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10th Annual Oil Spill Symposium

Environmental & Energy Law Section

May 8, 2019

State Bar Center

Albany, NY

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___ Environmental Business Transactions (ENVI4100)
___ Environmental Impact Assessment (ENVI1800)
___ Environmental Insurance (ENVI3300)
___ Environmental Justice (ENVI1700)
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NYSBA

NEW YORK STATE BAR ASSOCIATION

ENVIRONMENTAL & ENERGY LAW SECTION
2019 Annual Oil Spill Symposium

Wednesday, May 8, 2019 | Great Hall, State Bar Center, Albany

Live Only | 3.5 MCLE Credit is available for this program.

12:00 – 12:20 p.m.
Registration and Lunch

12:20 – 12:30 p.m.
Welcome and Introduction

Gary S. Bowitch, Esq. | Bowitch & Coffey, LLP | Albany, NY | Co-Chair, Petroleum Spills Committee

12:30 – 1:10 p.m.
Oil Spill Update

(0.5 Credit in Areas of Professional Practice)

- Current status of the Oil Spill Fund, along with any State policy updates.
- Recent case law developments pertaining to New York's Oil Spill Act, including unreported cases.

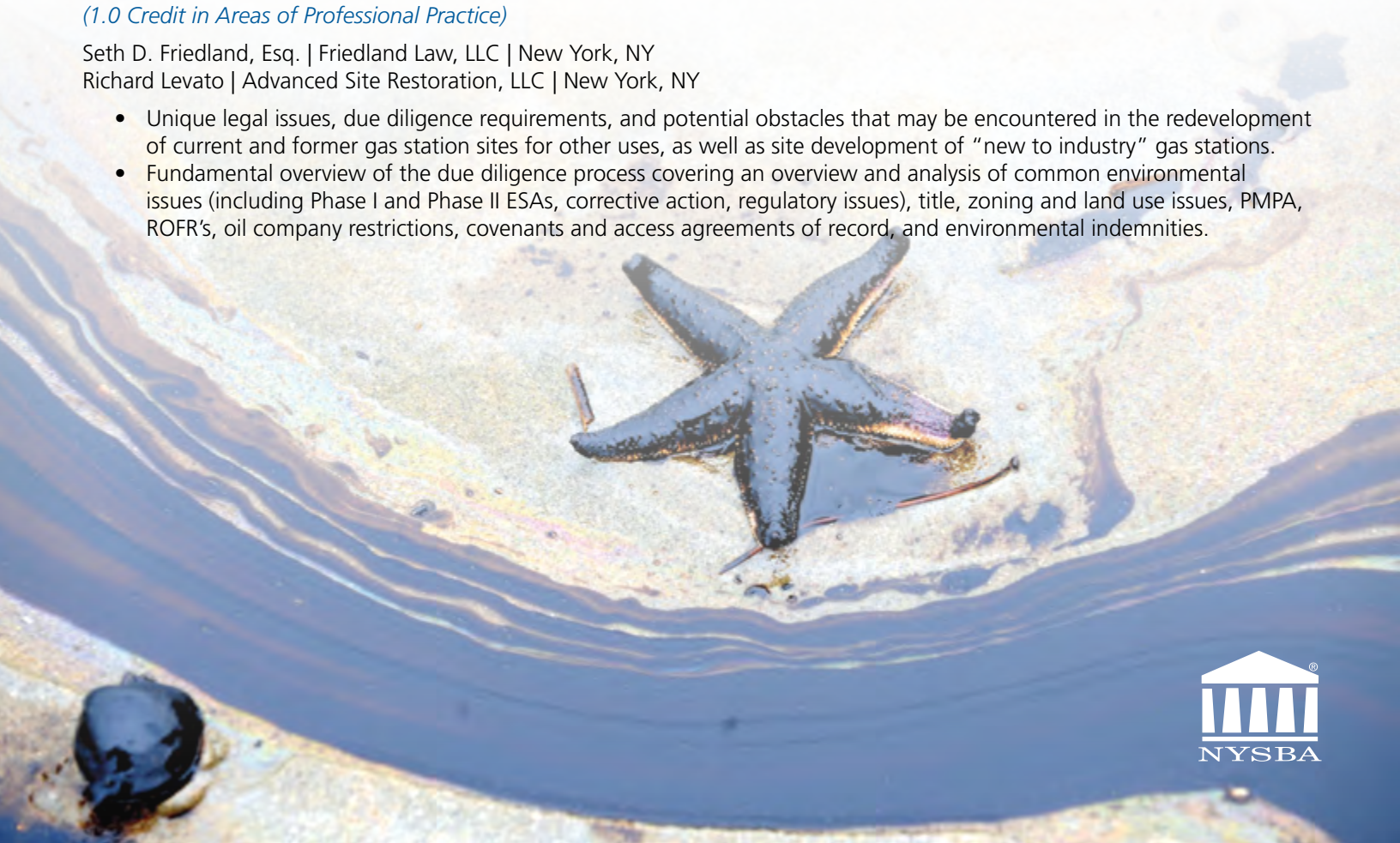
Patrick J. Holloway, Esq. | Office of State Comptroller | Albany, NY
Alan J. Knauf, Esq. | Knauf Shaw LLP | Rochester, NY
Bonnie J. Riggi, Esq. | Assistant Attorney General | NYS Office of the Attorney General | Albany, NY

1:10 – 2:00 p.m.
Gas Station Development, Redevelopment, and Due Diligence

(1.0 Credit in Areas of Professional Practice)

Seth D. Friedland, Esq. | Friedland Law, LLC | New York, NY
Richard Levato | Advanced Site Restoration, LLC | New York, NY

- Unique legal issues, due diligence requirements, and potential obstacles that may be encountered in the redevelopment of current and former gas station sites for other uses, as well as site development of "new to industry" gas stations.
- Fundamental overview of the due diligence process covering an overview and analysis of common environmental issues (including Phase I and Phase II ESAs, corrective action, regulatory issues), title, zoning and land use issues, PMPA, ROFR's, oil company restrictions, covenants and access agreements of record, and environmental indemnities.



NYSBA

2:00 – 2:15 p.m.
Break

2:15 – 3:05 p.m.
Individual Liability & the Responsible Corporate Officer Doctrine

(1.0 Credit in Areas of Professional Practice)

- Individual liability and the Corporate Officer Doctrine
- Liability under New York's Oil Spill Act as compared to other environmental statutes
- Best practices to avoid liability

Jeffrey C. Stravino, Esq. | Hodgson Russ LLP | Buffalo, NY
Douglas H. Zamelis, Esq. | Law Office of Douglas H. Zamelis, Cooperstown, NY | Co-Chair, Petroleum Spills Committee

3:05 – 3:55 p.m.
Petroleum Spill Case Study

(1.0 Credit in Areas of Professional Practice)

A case study highlighting the nuances of the Oil Spill Act, focusing on liability, spill reporting and investigation/remediation issues.

Melissa M. Valle, Esq. | Knauf Shaw LLP | Rochester, NY | Co-Chair, Petroleum Spills Committee
Gary S. Bowitch, Esq. | Bowitch & Coffey, LLP | Albany, NY | Co-Chair, Petroleum Spills Committee

3:55 – 4:00 p.m.
Closing Remarks

Douglas H. Zamelis, Esq. | Law Office of Douglas H. Zamelis | Cooperstown, NY | Co-Chair, Petroleum Spills Committee

4:00 - 5:00 p.m.
Cocktail Reception

Register online:
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CLE INFORMATION

Under New York's MCLE rule, this program has been approved for a total of 3.5 MCLE credits in Areas of Professional Practice for both experienced and newly-admitted attorneys.

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Oil Spill Update

Patrick J. Holloway, Esq.
Office of State Comptroller | Albany, NY

Alan J. Knauf, Esq.
Knauf Shaw LLP | Rochester, NY

Bonnie J. Riggi, Esq.
NYS Office of Attorney General | Albany, NY

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

STATE OF NEW YORK,

Plaintiff,

-against-

DECISION AND ORDER

AMERICAN AXLE & MANUFACTURING, INC., LEWIS BROS., L.L.C., SAMUEL LEWIS and TIMOTHY LEWIS,

Defendants.

(Supreme Court, Albany County, Motion Term, May 11, 2018)
Index No. L-00083-17
(RJI No. 01-18-127565)

(Acting Justice Michael H. Melkonian, Presiding)

APPEARANCES: Barbara Underwood
Attorney General of the State of New York
Attorney for Plaintiff
(Jennifer M. Dentinger, Assistant Attorney General, of Counsel)
The Capitol
Albany, New York 12224-0341

Hodgson Russ, LLP
Attorneys for Defendant American Axle & Manufacturing, Inc.
(Jeffrey C. Stravino, Esq., of Counsel)
The Guaranty Building
140 Pearl Street
Buffalo, New York 14202

MELKONIAN, J.:

On November 21, 2017, plaintiff the State of New York ("plaintiff") commenced this action pursuant to article 12 of the Navigation Law against defendants American Axle & Manufacturing, Inc., Lewis Bros., L.L.C., Samuel Lewis and Timothy Lewis, seeking to recover its costs for the cleanup and removal of petroleum discharge, on the ground that the discharge emanated from defendants' property, and defendants are strictly liable therefore. According to the complaint, the New York State Environmental Protection and Spill Compensation Fund (the "Oil Spill Fund") expended $425,717.48 to clean up and remove the discharge. Defendant American Axle & Manufacturing, Inc. ("defendant") now moves to pursuant to CPLR § 3211(a)(7) and CPLR § 3013 to dismiss the complaint as asserted against it. Defendant also argues that plaintiff's claims are time-barred.

According to the complaint filed by plaintiff, on or about August 1, 2009, discharges of petroleum product contaminated the groundwater and soil at and in the vicinity of 2390 Kenmore Avenue, Town of Tonawanda, Erie County (the "spill site"). Plaintiff alleges that the source of the afore mentioned petroleum product contamination of the groundwater and soil were discharges from equipment, aboveground and underground petroleum product storage and dispensing systems located at the spill site. Plaintiff alleges that from on or about February 28, 1994 through December 3, 2008, defendant owned the real property upon which the spill site was located as well as the systems located at the spill site.

On a motion to dismiss pursuant to CPLR § 3211(a)(7) for failure to state a claim, "[the Court] must afford the complaint a liberal construction, accept the facts as alleged in

the pleading as true, confer on the [nonmoving party] the benefit of every possible inference and determine whether the facts as alleged fit within any cognizable legal theory" (Torok v. Moore's Flatwork & Founds., LLC, 106 AD3d 1421, 1421 [3rd Dept. 2013] [internal quotation marks and citation omitted]; see, Sim v Farley Equip. Co. LLC, 138 AD3d 1228, 1228 [3rd Dept. 2016]).

As is relevant here, Article 12 of the Navigation Law, commonly known as the Oil Spill Act, was enacted to ensure swift, effective cleanup of petroleum spills that threaten the environment (see, Navigation Law §§ 170, 171; State of New York v Green, 96 NY2d 403, 406 [2001]). Pursuant to Navigation Law § 181(1), "[a]ny person who has discharged petroleum shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained." The Court of Appeals has read this provision together with Navigation Law § 172(8), which defines a "discharge" as "any intentional or unintentional action or omission resulting in" a petroleum spill, holding that while liability for remediation costs cannot be premised solely on land or system ownership, owners who have "control over activities occurring on their property" and reason to believe that petroleum products are stored there are liable as a discharger (State of New York v Green, 96 NY2d 403, 407 [2001]; see, State of New York v Speonk Fuel, Inc., 3 NY3d 720, 723–724 [2004]; State of New York v B & P Auto Serv. Ctr., Inc., 29 AD3d 1045, 1046–1047 [3rd Dept. 2006]).

