria E. Villa
Administrative Law Judge

Dated: Albany, New York
February 23, 2005

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