NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

- by -

W.R. PLUMBING and HEATING CORP.,

Respondent.

ORDER

DEC File No.
R2-20120130-63

This administrative enforcement proceeding concerns alleged violations of the Navigation Law and its regulations by respondent W.R. Plumbing and Heating Corp. ("W.R. Plumbing").

By notice of motion for order without hearing in lieu of complaint dated February 24, 2012, staff of the New York State Department of Environmental Conservation ("Department" or "DEC") alleges that respondent violated sections 173, 175, and 176 of Article 12 of the Navigation Law, and sections 32.3 and 32.5 of title 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("NYCRR"). Department staff alleges that, on January 26, 2012, respondent intentionally discharged approximately 100 gallons of home heating fuel into pits located in the backyard of 130-39 126th Street, South Ozone Park, Queens ("site"). In addition, staff alleges that respondent failed to notify the Department of the discharge and failed to promptly undertake containment and remediation action. Department staff requests a penalty in the amount of forty-five thousand dollars ($45,000) and an order mandating remediation of the site pursuant to a Department-approved remediation plan.

Respondent, in a letter to Department staff dated March 2, 2012, denies the allegations in the motion and alleges that if any discharge of home heating oil occurred at the site, it was done without respondent's knowledge or consent.

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

I concur with the ALJ's determination that Department staff is entitled to a finding of liability with respect to the allegations set forth in its motion. As the record reflects, a private citizen contacted the Department on January 26, 2012, describing an intentional discharge at the site, specifically, the disposal of heating oil from a tank onto the ground at the site (see Affidavit of Sharif F. Rahman, P.E., in support of motion for an order without hearing, sworn to on February 24, 2012 ["Rahman Affidavit"], at ¶ 5). Sharif F. Rahman, a DEC environmental

engineer, went to the site where one of respondent's employees stated to Mr. Rahman that residual fuel oil from the tank had been discarded in pits in the backyard of the site (see Rahman Affidavit, at ¶¶ 8, 10).

With respect to the requested penalty of forty-five thousand dollars ($45,000), the amount requested is authorized and appropriate. In its papers, Department staff provides a review of the factors considered in determining the penalty, and how this calculation is consistent with the Department's Civil Penalty Policy ("DEE-1") dated June 20, 1990, and other applicable enforcement guidance and administrative precedent (see Affirmation of John K. Urda, Esq., in support of motion for an order without hearing, dated February 24, 2012, at ¶¶ 20-30).[1]

The ALJ recommends that respondent be required to submit to Department staff an approvable remediation work plan within sixty (60) days of service of this order upon respondent, and that the plan should be carried out within ninety (90) days of DEC staff approval. In order to ensure that the remediation is undertaken promptly, I hereby direct respondent to commence the implementation of the work plan within seven (7) days of Department staff's written notification to respondent that the submitted work plan has been approved. The work plan must include a schedule by which remedial tasks are to be undertaken, which schedule shall be subject to the approval of Department staff.

NOW, THEREFORE, having considered these matters and being duly advised, it is **ORDERED** that:

I. Respondent W.R. Plumbing and Heating Corp. is adjudged to have violated:

A. Navigation Law § 173, by discharging approximately 100 gallons of heating oil into pits in the backyard of 130-39 126th Street, South Ozone Park, New York;
B. Navigation Law § 175 and 17 NYCRR 32.3, by failing to immediately notify the Department of the discharge; and
C. Navigation Law § 176 and 17 NYCRR 32.5, by failing to immediately undertake to contain or clean up the discharge.

II. Respondent W.R. Plumbing and Heating Corp. is assessed a civil penalty in the amount of forty-five thousand dollars ($45,000). Within thirty (30) days of the service of this order upon respondent, respondent shall submit payment of the penalty in the form of a cashier's check, certified check or money order payable to

[1] The ALJ calculates a maximum penalty of seventy-five thousand dollars ($75,000) based on the information provided in the papers (see ALJ Summary Hearing Report, at 5 n2). However, the ALJ indicated that, in recommending a penalty, she was limited to the staff-requested penalty of forty-five thousand dollars ($45,000) (see ALJ Summary Hearing Report, at 6).