In Lowenthal v Perkins, 164 Misc.2d 922, 925 [Sup.Ct., Tompkins Cty., 1995], the

Court recognized that [t]he term "discharger" by statutory design is broad in its embrace. The Legislature recognized that article 12 of the Navigation Law was necessary for the general health, safety, and welfare of the people of this State and mandated that the article be construed liberally to effect its purposes (Navigation Law § 195).

Further, "[t]he courts have indeed liberally construed the provisions of the Navigation Law" (State of New York v Montayne, 199 AD2d 674, 675 [3rd Dept.1993]). Liberally construing Navigation Law §§ 181(1) and 172(8) eliminates the need for the State to prove fault or even knowledge on the part of the party being held strictly responsible for the contamination in question (see, State of New York v Green, 96 NY2d at 406 – 407; State of New York v C.J. Burth Servs., Inc., 79 AD3d 1298, 1300 [3rd Dept. 2010]; State v Joseph, 29 AD3d 1233, 1235 [3rd Dept., 2006]) i.e., owners with such capacity are strictly liable as a discharger, "even in the absence of any evidence that the owner caused or contributed to the discharge" (State of New York v Dennin, 17 AD3d 744, 745 [3rd Dept. 2005]; see, State of New York v C.J. Burth Servs., Inc., 79 AD3d at 1300), and their strict liability cannot be avoided by demonstrating that another party actually caused the discharge or contributed to the contamination in issue (see, State of New York v Robin Operating Corp., 3 AD3d 767, 769 [3rd Dept. 2004]).

In its complaint, plaintiff specifically alleges that a petroleum discharge occurred from aboveground and underground petroleum product storage and dispensing systems. Plaintiff also alleges that the discharge, which occurred at and in the vicinity of 2390 Kenmore

Avenue, Town of Tonawanda, Erie County, contaminated the soil and groundwater located at the spill site and that defendant failed to take all measures necessary to cleanup and remove the petroleum product discharge. Plaintiff further alleges that as a result of the discharge, plaintiff has expended $425,717.48 to clean up and remove the discharge. According the plaintiff here every favorable reasonable inference and bearing in mind the broad definition and public policy considerations and that the Navigation Law must be liberally construed, the Court finds that the complaint states alleges a viable cause of action pursuant to Navigation Law § 181.

Turning to the CPLR § 3013 prong of defendant's motion to dismiss, on a motion addressed to the sufficiency of the pleadings[1], the Court's inquiry is limited to ascertaining whether the pleading states any cause of action, and not whether there is evidentiary support for the claim (Guggenheimer v Ginzburg, 43 NY2d 268 [1977]). The claim must be liberally

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[1]CPLR § 3013 provides that statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.

CPLR § 3014 provides, in pertinent part, that every pleading shall consist of plain and concise statements in consecutively numbered paragraphs. It further provides that each paragraph shall contain, as far as practicable, a single allegation. As a general rule, the assignment of separately numbered paragraphs to each factual allegation aid clarity and facilitates responsive pleadings. However, this numbering requirement is governed by the practicable standard. If presentation is facilitated by including a few facts in a single paragraph, it is permissible. See Siegel's New York Practice § 212.

construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true (Morone v Morone, 50 NY2d 481 [1980]). "However imperfectly, informally, or even illogically the facts may be stated, a complaint [or counterclaim], attacked for insufficiency, [must be] deemed to allege 'whatever can be implied from its statements by fair and reasonable intendment.'" Vitale v Dean Fowler Oil Co., 238 AD2d 794, 795 (3rd Dept. 1997), quoting Korenman v Zaydelman, 237 AD2d 711 (3rd Dept. 1997).

The Court finds no contravention of CPLR § 3013 (or § 3014) in plaintiff' complaint. Upon a careful review of the complaint, this Court finds that plaintiff's complaint sets forth the two causes of action asserted against defendant in plain and concise statements contained in consecutively numbered paragraphs which are sufficiently particular to give defendant notice of the basis for the claims and the facts underlying each cause of action. The complaint is sufficiently specific for the defendant to frame a response (see, CPLR § 3024[a]; Della Villa v Constantino, 246 AD2d 867 [3rd Dept. 1998]). If defendant desires additional information, it is free to serve a notice for a Bill of Particulars identifying the issues on which it seeks amplification.

Finally, the Court rejects defendant's argument that the statute of limitations has run. The statute of limitations period for a cause of action for restitution arising out of claims for unjust enrichment is six years (CPLR § 213; see, State v Stewart's Ice Cream Co., Inc., 64 NY 2d 83, 86 [1984]; see, also, State of New York v Speonk Fuel, Inc., 762 NYS2d 674, 675–76 [3rd Dept. 2003]; City of New York v Lead Industries Ass'n, Inc., 644 NYS2d 919

[1st Dept. 1996]). In a restitution cause of action, the limitations periods begins to run "upon the occurrence of the wrongful act giving rise to the duty" to repay (Congregation Yetev Lev D'Satmar, Inc. v 26 Adar N.B. Corp., 596 NYS2d 435, 437 [2nd Dept. 1993]). The triggering act would be "the State's expenditure of funds in connection with the remedial program" (New York v Hickey's Carting, Inc., 380 F.Supp.2d 108, 121 [ED New York 2005]; Speonk Fuel, Inc., 762 NYS2d at 676 ["the statutory period from which this claim shall be deemed to commence is from the time that a payment was made from the Fund for cleanup and removal costs"]; State of New York v Ackley, 734 NYS2d 722, 723–24 [3rd Dept. 2001]). In opposition to defendant's motion, plaintiff submits an affidavit of Wayne E. Sickler, Accounting Manager for the New York Environmental Protection and Spill Compensation Fund (the "fund"). Mr. Sickler affirms that the first payment made by plaintiff for cleanup and removal costs was on November 23, 2011. Inasmuch as plaintiff filed its complaint on November 21, 2017, the Court rejects defendant's argument that the action is time-barred.

Accordingly, defendant's motion is denied in its entirety without costs.

This constitutes the Decision and Order of the Court. This Decision and Order is returned to the attorneys for plaintiff. All other papers are delivered to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

SO ORDERED.
ENTER.

Troy, New York

Dated: June 26, 2018

MICHAEL H. MELKONIAN
Acting Supreme Court Justice

Papers Considered:

(1) Notice of Motion dated March 13, 2018;
(2) Affirmation of Jeffrey Stravino, Esq., dated March 13, 2018, with exhibit annexed;
(3) Memorandum of Law dated March 13, 2018;
(4) Affirmation of Jennifer M. Dentinger, Esq., dated May 4, 2018, with exhibit annexed;
(5) Affidavit of Wayne E. Sickler dated April 19, 2018, with exhibit annexed;
(6) Affidavit of Robert M. Crossed dated May 3, 2018;
(7) Memorandum of Law dated May 4, 2018, with exhibit annexed;
(8) Affirmation of Jeffrey C. Stravino, Esq., dated May 10, 2018.

2019 OIL SPILL SYMPOSIUM

LIABILITY CASE LAW

BRG Corp. v Chevron U.S.A., Inc.

Supreme Court of New York, Appellate Division, Fourth Department

July 25, 2018, Decided; July 25, 2018, Entered

803 CA 17-02205

Reporter
163 A.D.3d 1495 *; 82 N.Y.S.3d 798 **; 2018 N.Y. App. Div. LEXIS 5398 ***; 2018 NY Slip Op 05425 ****; 2018 WL 3567352

[**1]** BRG CORPORATION AND DEMETRIOS TAMOUTSELIS, PLAINTIFFS-RESPONDENTS, v CHEVRON U.S.A., INC., TEXACO, INC., DEFENDANTS-RESPONDENTS, VALERO ENERGY CORPORATION, DEFENDANT-APPELLANT, ET AL., DEFENDANTS.

Notice: THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.
THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

Core Terms

personal jurisdiction, second amended complaint, successor liability, predecessor, successor, jurisdictional, lack of personal jurisdiction, deny a motion, contamination, costs

Counsel: **[***1]** HODGSON RUSS LLP, BUFFALO (JEFFREY C. STRAVINO OF COUNSEL), FOR DEFENDANT-APPELLANT.

KNAUF SHAW LLP, ROCHESTER (AMY K. KENDALL OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

WOODS OVIATT GILMAN LLP, ROCHESTER (GRETA K. KOLCON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Judges: PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND TROUTMAN, JJ.

Opinion

[*1495] **[**798]** Appeal from an order of the Supreme Court, Monroe County (William K. Taylor, J.), entered September 22, 2017. The order denied the motion of defendant Valero Energy Corporation to dismiss the second amended complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, and the second amended complaint is dismissed against defendant Valero Energy Corporation.

Memorandum: Plaintiffs commenced this action to recover the costs of remediating environmental contamination to their property in the City of Rochester. Plaintiffs allege that defendants, or their respective predecessors in interest, caused the contamination in the 1960s and 1970s. Valero Energy Corporation (defendant) moved to dismiss the second amended complaint against it for lack of personal jurisdiction (*see* CPLR 3211 [a] [8]). Supreme Court denied **[***2]** the motion, holding **[**799]** that plaintiffs had "provided ample evidence demonstrating the existence of facts sufficient to justify the exercise of personal jurisdiction over [defendant]," specifically that defendant was the successor in interest to a company that was itself subject to personal jurisdiction in New York. "*[A]s such*," the court continued, it "has personal jurisdiction over [defendant]" for the alleged torts of its purported predecessor (emphasis added). We now reverse.

It is undisputed that defendant, a foreign corporation with no present contacts in this State, is not subject to personal jurisdiction in New York under either CPLR 301 or 302 (a) (*see Semenetz v Sherling & Walden, Inc.*, 21 AD3d 1138, 1139-1140, 801 N.Y.S.2d 78 [3d Dept 2005], *affd on other grounds* 7 NY3d 194, 851 N.E.2d 1170, 818 N.Y.S.2d 819 [2006]). **[*1496]** Nevertheless, plaintiffs contend that personal jurisdiction

exists over defendant because it ostensibly bears successor liability for a predecessor corporation that was itself subject to personal jurisdiction in New York. The Third Department, however, expressly rejected that jurisdictional theory in *Semenetz* (*see id.* at 1140). The "successor liability rule[s]," wrote the *Semenetz* court, "deal with the concept of tort liability, not jurisdiction. When and if [successor liability] is found applicable, the corporate successor would **[***3]** be subject to liability for the torts of its predecessor in any forum having in personam jurisdiction over the successor, but the [successor liability rules] do not and cannot confer such jurisdiction over the successor in the first instance" (*id.*).

Plaintiffs do not challenge *Semenetz's* holding or its rationale, nor do they ask us to chart our own course on this novel and unsettled jurisdictional issue (*see generally Semenetz*, 7 NY3d at 199 n 2; *Edie v Portland Orthopaedics Ltd.*, 2017 U.S. Dist. LEXIS 25622, 2017 WL 945936, *2 [SD NY, Feb. 16, 2017, No. 14-Civ-7350 (NRB)]; *cf. Patin v Thoroughbred Power Boats Inc.*, 294 F3d 640, 653 [5th Cir 2002]; *Williams v Bowman Livestock Equip. Co.*, 927 F2d 1128, 1132 [10th Cir 1991]; *City of Richmond v Madison Mgt. Group, Inc.*, 918 F2d 438, 454 [4th Cir 1990]; *Bridges v Mosaic Global Holdings, Inc.*, 23 So 3d 305, 315-317 [La Ct App 2008], *cert denied* 1 So 3d 496 [La Sup Ct 2009]; *Jeffrey v Rapid Am. Corp.*, 448 Mich 178, 189-194, 529 NW2d 644, 650-653 [1995]; *Hagan v Val-Hi, Inc.*, 484 NW2d 173, 174-178 [Iowa Sup Ct 1992]). Moreover, plaintiffs do not claim that defendant qualifies for personal jurisdiction under the narrow "inherit[ed] jurisdictional status'" exception recognized in *Semenetz* (21 AD3d at 1140-1141; *see Societe Generale v Florida Health Sciences Ctr., Inc.*, 2003 U.S. Dist. LEXIS 21502, 2003 WL 22852656, *4 [SD NY, Dec. 1, 2003, No. 03-Civ-5615 (MGC)]). We therefore conclude that the court erred in denying defendant's motion to dismiss the second amended complaint against it for lack of personal jurisdiction.

The parties' remaining contentions are academic in light of our determination.

Entered: July 25, 2018

End of Document

State of New York v Ronney

Supreme Court of New York, Appellate Division, Third Department

July 19, 2018, Decided ; July 19, 2018, Entered

525858

Reporter
163 A.D.3d 1315 *; 81 N.Y.S.3d 647 **; 2018 N.Y. App. Div. LEXIS 5313 ***; 2018 NY Slip Op 05389 ****; 2018 WL 3463146

[**1]** State of New York, Respondent, v Deborah Norry Ronney, Also Known as Deborah N. Ronnen, et al., Defendants, and DR Holdings LLC, Appellant.

Core Terms

Storage, petroleum, costs, discharges, cleanup, removal, remediation, funds, damages, clean, appropriation, disputed, partial, contamination, expenditures, enrichment, recouping, replenish, expended, provides, default, double, unjust, oil

Case Summary

Overview
HOLDINGS: [1]-In plaintiff's action to recover petroleum cleanup costs from defendant owners of an oil storage facility, the supreme court held that plaintiffs were entitled to recover the $221,192 expended by the Leaking Underground Storage Tank Fund because the federal appropriation was not "compensation" for cleanup costs under Navigation Law § 193; [2]-Recovery of the disputed funds would make plaintiff whole for the cleanup costs and replenish the Leaking Underground Storage Tank Fund so that the recovered funds could be used to pay for other remediation work; [3]-Plaintiff's recoupment of the $221,192 would not amount to a double recovery, because the federal funds merely provided plaintiff with the financial means to carry out its remedial obligations under Navigation Law art. 12.

Outcome
Order affirmed.

LexisNexis® Headnotes

Environmental Law > Hazardous Wastes & Toxic Substances > Cleanup

Business & Corporate Compliance > ... > Environmental Law > Hazardous Wastes & Toxic Substances > Underground Storage Tanks

HN1[] **Cleanup**

The New York Navigation Law prohibits the discharge of petroleum and requires a discharger to immediately notify the Department of Environmental Conservation (DEC) of the discharge and undertake to contain such discharge. Navigation Law § 176 [1]; Navigation Law §§ 173 [1]; 175. Where a petroleum discharge has occurred, DEC may retain agents and contractors to clean up and remove the contamination under Navigation Law § 176 [1], [2] [a], with the cost of such cleanup efforts to be initially paid with money from the Spill Fund under Navigation Law § 180 [5] and/or the Leaking Underground Storage Tank Fund, which contains federal appropriations earmarked for remediating petroleum discharges. Pub. L. No. 111-5, 123 U.S. Stat. 115, 169; 42 U.S.C.S. § 6991b [h] [2].

Environmental Law > Hazardous Wastes & Toxic Substances > Cleanup

Business & Corporate Compliance > ... > Environmental Law > Hazardous

Wastes & Toxic Substances > Underground Storage Tanks

HN2[] **Cleanup**

The owner or operator of a major oil storage facility that discharges petroleum is strictly liable, without regard to fault, subject to certain defenses, for all cleanup and removal costs and all direct and indirect damages paid by the Spill Fund. Navigation Law § 181 [3] [a].

Headnotes/Summary

Headnotes

Environmental Conservation—Bulk Storage of Petroleum—Remediation of Petroleum Discharge

Environmental Conservation—Bulk Storage of Petroleum—State's Obligation and Ability to Seek Recovery of Funds Provided by Leaking Underground Storage Tank Fund

Counsel: **[***1]** Knauf Shaw LLP, Rochester (Alan J. Knauf of counsel), for appellant.

Barbara D. Underwood, Attorney General, Albany (Frederick A. Brodie of counsel), for respondent.

Judges: Before: Devine, J.P., Clark, Mulvey, Rumsey and Pritzker, JJ. Devine, J.P., Mulvey, Rumsey and Pritzker, JJ., concur.

Opinion by: Clark

Opinion

[648]** **[*1316]** Clark, J. Appeal from an order of the Supreme Court (Melkonian, J.), entered January 30, 2017 in Albany County, which, among other things, denied a cross motion by defendant DR Holdings LLC for partial summary judgment.

In October 2014, plaintiff commenced this action pursuant to Navigation Law article 12 alleging that defendants—as purported owners of a major oil storage facility on certain real property in the Town of Tonawanda, Erie County—were strictly liable for petroleum cleanup and removal costs in the amount of $590,194.66, the total amount expended by the New York Environmental Protection and Spill Compensation Fund (hereinafter the Spill Fund) and the Department of Environmental Conservation's American Recovery and Reinvestment Act Leaking Underground Storage Tank Fund (hereinafter the Leaking Underground Storage Tank Fund) to remediate the alleged petroleum discharges at the facility. As alleged **[***2]** by plaintiff, $369,002.66 of the total remediation costs were paid with funds from the Spill Fund, while $221,192 came from the Leaking Underground Storage Tank Fund. Defendant DR Holdings LLC (hereinafter defendant) and defendant Deborah Norry Ronnen joined issue and asserted **[****2]** cross claims against defendant Riverview Industrial Center, Inc., who ultimately defaulted.* Following discovery, plaintiff moved for a protective order suppressing certain inadvertently disclosed information. Defendant opposed the motion and cross-moved for partial summary judgment, arguing that plaintiff was not entitled to recover the $221,192 expended by the Leaking Underground Storage Tank Fund because, having received those funds by federal grant, any such award would constitute a double recovery. Supreme Court, as relevant here, denied defendant's cross motion, prompting this appeal.

HN1[] The Navigation Law prohibits the discharge of petroleum and requires a discharger to immediately notify the Department of Environmental Conservation (hereinafter DEC) of the discharge and "undertake to contain such discharge" (Navigation Law § 176 [1]; *see* Navigation Law §§ 173 [1]; 175). Where a petroleum discharge has occurred, DEC may retain agents and contractors to clean **[***3]** up and remove the contamination (*see* Navigation Law § 176 [1], [2] [a]), with the cost of such cleanup efforts to be initially paid with money from the Spill Fund (*see* **[*1317]** Navigation Law § 180 [5]) and/or the Leaking Underground Storage Tank Fund, which contains federal appropriations earmarked for remediating petroleum discharges (*see* Pub L 111-5, 123 US Stat 115, 169; 42 USC § 6991b [h] [2]). ***HN2***[] The owner or operator of a major oil storage facility that discharges petroleum is "strictly liable, without regard to fault, subject to [certain defenses], for all cleanup and removal costs and all direct and indirect damages paid by the [Spill F]und" (Navigation Law § 181 [3] [a]). Plaintiff is required to seek recovery of "[c]osts incurred by the [Spill F]und in the cleanup and removal of a discharge when the [discharger] has failed **[**649]** to promptly clean up and remove the discharge to the satisfaction of [DEC]"

*A default judgment was subsequently entered against Riverview.

(Navigation Law § 187 [1]). Plaintiff is also required to seek recovery of remediation costs incurred by the Leaking Underground Storage Tank Fund (*see* 42 USC § 6991b [h] [6]; US Envtl Protection Agency Directive No. 9610.10a at 1-2, 5).

By commencing this action, plaintiff fulfilled its obligation to seek recovery of the $221,192 provided by the Leaking Underground Storage Tank Fund to pay for the costs associated with cleaning and removing **[***4]** the alleged petroleum discharges on defendant's alleged property (*see* 42 USC § 6991b [h] [6]; US Envtl Protection Agency Directive No. 9610.10a at 1-2, 5). Although it is true that plaintiff received the $221,192 by federal grant, defendant provides no support whatsoever for its illogical assertion that plaintiff's recoupment of those funds would amount to a double recovery and, thus, plaintiff's unjust enrichment. Rather, recovery of the disputed funds would make plaintiff whole for the costs incurred in remediating the petroleum contamination and replenish the Leaking Underground Storage Tank Fund so that the recovered funds could be used to pay for other remediation work. Such replenishment is consistent with the purpose of Navigation Law article 12, which seeks "to ensure a clean environment and healthy economy for the state" (Navigation Law § 171). Additionally, as Supreme Court aptly observed, an order precluding plaintiff from recouping the Leaking Underground Storage Tank Fund expenditures simply because they were federally funded would result in the unjust enrichment of defendant—an alleged discharger of petroleum. Indeed, the result sought by defendant would grant a windfall to petroleum dischargers by providing petroleum cleanup and removal **[***5]** at a reduced rate. Contrary to defendant's contention, equitable principles do not support such a result (*see generally Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182, 944 NE2d 1104, 919 NYS2d 465 [2011]; *Kunze v Arito, Inc.*, 48 AD3d 272, 273-274, 851 NYS2d 182 [2008]; *Alpert v Shea Gould Climenko & Casey*, 160 AD2d 67, 72, 559 NYS2d 312 [1990]). Moreover, a determination barring plaintiff from **[*1318]** seeking to hold defendant strictly liable for the disputed expenditures would thwart the plain language of Navigation Law § 181, as well as the express purposes of Navigation Law article 12 (*see* **[****3]** Navigation Law § 171) and the American Recovery and Reinvestment Act of 2009 (*see* Pub L 111-5, 123 US Stat 115, 115-116).

Nor is plaintiff's recovery of the disputed funds barred by Navigation Law § 193, which provides that "no person who receives compensation for damages or cleanup and removal costs pursuant to any other state or federal law shall be permitted to receive compensation for the same damages or cleanup and removal costs under [Navigation Law article 12]." Although it is undisputed that plaintiff received the $221,192 by federal appropriation, such appropriation cannot be reasonably interpreted as "compensation for damages or cleanup and removal costs," as contemplated by Navigation Law § 193 (*see generally Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583, 696 NE2d 978, 673 NYS2d 966 [1998]; *Matter of Soriano v Elia*, 155 AD3d 1496, 1498, 66 NYS3d 331 [2017], *lv denied* 31 NY3d 913, 81 NYS3d 372, 106 NE3d 755 [2018]). Rather, the federal funds received by plaintiff under the American Recovery and Reinvestment Act of 2009 and then deposited into the Leaking Underground Storage Tank Fund merely provide plaintiff with the financial **[***6] [**650]** means to carry out its remedial obligations under Navigation Law article 12.

We further find defendant's *Drinkwater* doctrine argument to be wholly without merit (*see Applehead Pictures LLC v Perelman*, 80 AD3d 181, 191, 913 NYS2d 165 [2010]). Defendant's remaining arguments, to the extent not expressly addressed herein, have been examined and found to be similarly lacking in merit. Accordingly, because defendant failed to make a prima facie showing of entitlement to partial summary judgment reducing the amount of plaintiff's claimed damages, Supreme Court properly denied defendant's cross motion.

Devine, J.P., Mulvey, Rumsey and Pritzker, JJ., concur. Ordered that the order is affirmed, without costs.

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2019 OIL SPILL SYMPOSIUM

INDEMNITY CASE LAW

One Flint St., LLC v Exxon Mobil Corp.

Supreme Court of New York, Appellate Division, Fourth Department

February 1, 2019, Decided; February 1, 2019, Entered

1116 CA 18-00971

Reporter
169 A.D.3d 1392 *; 93 N.Y.S.3d 759 **; 2019 N.Y. App. Div. LEXIS 799 ***; 2019 NY Slip Op 00752 ****; 86 ERC (BNA) 3654; 2019 WL 408814

[**1]** ONE FLINT STREET, LLC, AND DHD VENTURES NEW YORK, LLC, PLAINTIFFS, v EXXON MOBIL CORPORATION, ET AL., DEFENDANTS.LOUIS ATKIN AND 15 FLINT STREET, INC., THIRD-PARTY PLAINTIFFS-APPELLANTS, v MARTIN T. MARKS, THIRD-PARTY DEFENDANT-RESPONDENT.