The information contained in the "DEC Remarks" section to the DEC Spill Report (see Exh A to the Rahman Affidavit) provides a basis for calculating a maximum penalty higher than what the ALJ determined. However, based on this record, I am assessing the civil penalty that Department staff requested. Accordingly, it is not necessary for me to reach whether a penalty higher than the staff-requested amount may be assessed where a motion for order without hearing is opposed.

the order of the "New York State Department of Environmental Conservation" and mailed to the Department at the following address:

John K. Urda, Esq.
Assistant Regional Attorney
New York State Department of
Environmental Conservation, Region 2
47-40 21st Street
Long Island City, New York 11101

III. Within sixty (60) days of service of this order upon respondent, respondent shall submit an approvable work plan to Department staff for remediation of the site. The work plan must include a schedule by which remedial tasks are to be undertaken, which schedule shall be subject to the approval of Department staff. Respondent shall commence implementation of the work plan within seven (7) days of Department staff's written notification to respondent that Department staff has approved the work plan.

IV. All communications from respondent to the Department concerning this order shall be made to John K. Urda, Assistant Regional Attorney, at the address listed in paragraph II of this order.

V. The provisions, terms, and conditions of this order shall bind respondent W.R. Plumbing and Heating Corp., and its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/
By: ______________________________
Joseph J. Martens
Commissioner

Dated: December 31, 2012
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

- by -

W.R. PLUMBING and HEATING CORP.,

Respondent.

Summary Hearing Report

NYSDEC File No. R2-20120130-63

Proceedings

By notice of motion for order without hearing dated February 24, 2012, the staff of the New York State Department of Environmental Conservation (DEC or Department) commenced this enforcement proceeding against respondent W.R. Plumbing and Heating Corp. (WR Plumbing) for alleged violations of Article 12 of the Navigation Law (NL) and Title 17 of the Official Compilation of Codes, Rules and Regulations (17 NYCRR) for intentionally dumping 100 gallons of heating oil onto the ground at 130-39 126th Street, South Ozone Park, Queens, New York on January 26, 2012; for failing to immediately notify the Department of the spill; and for failure to remediate the spill. On February 24, 2012, by certified mail return receipt requested, the Department staff served its notice of motion and supporting statements and exhibits on the respondent. The United States Post Office delivered the motion on February 27, 2012.[1]

The respondent submitted to DEC staff a letter dated March 2, 2012 that was received in Region 2 on March 7, 2012. The letter has a return address of WR Plumbing & Heating Corp.; however, Darmin Bachu, attorney, is the signatory on the letter. On March 12, 2012, the Department's Office of Hearings and Mediation Services (OHMS) received the staff's motion papers and the respondent's March 2nd submission. On March 20, 2012, Chief Administrative Law Judge James T. McClymonds assigned the matter to me.

[1] The Postal Service tracking statement indicates that the papers were delivered on February 27, 2012. The copy of the "green" card that staff submitted with Ms. Regina Seetahal's affidavit of service and the USPS tracking statement contains a date stamp of February 28, 2012 below the signature line. Whether the date stamp or the tracking form is incorrect is not important as there is no question that the respondent received the staff's motion.

Staff's Charges

Assistant Regional Attorney John K. Urda submitted to the OHMS Department staff's motion for order without hearing consisting of the notice of motion dated February 24, 2012; Mr. Urda's affirmation dated February 24, 2012; the New York State Department of State Division of Corporations Entity Information re: WR Plumbing and Heating Corp. (Exhibit [Ex.] A); affidavit of DEC Region 2 Environmental Engineer Sharif F. Rahman dated February 24, 2012 with the spill report (Ex. A); photograph of subject premises (Ex. B); photograph of oil soaked soil in pit (Ex. C); business cards of respondent (Ex. D); fuel oil invoice for 130-39 126th Street dated January 18, 2012 (Ex. E); and notice of violation dated January 28, 2012 (Ex. F).