Notice: THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION. THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

Prior History: One Flint St., LLC v. Exxon Mobil Corp., 112 A.D.3d 1353, 977 N.Y.S.2d 531, 2013 N.Y. App. Div. LEXIS 8746 (N.Y. App. Div. 4th Dep't, Dec. 27, 2013)

Core Terms

third-party, Marks, summary judgment, parties, cause of action, indemnity provision, indemnification, beneficiary, conditions, declaring, indemnify, Inasmuch, Oil, contractual, obligations, plaintiffs', attorney's, modified, costs, law law law, predecessor, reinstating, prosecute, quotation, promise, intend

Case Summary

Overview
HOLDINGS: [1]-The terms of a purchase contract established that both the seller (a third-party plaintiff) and the buyer (third-party defendant) were generally aware of the subject property's historical environmental contamination, and the language in an indemnification provision expressed the parties' intent that the buyer would indemnify the seller with respect to claims regarding environmental conditions; [2]-Inasmuch as the contract did not clearly express that the parties intended the indemnification provision to cover attorney's fees, the trial court properly granted that part of the buyer's motion for summary judgment; [3]-Inasmuch as the parties' intention was not clear from the contract, third-party plaintiffs failed to establish that they were entitled to summary judgment on the issue of whether the buyer was personally liable under the contract's indemnification provision.

Outcome
Order modified and affirmed as modified.

LexisNexis® Headnotes

Contracts Law > Contract Interpretation

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

HN1[] **Contract Interpretation**

In a case of contract interpretation, the party seeking summary judgment has the burden of establishing that the construction it favors is the only construction which can be fairly placed thereon.

Contracts Law > Contract Interpretation

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Indemnity Clauses

HN2[] **Contract Interpretation**

When a party has no legal duty to indemnify, a contract requiring that the party assume such an obligation must be strictly construed in order to avoid reading into the contract the imposition of a duty that the parties did not intend.

Business & Corporate Law > ... > Corporate Formation > Preincorporation > Contracts & Transactions

HN3[] **Contracts & Transactions**

Although it is well settled that an individual who acts on behalf of a nonexistent corporation can be held personally liable, the determination whether a person is personally obligated on a pre-incorporation transaction depends on the intention of the parties.

Contracts Law > ... > Beneficiaries > Types of Third Party Beneficiaries > Intended Beneficiaries

HN4[] **Intended Beneficiaries**

In determining whether a party is an intended beneficiary, the intention of the promisee is of primary importance, since the promisee procured the promise by furnishing consideration therefor.

Counsel: **[***1]** WOODS OVIATT GILMAN LLP, ROCHESTER (GRETA K. KOLCON OF COUNSEL), FOR THIRD-PARTY PLAINTIFFS-APPELLANTS.

PHILLIPS LYTLE LLP, ROCHESTER (MARK J. MORETTI OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Judges: PRESENT: CENTRA, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

Opinion

[761]** **[*1392]** Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered January 26, 2018. The order, among other things, granted the motion of third-party defendant for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying third-party defendant's motion in part and reinstating the first and second causes of action in the third-party complaint as asserted by both third-party plaintiffs, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced the underlying action seeking indemnification from defendants for the environmental response conducted by plaintiffs to remediate two parcels of property on Flint Street in the City of Rochester (the property) that were part of the former oil refinery operations of Vacuum Oil Company, a predecessor of Exxon Mobil Corporation and ExxonMobil Oil Corporation (Exxon defendants). In **[***2]** a prior appeal, we concluded, inter alia, that the Exxon defendants are strictly liable, as dischargers under Navigation Law § 181 (1), for the cleanup and removal costs associated with the discharge of petroleum products at the property (*One Flint St., LLC v Exxon Mobil Corp.*, 112 AD3d 1353, 1354, 977 N.Y.S.2d 531 [4th Dept 2013], *lv dismissed* 23 N.Y.3d 998, 992 N.Y.S.2d 764, 16 N.E.3d 1242 [2014]). Defendants-third-party plaintiffs Louis Atkin and 15 Flint Street, Inc. (15 Flint) (collectively, third-party plaintiffs) subsequently commenced this contractual indemnification action against third-party defendant **[*1393]** Martin T. Marks seeking, among other things, a declaration that, under a contract in which Atkin conveyed the property to Marks, Marks is obligated to indemnify third-party plaintiffs for any costs incurred with respect to the environmental conditions at the property, including attorney's fees incurred in connection with defending the underlying action and in prosecuting the third-party action. Third-party plaintiffs appeal from an order that granted Marks' motion for summary judgment dismissing the third-party complaint and denied their cross motion for summary judgment on their contractual indemnification causes of action. We modify the order by denying Marks' motion in part and reinstating the first and second causes of action in the third-party **[**762]** **[***3]** complaint as asserted by both third-party plaintiffs.

As a preliminary matter, we note our difficulty in reviewing this case inasmuch as Supreme Court did not set forth its reasoning for its determination.

We agree with third-party plaintiffs that the court erred in granting Marks' motion with respect to their indemnification causes of action. ***HN1***[] In a case of contract interpretation, the "party seeking summary judgment has the burden of establishing that the construction it favors is the only construction which can be fairly placed thereon" (*Auburn Custom Millwork, Inc. v Schmidt & Schmidt, Inc.*, 148 AD3d 1527, 1529, 50 N.Y.S.3d 635 [4th Dept 2017] [internal quotation marks omitted]; *see Arrow Communication Lab. v Pico Prods.*, 206 A.D.2d 922, 922-923, 615 N.Y.S.2d 187 [4th Dept 1994]) and, here, Marks failed to meet that burden (*see generally Maven Tech., LLC v Vasile*, 147 AD3d 1377, 1378, 46 N.Y.S.3d 720 [4th Dept 2017]; *Gilpin v Oswego Bldrs., Inc.*, 87 AD3d 1396, 1398, 930 N.Y.S.2d 120 [4th Dept 2011]; *St. Mary v Paul Smith's Coll. of Arts & Sciences*, 247 AD2d 859, 859-860, 668 N.Y.S.2d 813 [4th Dept 1998]).

The purchase contract provided that a "Phase One Environmental report" had been completed on the property and that Marks, the "Buyer" of the property, was in receipt of the environmental report and "approve[d] of same." The contract further provided that Atkin was the "Seller," the property "was not in compliance with federal, state and/or local laws/ordinances," the Buyer agreed to purchase the property "as is," the "Buyer accept[ed] the property as is, with no representations or warranties as to environmental conditions" of the property, and the **[***4]** Buyer "release[d] and indemnifie[d] Seller with respect to any claims as to environmental conditions on or related to the property." Thus, the terms of the contract establish that, prior to entering into the contract, both Atkin and Marks were generally aware of the property's historical environmental **[*1394]** contamination by the Exxon defendants and their predecessor, and the language in the indemnification provision, considered in light of the contract as a whole and the circumstances of the sale of the property, clearly and unambiguously expresses the intent of the parties that the Buyer would indemnify the Seller with respect to *any* claims regarding environmental conditions related to the property (*see Bero Family Partnership v Elardo*, 122 AD3d 1279, 1280-1281, 996 N.Y.S.2d 430 [4th Dept 2014]; *see generally W.W.W. Assocs. v Giancontieri*, 77 N.Y.2d 157, 162, 566 N.E.2d 639, 565 N.Y.S.2d 440 [1990]; *M.J. Peterson Real Estate v Krantz*, 226 AD2d 1079, 1079, 641 N.Y.S.2d 942 [4th Dept 1996]).

We reject the further contention of third-party plaintiffs, however, that the indemnification language in the contract is broad enough to encompass their recovery of attorney's fees to defend the underlying action and to prosecute their third-party action. ***HN2***[] When a party has no legal duty to indemnify, a contract requiring that the party assume such an obligation must be strictly construed in order to avoid reading into the contract the imposition of a duty that the parties **[***5]** did not intend (*see Levine v Shell Oil Co.*, 28 NY2d 205, 211, 269 N.E.2d 799, 321 N.Y.S.2d 81 [1971]; *Kurek v Port Chester Hous. Auth.*, 18 NY2d 450, 456, 223 N.E.2d 25, 276 N.Y.S.2d 612 [1966]). Inasmuch as the contract does not clearly express that the parties intended that the indemnification provision cover attorney's fees (*see Niagara Frontier Transp. Auth. v Tri-Delta Constr. Corp.*, 107 AD2d 450, 453, 487 N.Y.S.2d 428 [4th Dept 1985], *affd* 65 NY2d 1038, 484 N.E.2d 1047, 494 N.Y.S.2d 695 [1985]; **[**763]** *Bero Family Partnership*, 122 AD3d at 1281), we conclude that the court properly granted that part of Marks' motion for summary judgment dismissing third-party plaintiffs' third cause of action (*see Schreiber v Cimato*, 281 AD2d 961, 962, 722 N.Y.S.2d 680 [4th Dept 2001]).

Notwithstanding our conclusion that the court erred in determining that the indemnification provision was inapplicable to the underlying action as a matter of law, we reject third-party plaintiffs' contention that they are entitled to summary judgment on the issue whether Marks is personally liable under the indemnification provision of the contract. Here, the transmittal letter that Marks' attorney sent to Atkin's attorney with the executed contract states that "Martin T. Marks" had executed the contract, the body of the contract identifies Marks as the "Buyer," and all attendant rights and obligations under the contract related to the "Buyer." The contract further provides, however, that Marks signed the contract "on behalf of an entity to be formed," and the parties now disagree whether they intended that Marks be personally bound by the contract's indemnification **[***6]** provision. ***HN3***[] Although it is well settled that "[a]n **[*1395]** individual who acts on behalf of a nonexistent corporation can be held personally liable" (*Production Resource Group L.L.C. v Zanker*, 112 AD3d 444, 445, 976 N.Y.S.2d 75 [1st Dept 2013]; *see J.N.K. Mach. Corp. v TBW, LTD.*, 155 AD3d 1611, 1612, 65 N.Y.S.3d 382 [4th Dept 2017]; *see also Bay Ridge Lbr. Co. v Groenendaal*, 175 AD2d 94, 96, 571 N.Y.S.2d 798 [2d Dept 1991]; *Clinton Invs. Co., II v Watkin*, 146 AD2d 861, 863, 536 N.Y.S.2d 270 [3d Dept 1989]), the determination "[w]hether a person is personally obligated on a preincorporation transaction depends on the intention of the parties" (*Universal Indus. Corp. v Lindstrom*, 92 AD2d 150, 151, 459 N.Y.S.2d 492 [4th Dept 1983]). Inasmuch as the

intention of the parties is not clear from the contract, third-party plaintiffs failed to establish that they are entitled to summary judgment on the issue of whether Marks is personally liable under the contract's indemnification provision (*see generally Rotuba Extruders v Ceppos*, 46 NY2d 223, 231, 385 N.E.2d 1068, 413 N.Y.S.2d 141 [1978]; *Brinson v Kulback's & Assoc.*, 296 AD2d 850, 852, 744 N.Y.S.2d 621 [4th Dept 2002]) **[****2]** .

We also reject third-party plaintiffs' contention that they are entitled to summary judgment on the issue whether 15 Flint is a third-party beneficiary under the contract. We agree with third-party plaintiffs, however, that the court erred insofar as it granted Marks' motion to the extent that he sought summary judgment dismissing the first and second causes of action in the third-party complaint as asserted by 15 Flint. ***HN4***[] In determining whether a party is an intended beneficiary, "the intention of the promisee is of primary importance, since the promisee procured the promise by furnishing consideration **[***7]** therefor" (*Drake v Drake*, 89 AD2d 207, 209, 455 N.Y.S.2d 420 [4th Dept 1982]). Here, questions of fact exist whether Atkin, "the promisee[,] intend[ed] to give [15 Flint,] the beneficiary[,] the benefit of the promised performance" (*DeLine v CitiCapital Commercial Corp.*, 24 AD3d 1309, 1311, 807 N.Y.S.2d 247 [4th Dept 2005] [internal quotation marks omitted]; *see generally Fourth Ocean Putnam Corp. v Interstate Wrecking Co.*, 66 NY2d 38, 44, 485 N.E.2d 208, 495 N.Y.S.2d 1 [1985]).

Finally, in light of our determination, we do not address the contention of third-party plaintiffs that the court erred in failing to declare the rights of the parties under the contract when it granted Marks' motion for summary judgment dismissing the third-party complaint. Although it generally is improper for a court **[**764]** to simply grant a motion seeking dismissal of a declaratory judgment cause of action rather than declaring the rights of the parties with respect thereto (*see Olinsky v CNA Ins. Cos.*, 261 AD2d 886, 886, 689 N.Y.S.2d 815 [4th Dept 1999]; *Tigue v Commercial Life Ins. Co.*, 219 AD2d 820, 820-821, 631 N.Y.S.2d 974 [4th Dept 1995]), a judgment declaring the rights and obligations of the parties **[*1396]** under the contract would be premature inasmuch as there are issues of material fact whether Marks is personally liable to Atkin for contractual indemnification and whether 15 Flint is an intended third-party beneficiary under the contract.

Entered: February 1, 2019

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2019 OIL SPILL SYMPOSIUM

DISCOVERY CASE LAW

221 E. 50th St. Owners, Inc. v Efficient Combustion & Cooling Corp.

Supreme Court of New York, New York County

December 10, 2018, Decided

155137/2017

Reporter
2018 N.Y. Misc. LEXIS 6004 *; 2018 NY Slip Op 33160(U) **

[1]** 221 EAST 50TH STREET OWNERS, INC., Plaintiff, - against - EFFICIENT COMBUSTION and COOLING CORP. and PETROLEUM TANK CLEANERS LTD., Defendants. Index No. 155137/2017

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

oil, oil tank, discovery, oil spill, tank, affirmation, spoliation, alleges, cross motion, inspect, partial summary judgment, citations, opposes, testing, notice, moves, cause of action, discharging, Petroleum, summary judgment motion, doctrine of common law, default judgment, summary judgment, issue of fact, declaratory, property's, sanctions, triable, aff

Judges: **[*1]** HON. PAUL A. GOETZ, J.S.C.

Opinion by: PAUL A. GOETZ

Opinion

Decision and Order

HON. PAUL A. GOETZ, J.:

This action arises from an oil leak in a tank located in plaintiff's basement. Plaintiff alleges that defendant Efficient Combustion and Cooling Corp. (ECC), and its subcontractor, defendant Petroleum Tanks Cleaners Ltd. (PTC), improperly drained the plaintiff's oil tank and failed to inspect it and test it before it was refilled, thereby causing an oil spill. In the complaint, plaintiff asserts causes of action under Navigation Law §§ 176 and 181, as well as claims for breach of contract and negligence. Plaintiff also seeks a declaratory judgment declaring that defendants are wholly responsible for the costs associated with cleaning the oil spill. Plaintiff now moves for an order pursuant to CPLR 3212 for partial summary judgment as to liability against defendants and for a default judgment against defendant PTC. ECC opposes plaintiff's motion and cross-moves to strike plaintiff's complaint pursuant to CPLR 3126 and the common law doctrine of spoliation. PTC also opposes plaintiff's motion and cross-moves for an order pursuant to CPLR 3126 and the common law doctrine of spoliation to dismiss plaintiff s complaint and all cross claims against it and pursuant **[*2]** to CPLR 2004 and 3012 (d) compelling plaintiff to accept late service of its, answer.

[2] BACKGROUND**

Plaintiff owns the building and property located at 221 East 50th Street, New York, New York (the property). The property's heating system operated on #4 fuel oil, which was stored in a 4,000-gallon tank located in the basement level (*see* plaintiff's notice of motion, Clayton aff, 4). On December 1, 2015, plaintiff entered into a written agreement with ECC (the Agreement) convert the property's existing heating system to a system capable of operating on both natural and #2 fuel oil (*see* plaintiff's notice of motion, Santamarina affirmation, exhibit E [Agreement]). The purpose of the conversion was to make the property's heating system more friendly and energy efficient (*see* Clayton aff, ¶ 5).

ECC hired PTC as a subcontractor to drain the #4 oil from the property's oil tank, then clean, test, and inspect the tank (*see* Clayton aff, ¶ 7). On or about May 26, 2016, PTC drained oil tank of #4 oil (*see id.*, ¶ 10). Then, an oil supplier pumped 2,000 gallons of #2 oil into the (*id.*, ¶ 11). On or about May 31, 2016, ECC observed that there had been an oil spill as all #2 oil had leaked from the oil tank into the soil **[*3]** and other parts of the property (*see id.*, ¶ 12; Santamarina affirmation,

exhibit G). The oil spill spread to the adjacent property located at 825 Avenue, New York, New York (*see* Clayton aff, ¶ 12). Plaintiff alleges that it conducted cleanup and removal of the oil spill, and has incurred substantial costs and (*see* Clayton aff, ¶ 17; Santamarina affirmation, exhibit I).

On June 5, 2017, plaintiff commenced this action against defendants. On January 17, PTC filed a third-party complaint against Original Energy (Original), which is the entity filled the oil tank with 2,000 gallons of #2 oil before the oil spill (*see* PTC's notice of cross Larkin affirmation, exhibit D). PTC's third-party complaint alleges that Original filled the tank, which caused it to leak (*see id*).

[3] DISCUSSION**

Plaintiff's Summary Judgment Motion

'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case' (*Santiago v Filstein*, 35 AD3d 184, 185-186, 826 N.Y.S.2d 216 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 476 N.E.2d 642, 487 N.Y.S.2d 316 [1985]). The burden then shifts to the motion's opponent "to present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228, 812 N.Y.S.2d 12 [1st Dept 2006], citing **[*4]** *Zuckerman v City of New York*, 49 NY2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325, 817 N.Y.S.2d 282 [1st Dept 2006]). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231, 385 N.E.2d 1068, 413 N.Y.S.2d 141 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226, 750 N.Y.S.2d 1 [1st Dept 2002]).

Plaintiff moves for partial summary judgment as to liability on its first cause of action pursuant to section 181 (1) of the Navigation Law which provides that "[a]ny person who has discharged petroleum shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained" (Nav. Law § 181). "Discharge" is defined, in relevant part, as "any intentional or unintentional action or omission resulting in the releasing, spilling [or] leaking . . . of petroleum . . ." (Nav. Law § 172[8]). A party will be strictly liable as a discharger under section 181(5) if they "set in motion the events which resulted in the discharge" (*see Domermuth Petroleum Equip. & Maintenance Corp. v. Herzog & Hopkins, Inc.*, 111 AD2d 957, 957, 959, 490 N.Y.S.2d 54 [3d Dept 1985]). Property owners are considered dischargers for purposes of the Navigation Law because they are presumed to have **[**4]** control over "potential sources of contamination" (*see State v Green*, 96 NY2d 403, 407, 754 N.E.2d 179, 729 N.Y.S.2d 420 [2001]). The Court of Appeals recognizes that "[a]lthough even faultless owners of contaminated lands have been deemed 'dischargers' for purposes of their own section 181 (1) liability, where they have not caused or contributed to (and thus are not 'responsible for') the discharge, **[*5]** they should not be precluded from suing those who have actually caused or contributed to such damage" (*White v Long*, 85 NY2d 564, 569, 650 N.E.2d 836, 626 N.Y.S.2d 989 [1995]).

Defendants oppose plaintiff's motion arguing that plaintiff's motion is premature as no discovery has been conducted. "A party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment" (*Amico v Melville Volunteer Fire Co.*, 39 AD3d 784, 785, 832 N.Y.S.2d 813 [2d Dept 2007] [internal citations omitted]). "A party opposing summary judgment is entitled to obtain further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated" (*Matter of Fasciglione*, 73 AD3d 769, 770, 899 N.Y.S.2d 645 [2d Dept 2010] [internal citations omitted]; *see also Liggins v Daly H Associates*, 278 AD2d 107, 718 N.Y.S.2d 46 [1st Dept 200]). "This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion" (*Nicholson v Bader*, 83 AD3d 802, 802, 920 N.Y.S.2d 682 [2d Dept 2011] [internal quotation marks and citations omitted]). Furthermore, it would be premature to grant summary judgment on the issue of liability when no depositions have been held (*see Hirsch v Greenridge Assocs., LLC*, 26 A.D.3d 411, 412, 809 N.Y.S.2d 557 [2d Dept 2006]).

Here, it is undisputed that no discovery had been conducted prior to plaintiff filing its motion for partial summary judgment. Plaintiff filed its complaint on June 5, 2017 (*see* Santamarina affirmation, exhibit A). ECC filed its answer on July 10, 2017 (*see* Santamarina affirmation, **[*6]** exhibit B). On the same date, ECC served on plaintiff discovery demands, including **[**5]**

but not limited to a demand for a verified bill of particulars, a notice for discovery and inspection, a notice of deposition, and combined demands (*see* ECC's notice of cross motion, Bieder affirmation, exhibit A). Plaintiff did not respond to ECC's discovery demands and instead filed a motion for partial summary judgment.

Moreover, there are questions of fact as to which party "set in motion the events which resulted in the discharge" and /or "actually caused or contributed to [the] damage" (*Domermuth*, 111 AD2d at 957; *White v Long*, 85 NY2d at 569). Defendant FCC has raised triable issues or fact with respect to its role in discharging the oil and in whether plaintiff caused or contributed to the oil spill. For example, ECC alleges that it was not responsible for the delivery of #2 oil nor was it at the property between the date of oil delivery on. May 26, 2016 and the date the oil spill was discovered on May 31, 2016 (*See* Bieder affirmation, exhibit C). ECC further alleges that the superintendent of the property called ECC on May 31, 2016 to determine why the boiler was not running (*see id.*). No discovery has been provided as to what occurred at the property **[*7]** during the period between the oil delivery and the discovery of the spill, what maintenance was performed, what responsibilities did the superintendent or anyone else have to inspect and maintain the area where the oil tank was located, who delivered the oil, what precautions were taken to deliver the oil, and what did any representative of plaintiff do to confirm that the oil was secured upon delivery.

Defendant PTC has also raised triable issues of fact with respect to its role and plaintiff's role in discharging the oil. PTC alleges that when it left the tank on May 26, 2016, the tank had just passed pressure sensor testing, water sensor testing, and acoustic testing under criteria set by the U.S. Environmental Protection. Agency (*see* PTC's notice of cross motion, Larkin affirmation, exhibit E). Plaintiff submitted an unsworn report by Alan Fidellow, an engineer of **[**6]** Levine Fidellow Consulting Inc., in which Fidellow opined that PTC should be held accountable for the oil spill because it "should have properly tested and inspected the tank prior to the introduction of #2 oil" (*see* Santamarina affirmation, exhibit J at 2). Since Fidellow's report is not in admissible form it may not be considered **[*8]** (*Accardo v. Metro-North R.R.*, 103 A.D.3d 589, 959 N.Y.S.2d 696 [1st Dep't 2010]). Even if Fidellow's report had been in admissible form, he did not identify how he reached the conclusion that PTC should be held accountable for the spill as he did not identify any procedures for cleaning and testing oil tanks or describe how PTC departed from any procedures nor did he cite to any codes or statutes or explain how PTC may have violated them.