As noted above, the staff has alleged that respondent, in the course of converting the property owner's heating system from oil to gas, intentionally discharged 100 gallons of home heating fuel into pits in the backyard of the home. Based upon these actions, and the respondent's alleged failures to notify the Department of the spill and to promptly undertake containment and remediation, the staff has charged the respondent with violations of NL §§ 173, 175 and 176 in addition to 17 NYCRR §§ 32.3 and 32.5.

Based upon these allegations, the Department staff is seeking a penalty of $45,000 and a Commissioner's Order mandating the remediation of the site pursuant to NL § 192 and the Department's Civil Penalty Policy (DEE-1), Order on Consent Enforcement Policy (DEE-2), Bulk Storage and Spill Response Enforcement Policy (DEE-4), and Spill Site Remediation under Department Order Enforcement Policy (DEE-18).

The Department staff emphasizes that the penalty requested is within "those awarded in adjudicated precedent . . .". In further support of a significant penalty, staff describes the violations as serious given the spill's location in a highly populated area and the intentional nature of the spill. The Department staff also notes that the respondent's allegation that it used a sub-contractor to haul waste oil was proven to be false, thus indicating a potential pattern of illegal waste oil dumping.

Respondent's Position

In the respondent's March 2, 2012 letter, Mr. Bachu states that "[m]y company denies all of the allegations in the notice of motion." He further alleges that there was no intention to illegally discharge home heating oil and if such a discharge occurred, it was without the knowledge or authorization of the company. He argues that the penalty requested by staff is excessive and would put the company out of business. He states that the company can only afford to pay the cleanup costs and no more.

FINDINGS OF FACT

On this motion, which is the Department's version of summary judgment, the respondent has not produced an affidavit or any documentary evidence from an individual with personal knowledge of the facts. Thus, the only facts before me are those presented by Department staff.

1. The respondent is a New York State active corporation that engages in the plumbing and heating business. Exs. A (annexed to Urda Affidavit [Aff.]) and D (annexed to Rahman Aff.).

2. On January 26, 2012, an individual contacted the Department regarding the discharge of home heating oil into the backyard of 130-39 126th Street in South Ozone Park, Queens. Rahman Aff., ¶¶ 5-8; Ex. A.

3. Balgolbin Beharry, an employee of W.R. Plumbing & Heating Corp., dumped heating oil into pits in the backyard of 130-39 126th Street when removing the oil tank that was present in the home located at this address. Rahman Aff., ¶¶ 8-9; Exs. A, D.

4. The new owner of this property, Jastwan Singh, had purchased 100 gallons of fuel oil on January 18, 2012, but because the boiler did not operate, no heating oil had been used between the date of delivery and January 26, 2012, when it was discharged into the pits in the backyard. Rahman Aff., ¶¶ 10-11; Ex. E.

5. While the respondent claimed that ABC Tank & Repair Lining Inc. took the waste oil from other jobs WR Plumbing worked on, Donna at ABC Tank & Repair Lining Inc. denied picking up waste oil from the respondent. Rahman Aff., ¶ 12.

6. The Department staff issued a notice of violation to the respondent on January 28, 2012 and required the immediate excavation of contaminated soil and sampling. Rahman Aff., ¶ 13. On February 2, 2012, when staff met with the respondent's representatives, they were unable to produce evidence of proper disposal of the fuel oil from the site. Rahman Aff., ¶ 14.

7. On February 7, 2012, a representative of a remediation company, Lou Bascelli from Eastern Environmental, advised DEC that there were two areas of contamination on the property, bore holes had been dug, groundwater was not encountered, and the work would continue until the excavations yielded no impact. Rahman Aff., Ex. A.

CONCLUSIONS OF LAW

1. By discharging approximately 100 gallons of heating fuel into pits located in the backyard of 130-39 126th Street, South Ozone Park, Queens, New York, the respondent has violated NL § 173.

2. By failing to promptly notify the Department of the prohibited discharge, the respondent has violated NL § 175 and 17 NYCRR § 32.3.

3. By failing to immediately undertake to contain or clean up the prohibited discharge, the respondent has violated NL § 176 and 17 NYCRR § 32.5.

DISCUSSION

Section 622.12 of 6 NYCRR provides for an order without hearing when upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party. And, "[s]ummary judgment is appropriate when no genuine, triable issue of material fact exists between the parties and the movant is entitled to judgment as a matter of law." *Matter of Frank Perotta*, ALJ Ruling on Motion for Summary Order and Summary Report adopted by Commissioner's Partial Summary Order, January 10, 1996. Section 3212(b) of the CPLR provides that a motion for summary judgment shall be granted, ". . . if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." Once the moving party has put forward its case, the burden shifts to the non-movant to produce sufficient evidence to establish a triable issue. *Matter of Locaparra*, Commissioner's Decision, June 16, 2003, at p. 4.

Pursuant to 6 NYCRR § 622.12(a), staff has supported its motion for an order without hearing with both a factual affidavit from Environmental Engineer Rahman who responded to the spill complaint and the affirmation of Assistant Regional Attorney Urda that supports the Department staff's request for relief. In addition to the spill report attached to Mr. Rahman's affidavit, staff has also included the oil spill report, photographs documenting the oil discharge, a copy of the business card of the employee that identifies the respondent as the contractor on the site, and a copy of the invoice for the 100 gallons of fuel oil that was delivered on January 18, 2012 to the site.

The respondent's sole response to staff's motion is a letter from an attorney that makes a general denial of the Department staff's claims and argues that the penalties requested are too high. It is appropriate to grant the staff's motion for order without hearing because the respondent "failed to establish the existence of any material issue of fact which would require a hearing." *Edgar v. Jorling*, 225 AD2d 770, 771 (2d Dep't 1996), *lv to appeal den.*, 89 NY2d 802 (1996); 6 NYCRR § 622.12(c). It is essential that a party opposing summary judgment submit competent evidence rather than conclusions or speculation in order to defeat the motion. *Zuckerman v. City of New York*, 49 NY2d 557 (1980). In addition to the paucity of the respondent's letter response, it was submitted by an attorney with no demonstrated personal knowledge of or expertise related to the facts in question.

Accordingly, I find the respondent liable for the violations of NL §§ 173, 175, and 176 and 17 NYCRR §§ 32.3 and 32.5.

Penalties

In its notice of motion, Department staff requests that the respondent be ordered to pay a combined civil penalty of $45,000 and to fully remediate the site pursuant to a Department approved work plan. Section 622.12(f) of 6 NYCRR provides for a hearing on penalties if the ALJ finds that there is an issue of triable fact related to the relief. As is the case regarding

liability, because the respondent has presented no issues of material fact, I do not find a hearing is warranted on this matter. Without any factual basis or supporting information, Mr. Bachu states that the "requested penalties are excessive, unreasonable and unfair when considered in light of the fact that a considerable amount of money (approximately $15,000 to $20,000) was spent to clean the spill" and that "[t]his is the first and only incident know [sic] of by this company and the only effect served by the excessive penalty sought by NYS DEC would be the financial destruction of this company." Mr. Bachu fails to provide any information that would demonstrate exactly what the respondent has spent on the remedial work thus far or what stage the cleanup is in. In addition, he fails to provide any information that would show the financial circumstances of the company. Thus, I cannot rely upon his conclusory statements in calculation of the penalty. *See, e.g.,* supplemental hearing report in *Matter of B & G Diversified*, at p. 13, adopted by Order of the Commissioner, August 15, 1994.

NL § 192 provides that persons who violate Article 12 of the Navigation Law or any rule promulgated thereunder or who fail to comply with any duty created by Article 12 are liable for penalties up to $25,000 per day for each violation. For the three causes of action set forth by the staff in its motion for order without hearing, the maximum penalty would be $75,000.[2] Pursuant to the Department's 1990 Civil Penalty Policy, all monetary penalty calculations begin with the statutory maximum. The maximum penalty is only the starting point; a number of considerations, including the economic benefit of noncompliance, the gravity of the violations, and the culpability of the respondent's conduct are to be taken into account in determining the appropriate penalty.