PTC further alleges that between the time it performed the cleaning and testing and the oil spill, ECC, Original, and plaintiff had access to the oil tank. However, without any discovery or depositions. PTC does not have any information about what may have occurred after it tested the oil tank. In addition, PTC filed a third-party complaint against Original, the company that filled the oil tank with #2 oil and which may have information pertinent to the cause of the oil spill. Since there are triable questions of fact, plaintiff's branch of the motion for partial summary judgment on its first cause of action pursuant to section 181 of Navigation Law must be denied.

Plaintiff further argues that even if it was partially responsible for the oil spill, it would still be entitled to partial summary judgment on its second cause of action pursuant to section 176 (8) of the Navigation Law. Section 176 (8) provides **[*9]** that "every person providing cleanup, removal of discharge of petroleum or relocation of persons pursuant to this section shall be entitled to contribution from any other responsible party" (Nav. Law § 176[8]). However, because no discovery was completed before plaintiff filed its motion, whether plaintiff is entitled **[**7]** to contribution cannot be determined at this time. Therefore, this branch of plaintiff s motion must also be denied.

Plaintiff also moves for partial summary judgement as to liability on its third cause of action for breach of contract. Plaintiff alleges that ECC breached their contract by failing to properly install, service, maintain, inspect or handle plaintiff's heating system. "The elements of a breach of contract claim are formation of a contract between the parties, perfonnance by the plaintiff, the defendant's failure to perform, and resulting damage" (*Flomenbaum v New York Univ.*, 71 AD3d 80, 91, 890 N.Y.S.2d 493 [1st Dept 2009], *affd* 14 NY3d 901, 929 N.E.2d 403, 903 N.Y.S.2d 339 [2010]). However, plaintiff fails to establish a breach as the Agreement does not state that ECC is responsible for the oil tank. Section 18 of the Agreement states, "It is understood and agreed that this agreement. . . does not include any repairs or alterations to the Owners existing apparatus which specifically includes but not **[*10]** limited thereto . .. fuel tanks" (Agreement, § 18). Section 24 of the Agreement provides as follows:

> "IT IS UNDERSTOOD AND AGREED BY AND BETWEEN THE OWNER AND [ECC] THAT THIS

> CONTRACT DOES NOT INCLUDE THE REMOVAL. REPLACEMENT, UPGRADE OR REPAIRING OF THE EXISTING OIL TANK. IT IS FURTHER UNDERSTOOD AND AGREED THAT THE OWNER SHALL (BE) SOLELY RESPONSIBLE FOR THE TANK IN IT[S] CONDITION"

(Agreement, § 24). The plain language of the Agreement states that the owner, here plaintiff, is responsible for the condition of the oil tank, and that ECC is not responsible for the oil tank. Therefore, that portion of plaintiff s motion for partial summary judgment as against ECC for breach of contract must be denied.

[8]** Plaintiff also moves for summary judgment as against defendants on its fourth and fifth causes of action for common law negligence and declaratory judgement respectively. On a cause of action for negligence that is premised on acts performed by a defendant pursuant to a contract, the plaintiff must establish that the defendant violated a legal duty separate and independent of the contract (*see Clark-Fitzpatrick, Inc. v Long Island Rail Road Co.*, 70 NY2d 382, 516 N.E.2d 190, 521 N.Y.S.2d 653 [1987]). "Declaratory judgment is a remedy that may be granted as to the rights and other legal relations of **[*11]** the parties to a justiciable controversy whether or not further relief is or could be claimed" (CPLR 3001). Plaintiff argues that there are no disputed issues of fact to be tried as to the negligence and declaratory judgment claims. However, as previously stated, there are issues of fact and the motion is premature as no discovery had been completed before plaintiff filed its motion. Therefore, that portion of plaintiff's motion for partial summary judgement on its negligence and declaratory judgment causes of action as against defendants must be denied.

Cross-Motions For Sanctions

Pursuant to CPLR 3126 and the common law doctrine of spoliation. ECC cross moves for an order striking plaintiff's complaint and PTC cross moves for an order dismissing the action and all cross claims as against it. "Spoliation is the destruction of evidence" (*Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 173, 666 N.Y.S.2d 609 [1st Dept 1997]). "Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, the responsible party may be sanctioned under CPLR 3126" (*Samaroo* v *Bogopa Serv. Corp.*, 106 AD3d 713, 714, 964 N.Y.S.2d 255 [2d Dept 2013] [internal citations and quotation marks omitted]). "Spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before **[*12]** his or her adversary had an opportunity to inspect them" (*Abar v Freightliner Corp.*, 208 AD2d 999, 1001, 617 N.Y.S.2d 209, [3d Deptl994] [internal citations **[**9]** omitted]; *see also Hennessey v Restaurant Assoc., Inc.*, 25 AD3d 340, 807 N.Y.S.2d 349 [1st Dept 2006]). "The Supreme Court has broad discretion in determining what, if any, sanction should be imposed for spoliation of evidence" (*Lentz v Nic's Gym, Inc.*, 90 AD3d 618, 618, 933 N.Y.S.2d 875 [2d Dept 2011]).

In support of their respective cross motions, defendants argue that the property's oil tank constitutes a key piece of evidence that plaintiff destroyed before defendants had an opportunity to inspect it, which completely deprived them of the ability to defend themselves in this action. "The party requesting sanctions for spoliation has the burden of demonstrating that a litigant intentionally or negligently disposed of critical evidence, and fatally compromised its ability to prove its claim or defense" (*Morales v City of New York*, 130 AD3d 792, 793, 13 N.Y.S.3d 548 [2d Dept 2015] [internal citations and quotation marks omitted]). "However, striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct and, thus, the courts must consider the prejudice that resulted from the spoliation to determine whether such drastic relief is necessary as a matter of fundamental fairness" (*id.* at 794 [internal citations and quotation marks omitted]). Here, it would be premature for the court to impose the sanctions requested **[*13]** without giving plaintiff and defendants an opportunity for discovery to see whether plaintiff's destruction of the tank actually deprives defendants of their ability to defend themselves in this action. Therefore, the branches of the cross motions of ECC and PTC based on CPLR 3126 and the common law doctrine of spoliation are denied without prejudice.

Plaintiff's Motion for a Default Judgment and PTC's Cross-Motion to Compel Acceptance of its Answer

Plaintiff moves for a default judgment as against PTC for its failure to serve an answer. PTC opposes plaintiff's motion for a default judgment as against it and cross-moves pursuant to CPLR 2004 and CPLR 3012 (d) to compel plaintiff to accept late service of its answer. CPLR 2004 states "[e]xcept where otherwise expressly prescribed by law, the court may extend the **[**10]** time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause

shown, whether the application for extension is made before or after the expiration of the time fixed." CPLR 3012 (d) provides "[u]pon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of **[*14]** reasonable excuse for delay or default." PTC has provided a reasonable excuse for its delay. PTC alleges that it never received a copy of the complaint because although plaintiff mailed a copy to 236 Butler Street Brooklyn, NY 11217, PTC did not occupy this premises after plaintiff commenced this action on June 5, 2017 (*see* Larkin affirmation, exhibit K, ¶ 19). PTC further alleges that it learned of the action through ECC's counsel, submitted its answer, and plaintiff never rejected the answer. Also. plaintiff has not opposed this branch of PTC's cross motion. Therefore, that portion of plaintiff's motion for a default judgment as against PTC must be denied and that portion of PTC's cross motion pursuant to CPLR 2004 and CPLR 3012 (d) to compel plaintiff to accept late service of its answer must be granted.

Any remaining arguments not addressed above have been considered and found to be unpersuasive.

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff's summary judgment motion is denied in its entirety; and it is further

ORDERED that the cross motions of defendant Efficient Combustion and Cooling Corp. pursuant to CPLR 3126 and the common law doctrine of spoliation to strike the complaint are denied without prejudice; **[*15]** and it is further

ORDERED that defendant Petroleum Tanks Cleaners Ltd.'s cross motion pursuant to CPLR 2004 and CPLR 3012 (d) to compel plaintiff to accept late service of its answer is granted, and the motion is otherwise denied; and it is further

ORDERED that the parties shall appear for a compliance conference on January 17, 2019 at 9:30 AM. 80 Centre St. Room 320.

Dated: December 10, 2018

ENTER:

/s/ Paul A. Goetz

J.S.C.

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2019 OIL SPILL SYMPOSIUM

BREACH OF REMEDIATION AGREEMENT CASE LAW

Henderson Harbor Mariners' Mar., Inc. v Upstate Natl. Bank

Supreme Court of New York, Appellate Division, Fourth Department

November 9, 2018, Decided; November 9, 2018, Entered

909 CA 17-02166

Reporter
166 A.D.3d 1477 *; 89 N.Y.S.3d 488 **; 2018 N.Y. App. Div. LEXIS 7550 ***; 2018 NY Slip Op 07555 ****; 2018 WL 5875592

[**1]** HENDERSON HARBOR MARINERS' MARINA, INC., AND MARLA COHEN, PLAINTIFFS-RESPONDENTS, v UPSTATE NATIONAL BANK, DEFENDANT-APPELLANT. (APPEAL NO. 2.)

Notice: THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.
THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

Prior History: Henderson Harbor Mariners' Mar., Inc. v. I.F.S. Lisbon, 159 A.D.3d 1447, 70 N.Y.S.3d 109, 2018 N.Y. App. Div. LEXIS 1819, 2018 NY Slip Op 1825 (Mar. 16, 2018)

Core Terms

plaintiffs', damages, breach of agreement, inter alia, remediation, cause of action, lost profits, contamination, petroleum, parties, summary judgment, written notice, seek damages, completing, disclosure, diligence, site, approximation, contemplation, obligations, speculation, third-party, unanimously, inducement, prejudiced, affiliate, deficient, economist, arguendo, awarding

Case Summary

Overview
HOLDINGS: [1]-The seller was not entitled to summary judgment on the buyers' claim for breach of the remediation agreement because the buyers raised issues of fact with respect to whether they provided written notice to the seller as a condition precedent to suit and whether the seller failed to perform its obligations under the agreement; [2]-The trial court did not abuse its discretion in denying the seller's motion to preclude the testimony of the buyers' expert forensic economist on the ground that the buyers' expert disclosure was insufficient because the seller failed to establish that there was an intentional or willful failure to disclose by the buyers and that it was prejudiced by the buyers' allegedly deficient response to its demand for expert disclosure.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Contracts Law > ... > Damages > Foreseeable Damages > Lost Profits

HN1[] **Foreseeable Damages, Lost Profits**

Damages resulting from the loss of future profits are often an approximation.

Counsel: **[***1]** BARCLAY DAMON LLP, SYRACUSE (ALAN R. PETERMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

AMDURSKY, PELKY, FENNELL, WALLEN, P.C., OSWEGO (TIMOTHY J. FENNELL OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Judges: PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ.

Opinion

[489]** **[*1477]** Appeal from a judgment of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered November 3, 2017. The judgment, among other things, awarded plaintiffs money damages as against defendant.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for, inter alia, breach of a Remediation Agreement (Agreement) pursuant to which defendant took responsibility for addressing petroleum contamination that existed at a marina. Plaintiffs purchased the marina in 2002 from an affiliate of defendant; defendant served as the mortgage lender for the transaction. At the time of the sale, all parties were aware that the marina had been contaminated by petroleum spills and that the New York State Department of Environmental Conservation (DEC) would require remediation of the site. Thus, as part of the sale, and as an inducement to plaintiffs to **[***2]** **[*1478]** purchase the property, the parties executed the Agreement. The Agreement required defendant to enter into a Voluntary Cleanup Agreement (VCA) with the DEC to remediate the environmental damage from the petroleum contamination "as soon as possible" and to **[**490]** "diligently pursue" the VCA's tasks "through completion." The Agreement also required plaintiffs to give 30 days' written notice to defendant prior to seeking damages for defendant's failure to perform.