With respect to economic benefit, while staff did not present any estimate of the financial advantage the respondent gained by dumping the heating oil in the backyard, clearly those actions would save the respondent from paying the fee that would normally be incurred when hiring a disposal company to pump out the fuel and to properly dispose of it. Such actions put those companies that adhere to legally sanctioned disposal methods at an unfair economic disadvantage. Thus, this would be a basis for raising the penalty.

As for gravity, the violations are extremely serious as the respondent intentionally disposed of the fuel oil in the pits in the backyard in violation of the law. While the law does not require the Department staff to prove intent with respect to violations of the Navigation Law, the respondent's intentional actions should enhance any penalty. The respondent is a self-proclaimed specialist in "violation removal" among other things related to heating and plumbing. Rahman Aff., Ex. D. In addition, the failure to properly dispose of the 100 gallons of fuel oil in this neighborhood of concentrated residences and businesses causes a special threat to public health. Thus, a substantial penalty is warranted given the potential impact on the environment and public health and the respondent's disregard for the environmental laws and regulations governing tank removal and oil disposal.

The Civil Penalty Policy also provides for factors that could adjust the gravity component: (a) culpability; (b) violator cooperation; (c) history of non-compliance; (d) ability to

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[2] It is certainly possible this figure could be higher if there was more information about the length of time that the violations continued. Seventy-five thousand dollars is the maximum penalty I could calculate based upon the information provided in the staff's motion papers.

pay; and (e) unique factors. The respondent's culpability in this matter should merit an upward penalty adjustment based upon its intention to perform these illegal acts. With respect to violator cooperation, the respondent failed to promptly report the spill and instead, the Department was made aware of the violations based upon a complaint. In addition, the respondent failed to agree to settle the matter. Based upon the spill report, it appears that the respondent has taken steps towards remediation of the site and that is a factor that should be included in the penalty calculation. As for ability to pay, no evidence was presented by the respondent of its financial status besides the conclusory statement of its attorney.

The Civil Penalty Policy also provides for the consideration of "unique factors" in calculation of the penalty; however, I could find none here that would mitigate the penalty. Instead, the unique factors of the respondent's expertise and its intentional actions are grounds for a larger penalty.

The staff's request for a $45,000 penalty is quite reasonable and as Mr. Urda points out in his affirmation (¶ 29) well within the range of penalties that the Department typically assesses in oil spill matters. In fact, as discussed above, the facts in this case would support a larger penalty. Because staff has limited the penalty to $45,000, I am limited to that amount. *See, Matter of Alvin Hunt d/b/a Our Cleaners*, Commissioner's Decision, July 25, 2006. Staff's request for an order requiring the respondent to complete remediation pursuant to a staff approved plan is also appropriate.

CONCLUSIONS

1. First Cause of Action: the respondent's discharge of approximately 100 gallons of heating oil into pits in the backyard of 130-39 126th Street, South Ozone Park, Queens, New York was in violation of NL § 173.

2. Second Cause of Action: the respondent's failure to immediately notify the Department of this discharge was in violation of NL § 175 and 17 NYCRR § 32.3.

3. Third Cause of Action: the respondent's failure to immediately undertake to contain or clean up this discharge was in violation of NL § 176 and 17 NYCRR § 32.5.

RECOMMENDATIONS

1. For the first, second and third causes of action, the respondent, W.R. Plumbing and Heating Corp., should be assessed a penalty of $45,000. All penalties should be paid within 30 days of service of the Commissioner's order.

2. Within 60 days of service of the Commissioner's order the respondent should be required to submit to Department staff an approvable remediation work plan and said plan should be carried out within 90 days of DEC staff approval.

Albany, New York
April 9, 2012

/s/
____
Helene G. Goldberger
Administrative Law Judge

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