Defendant did not complete the remediation work until May 2014. In their cause of action for breach of the Agreement, plaintiffs alleged that defendant's lack of diligence in completing the remediation caused plaintiffs significant economic damages in the form of, inter alia, lost profits. Defendant moved for summary judgment seeking, inter alia, dismissal of the cause of action for breach of the Agreement, and Supreme Court denied the motion. We dismissed a prior appeal from the order denying that motion inasmuch as the order was subsumed in the subsequently entered judgment (*Henderson Harbor Mariners' Mar., Inc. v I.F.S. Lisbon*, 159 AD3d 1447, 70 N.Y.S.3d 109 [4th Dept 2018]).

The matter proceeded to trial and the jury returned a verdict, inter alia, finding defendant liable to plaintiffs for breach of the Agreement and awarding plaintiffs **[***3]** damages of $1.1 million for, among other things, plaintiffs' lost profits. Defendant appeals from the judgment entered on the jury's verdict.

We reject defendant's contention that the court erred in denying its motion for summary judgment dismissing plaintiffs' cause of action for breach of the Agreement. We conclude that, contrary to defendant's contention, the second amended complaint adequately states a cause of action for breach of the Agreement **[****2]** (*see generally JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803, 893 N.Y.S.2d 237 [2d Dept 2010]). Moreover, even assuming, arguendo, that defendant met its initial burden on the motion, we conclude that the court properly determined that plaintiffs raised issues of fact with respect to whether they provided written notice to defendant as a condition precedent to suit and whether defendant failed to perform its obligations under the Agreement (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]). We reject defendant's contention that the Agreement limited plaintiffs' damages to the cost of third-party claims arising from the site contamination and the cost of corrective action. The Agreement contained no such limitation of damages provision (*cf. Metropolitan Life Ins. Co. v Noble Lowndes Int'l*, 192 A.D.2d 83, 87, 600 N.Y.S.2d 212 [1st Dept 1993], *affd* 84 NY2d 430, 643 N.E.2d 504, 618 N.Y.S.2d 882 [1994]).

[*1479] Contrary to defendant's further **[***4]** contention, the court did not abuse its discretion in denying defendant's motion pursuant to CPLR 3126 to preclude the testimony of plaintiffs' expert forensic economist on the ground that plaintiffs' expert disclosure was insufficient (*see generally Rivera v Montefiore Med. Ctr.*, 28 NY3d 999, 1002, 41 N.Y.S.3d 454, 64 N.E.3d 274 [2016]). Defendant failed to establish that there was an intentional or willful failure to disclose by plaintiffs and that it was prejudiced by plaintiffs' allegedly deficient response to its demand for expert disclosure (*see Sisemore v Leffler*, 125 AD3d 1374, 1375, 3 N.Y.S.3d 530 [4th Dept 2015]).

We reject defendant's contention that the trial court erred in denying its motion to set aside the verdict and for judgment in its favor on the issue of, inter alia, the damages awarded for plaintiffs' lost profits. Contrary to defendant's contention, we conclude that plaintiffs' lost profits were within "the contemplation of both parties, at the time they made the contract, as the probable result of the **[**491]** breach of it" (*Whitmier & Ferris Co. v Buffalo Structural Steel Corp.*, 104 AD2d 277, 279, 482 N.Y.S.2d 927 [4th Dept 1984], *affd* 66 NY2d 1013, 489 N.E.2d 1288, 499 N.Y.S.2d 386 [1985]; *see Ashland Mgt. v Janien*, 82 NY2d 395, 403, 624 N.E.2d 1007, 604 N.Y.S.2d 912 [1993]). Although ***HN1***[↑] "[d]amages

resulting from the loss of future profits are often an approximation" (*Ashland Mgt.*, 82 NY2d at 403), we further conclude that plaintiffs established their damages here with reasonable certainty and without undue speculation (*see id.*).

We have reviewed defendant's remaining contentions and conclude that they **[***5]** lack merit.

Entered: November 9, 2018

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2019 OIL SPILL SYMPOSIUM

EXPERT TESTIMONY CASE LAW

2019 WL 76573
Only the Westlaw citation is currently available.
United States District Court, W.D. New York.

51 WEBSTER ST., INC., Plaintiff
v.
ATLANTIC RICHFIELD COMPANY, Defendant.

16-CV-468-MJR
|
Signed 12/27/2018
|
Filed 01/02/2019

Attorneys and Law Firms

Robert E. Knoer, The Knoer Group, PLLC, Buffalo, NY, for Plaintiff.

Sadhanand David Devaprasad, Devaprasad PLLC, Albany, NY, for Defendant.

DECISION AND ORDER

MICHAEL J. ROEMER, United States Magistrate Judge

***1** Pursuant to 28 U.S.C. § 636(c), the parties consented to have a United States Magistrate Judge conduct all proceedings in this case. (Dkt. No. 25). Before the Court are cross-motions by plaintiff 51 Webster Street, Inc. and defendant Atlantic Richfield Company to strike and exclude expert testimony. (Dkt. Nos. 35, 38, 39, 40, 42). For the following reasons, the Court denies both plaintiff's and defendant's motions to strike and exclude expert testimony.

PROCEDUREAL HISTORY

This matter was commenced in New York State Supreme Court, County of Niagara, with the filing of a summons and verified complaint, on or about April 28, 2016. (Dkt. No. 1). Plaintiff initially sued Sunoco, Inc. (R&M), Sunoco, Inc. and BP p.l.c. ("BP"). *Id.* BP removed the case to the Western District of New York on June 8, 2016. (*Id.*) A stipulation was filed on July 14, 2016 stating that BP is the parent company of Atlantic Richfield Company ("Atlantic Richfiled"). (Dkt. No. 7). The parties agreed that the complaint would be amended by removing BP and inserting in its place Atlantic Richfield Company, and by removing Sunoco, Inc. (*Id.*). Plaintiff filed an amended complaint on August 1, 2016 reflecting these changes. (Dkt. No. 8). The Court held a preliminary pretrial conference on October 4, 2016 and issued a Case Management Order, setting forth various discovery and motion deadlines, on October 6, 2016. (Dkt. Nos. 21 and 22). Discovery commenced and the Court granted a number of extensions of time, by request of the parties, to complete discovery and file dispositive motions. (Dkt. Nos. 27, 28, 30). On June 19, 2018, the parties stipulated to the dismissal, with prejudice, of defendant Sunoco, Inc. (Dkt. No. 31). Atlantic Richfield is now the only defendant remaining in the case.

On August 30, 2018, plaintiff filed a motion to strike and exclude the testimony of defense experts Dr. Gregory Douglas and Michael Teeling. (Dkt. No. 35). On September 17, 2018, defendant filed a cross-motion to strike and exclude the testimony of plaintiff expert Jason Brydges. (Dkt. Nos. 38, 39). Plaintiff and defendant filed responses to the motions

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(Dkt. Nos. 40, 42) and the Court heard oral argument as to both motions on October 29, 2018. At the start of oral argument, the Court noted that a jury trial had not been requested in the complaint, amended complaint, answer or affidavits filed in connection with the notice of removal. [1] Counsel indicated that they were unsure as to whether their clients sought a jury trial. The Court instructed counsel to confer with their clients and each other, and to submit a letter stating whether they requested a jury trial. On November 27, 2018, counsel for plaintiff sent a letter to the Court confirming that a jury demand had not been filed and stating that neither party intended to seek a jury trial. Thus, the trial in this matter will proceed as a non-jury trial before this Court.

RELEVANT FACTS

***2** This case involves a contiguous piece of property located at 51 Webster Street and 68 Main Street, Tonawanda, New York (the "Site"). [2] For reference, the parties divide the Site into three parcels, which they refer to as the west parcel, the central parcel, and the east parcel. Over the years, the central and east parcels housed gas stations, and a greasing pit or "lubritorium" was located on the central parcel. Underground storage tanks for gasoline have been found on the central and east parcels. From 1957 to 1967, Richfield Oil Corporation, the predecessor to Atlantic Richfield, leased the central and east parcels and operated a gas station there. Eventually, the northern half of the east parcel merged with 68 Main Street, which is now known as the Riviera Theatre. The southern half of the east parcel eventually merged with 51 Webster Street. Plaintiff currently owns 51 Webster Street and operates a medical office and parking lot there. The complaint alleges that during the time period Richfield Oil occupied the property, the tanks, pumps or piping leaked and discharged petroleum into the soil and ground water.

In 2011, the New York State Department of Environmental Conservation ("DEC") oversaw the remediation of ground contamination found at 68 Main Street. During that process, the DEC determined that contamination continued off of the property at 68 Main Street and onto the property at 51 Webster Street. Pursuant to the DEC's request, plaintiff conduced its own investigation of petroleum impacted soils and groundwater at 51 Webster Street. In 2017, plaintiff remediated contamination found in the southern portion of the east parcel. Plaintiff alleges that Richfield Oil caused the contamination during their prior lease of the property and, as a result, defendant is liable for the remediation costs plaintiff has and will continue to incur there. The causes of action asserted in the complaint include violations of the New York State Navigation Law and common law claims of intentional continued trespass, public nuisance, private nuisance, indemnification, contribution and declaratory relief.

DISCUSSION

Rules Governing Excerpt Testimony

The Federal Rules of Evidence permit opinion testimony by experts when the expert is "qualified as an expert by knowledge, skill, experience, training, or education," and "if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine the fact in issue." *See* Fed. R. Evid. 702. To that end, expert testimony is admissible where: (1) the testimony is based on sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the expert has reliably applied the principles and methods to the facts of the case. *Id.*; *Nimely v. City of New York*, 414 F.3d 381, 396-97 (2d Cir. 2005). If the expert's testimony does not rest on traditional scientific methods, the court may permit testimony "where a proposed expert witness bases her testimony on practical experience rather than scientific analysis." *Davis v. Carroll*, 937 F.Supp.2d 390, 412 (SDNY 2013).

In light of the liberal admissibility standards of the Federal Rules of Evidence, exclusion of expert testimony is warranted only when the court finds "serious flaws in reasoning or methodology." *In re Fosamax Prods. Liab. Litig.*, 645 F.Supp.2d 164, 173 (SDNY 2009). Otherwise, if an expert's testimony falls within "the range where experts might reasonably differ,"

the duty of determining the weight and sufficiency of the evidence on which the expert relied lies with the trier of fact. *Kumho Tire, Co. v. Carmichael*, 526 U.S. 137, 153, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). The trial court's role is to "act as a gatekeeper with respect to expert testimony, properly admitting only such testimony as would help the jury understand the evidence or determine a fact at issue." *Hickey v. City of N. Y.*, 173 F. App'x 893, 894 (2d Cir. 2006); *citing Daubert*, 509 U.S. at 592-93, 113 S.Ct. 2786. However, when the judge acts as the trier of fact, the court "has greater flexibility in satisfying its gatekeeping function vis a vis expert testimony ... given the absence of the need to protect juries from dubious expert evidence." *Bank of N. Y. Mellon Trust Co. v. Solstice ABS CBO II, Ltd.*, 910 F.Supp.2d 629, 639 (SDNY 2012). To that end, courts have found that resolving *Daubert* questions at a pretrial stage is "generally less efficient than hearing the evidence [since] if the objections are well-taken, the testimony will be disregarded in any event." *Victoria's Secret Stores Brand Mgmt., Inc. v. Sexy Hair Concepts, LLC*, 2009 WL 959775, at *6 n. 3 (SDNY Apr. 8, 2009). *See also In re Salem*, 465 F.3d 767, 777 (7th Cir. 2006) ("[W]here the factfinder and the gatekeeper are the same, the court does not err in admitting the evidence subject to the ability later to exclude it or disregard it if it turns out not to meet the standard of reliability established by Rule 702.").

Plaintiff's Motion to Exclude the Testimony of Dr. Gregory Douglas

***3** Dr. Gregory Douglas has a Ph.D. in Chemical Oceanography from the University of Rhode Island. (Dkt. No. 35-4. Pg. 23). His field of expertise is environmental forensic chemistry and the "development and application of advanced analytical chemistry methods for the study of fate and effects of petroleum hydrocarbons and coal tar in marine sediments, soil, waste, waste water, petroleum products and biodata." (*Id.*). Douglas' *curriculum vitae* states that he participated in a number of oil spill studies for the Government and private industry. (*Id.*). In addition, he has published and presented extensively on how to identify and reliably monitor the degradation of petroleum products and crude oil in sediment and soil. (*Id.*). Douglas has testified in United States and international courts as to petroleum related environmental chemistry issues. (*Id.*). Here, Douglas conducted a chemical and forensic analysis of samples of water and soil sediments from the Site. He also analyzed sludge and sediments found in underground tanks removed from the Site. (*Id.* at pg. 2). His objective was to ascertain the type of petroleum products found at the Site and, to the extent possible, determine the age of the underlying petroleum products and dates of release. (*Id.*). It is anticipated that Douglas will offer the following opinions based upon this testing and his expertise: (1) petroleum products in waste oil Tank #5 indicate a simple, pre-alkylate era gasoline; (2) gasoline residuals associated with Tank #1 and Tank #2 sludge/sediment samples are a simple, pre-alkylate era gasoline; (3) the forensic chemistry results indicate that product releases likely occurred during the tank removal process; and (4) based upon site history, forensic chemistry and underground storage tank history, the gasoline residuals identified at the Site were more likely than not manufactured before Richfield Oil leased the site in 1957. In sum, Douglas opines that the residuals found and tested contain simple, non-alkylate gasoline. He will further opine that by 1957 the majority of the gasoline used in the United States was complex, alkylate gasoline. Therefore, he concludes that it is unlikely that Richfield Oil, which controlled the property between 1957 and 1967, produced the gasoline that caused the contamination.

Plaintiff argues that Douglas is not qualified to render an opinion that the gasoline residuals identified at the Site were more likely than not manufactured before Richfield Oil leased the Site because that opinion is based on a non-expert understanding of the historical distribution of gasoline. Specifically, plaintiff argues that Douglas is not an expert on the economics of the petroleum industry or the marketing of petroleum products in the United States. The Court rejects this argument. According to the expert report, Douglas is not anticipated to opine about the sale and marketing trends of gasoline in the United States from the 1950's until the present. Instead, he is anticipated to offer an opinion as to when the contamination occurred based upon his analysis of Site samples, his knowledge of the chemical composition and refining of gasoline, and his understanding as to the historical use of additives, specifically alkylates, in gasoline. Douglas is qualified to offer this opinion testimony. As permitted by Rule 702 and relevant case law, his expert report references studies of refinery production and sales documents that describe when gasoline containing alkylates was sold in the United States. *See Gussack Realty Co. v. Xerox Corp.*, 224 F.3d 85, 94-95 (2d Cir. 2000) ("An expert may rely on

data that she did not personally collect."); *Northbrook NY, LLC v. Lewis & Clinch, Inc.*, 09-CV-0792, 2012 U.S. Dist. LEXIS 134699, 2012 WL 4338740 (NDNY Sept. 20, 2012) ("[E]xtrapolation is an acceptable method that ... experts ... use in making their conclusion."). Moreover, any dispute as to Douglas' credentials and his ability to render an opinion as to the time period of the contamination based upon the presence of alkylates in the samples may be fully explored during cross-examination and will be considered by the Court in determining what weight, if any, to give Douglas' testimony. *See McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2d Cir. 1995) (Disputes as to an expert's credentials, faults in the expert's use of scientific methods and procedures, and lack of supporting textual authority for the expressed expert opinion go not to the opinion's admissibility, but to its weight.).

Plaintiff also argues that the findings are not reliable because Douglas: (1) did not include samples from the northern portion of the east parcel; (2) did not include samples from all available underground storage tanks; and (3) did not take into consideration an Energy Information Administration report indicating that numerous refineries sold pre-alkylate gas during the time period of the Richfield Oil lease. Plaintiff's criticisms are matters for cross-examination rather than reasons to disqualify or strike Douglas' anticipated testimony. In *Dolomite Products Co. Inc. v. Amerada Hess Corp.*, the Court permitted an expert to testify that a sewer bedding or backfill located on a property facilitated the flow of containments, despite plaintiff's objections that the expert did not take groundwater and soil samples from either site, failed to consider certain data and provided no topographical information. 01-CV-6530, 2004 WL 1125154 (WDNY May 19, 2004). The Court found that those criticisms were "better addressed on cross-examination rather than by [plaintiff's] motion to exclude such testimony." *Id.* Further, it makes little sense to exclude this testimony prior to the bench trial. At trial, the Court, as the trier of fact, may consider all of Douglas' opinions and analysis in light of the arguments made on cross-examination and any contrary evidence or testimony offered by plaintiff. There is no danger here that the jury will be prejudiced by inaccurate scientific testimony or unsound methods. *See New York v. Solvent Chem. Co.*, 83-CV-1401, 2006 U.S. Dist. LEXIS 65595 (WDNY Sept. 12, 2006) (internal citations and quotations omitted) (noting that the "primary purpose of the holdings in *Daubert* and *Kumho Tire* is to protect juries from technical evidence of dubious merit [and] this is not a prevailing concern where, as in this case, the court functions as the trier of fact.").

***4** Finally, plaintiff argues Douglas should not be permitted to testify that the gasoline sold during the Richfield Oil lease did not cause the contamination at 51 Webster Street because that is the ultimate legal issue to be determined by the trier of fact. "This circuit is in accord with other circuits in requiring exclusion of expert testimony that expresses a legal conclusion." *Hygh v. Jacobs*, 961 F.2d 359, 363 (2d Cir. 1992). Accordingly, courts exclude expert testimony that "provide[s] legal opinions, legal conclusions, or interpret[s] legal terms; those roles fall solely within the province of the court." *Roundout Valley Ctr. Sch. Dist. v. Coneco Corp.*, 321 F.Supp.2d 469, 480 (NDNY 2004). The dispute need not be resolved at this time. Douglas may testify about, *inter alia*, (1) the chemical make-up of gasoline in general and of the samples he tested, (2) the use of alkylates and other additives in gasoline over time, and (3) his opinion, based upon his knowledge and testing, that the gasoline he found and studied was not likely to have been sold during the time period of the Richfield Oil lease. It is the Court's role to determine the ultimate legal issues presented in this case, including defendant's liability under the Navigation Law. To that extent that Douglas, or any other witness, seeks to offer a legal conclusion, that testimony will either be excluded at the time of trial or ignored by the Court in rendering its ultimate determination. There is no risk of jury prejudice here necessitating the Court to strike or exclude testimony prior to trial.

Plaintiff's Motion to Exclude the Testimony of Michael J. Teeling

Michael Teeling is a principal geologist with twenty-seven years of experience in the investigation and remediation of petroleum and non-petroleum sites. (Dkt. No. 35-5, pg. 6). He has a B.A. degree in Geology from the State University of New York at Buffalo and an M.S. degree in Geology from the University of Kansas. (*Id.*). He has "executed industry standard protocols for the removal of underground storage tanks both for worker and public health and safety and for the protection of the environment." (*Id.*). Teeling has also managed and executed site investigations and evaluations for petroleum refineries, terminals, pipelines and gasoline service stations. (*Id.*). It is anticipated that Teeling will offer the following opinions based upon his investigation and his expertise: (1) Richfield Oil's lease interest is limited to 1957 through 1967 and confined to the central and east parcels; (2) the available records do not confirm that Richfield Oil

installed or owned underground storage tanks at the central and east parcels at any point in time; (3) there is no evidence of petroleum discharges during the time period that Richfield Oil leased the central and east parcels; (4) plaintiff's failure to conduct due diligence prior to its 2017 remedial activities resulted in the rupture of the water lines and adverse impact on the Site; (5) plaintiff's actions and omissions during the remedial activities in 2017 resulted in petroleum discharges; and (6) gasoline residuals and samples from Tanks 1, 2 and 5 are derived from a simple, pre-alkylate era gasoline manufactured before the Richfield Oil lease term. (*Id.* at pg. 7). Teeling's opinions are based on his review of: (1) legal and discovery documents; (2) environmental reports and data; (3) publicly available information including real estate documents; and (4) information about the geological and hydrogeological setting at the Site. (*Id.* at pg. 8). His opinions are also based on his physical inspection and sampling of the Site. (*Id.*).

Plaintiff argues that Teeling's testimony should be excluded because he did not consider the entire parcel, failed to consider the direction of the groundwater flow, and failed to consider the effects of the prior remediation. Based upon the same case law and reasoning discussed above with respect to Douglas' testimony, these arguments go to the weight of the testimony rather than its admissibility. The Court, as the trier of fact, may consider all of this testimony "while guided by the *Daubert*/*Kumho Tire* standards of relevance and reliability and aided by the parties' '[v]igorous cross-examination [and the] presentation of contrary evidence." *Solvent Chem. Co.*, 2006 U.S. Dist. LEXIS 65595, *3; *quoting* *Daubert*, 509 U.S. at 596, 113 S.Ct. 2786. *See also Joseph S. v. Hogan*, 06 Civ. 1042, 2011 U.S. Dist. LEXIS 76762, 2011 WL 2848330 (EDNY July 15, 2011) ("Indeed, without the risk of poisoning the jury with misleading expert testimony of limited probative value ... the Court can take in evidence freely and separate helpful conclusions from ones that are not grounded in reliable methodology.").

***5** Plaintiff further argues that Teeling should not be able to offer testimony that the composition of the gasoline found at the underground tanks is simple, pre-alkylate gasoline that was manufactured before the Richfield Oil lease because that opinion is essentially a repetition of Douglas' opinion. The Court has reviewed the expert reports and it does not appear that Teeling intends to merely restate the conclusions offered by Douglas. Teeling studied the Site history, the removal of the underground storage tanks, and the remediation process. He will opine that: (1) there is a lack of evidence that Richfield Oil installed, owned or was otherwise responsible for the underground storage tanks removed during the 2017 remediation and; (2) that this opinion is consistent with Douglas' forensic findings as to the composition of the gasoline. *Federal Housing Finance Agency v. Nomura Holding America, Inc.*, 11-CV-6201, 2015 WL 629316, *2 (SDNY Feb. 13, 2015) ("The explicit reliance on the analysis of another testifying expert is entirely proper.") There is no reason, at this time, to exclude Teeling's opinion on the basis that it is repetitive of Douglas.

Finally, plaintiff argues that Teeling's anticipated testimony that the 2017 remediation was inconsistent with industry standards and caused a release of contamination should be excluded because it is irrelevant and unduly prejudicial. Plaintiff also argues that the photographs taken by Teeling are prejudicial because they appear to show that large amounts of containments were left in the tanks, when the tanks are actually filled with water. Testimony or evidence that the 2017 remediation process caused contamination is likely relevant to the issues of contributory negligence and the allocation of damages. Further, the Court's determination as to the relevance of this and other evidence is best made at the time of the bench trial, in light of the specific reasons for which the evidence is offered and the other evidence presented. *See Commerce Funding Corp. v. Comprehensive Habilitation Servs.*, 01 Civ. 3796, 2004 U.S. Dist. LEXIS 17791, *18-19 ("While the Rules of Evidence apply with equal force in jury and non-jury trials, courts often apply the relevance standard with little rigor during a bench trial [and] all doubts at a bench trial should be resolved in favor of admissibility."). Likewise, the Court is not concerned as to the potential prejudicial nature of this evidence or testimony. Rule 403 of the Federal Rules of Evidence states that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by [*inter alia*] unfair prejudice." *See* Fed. R. Evid. 403. In the context of a bench trial, there is no danger that photographs or testimony about errors made during the remediation will prejudice a jury. The Court, as the trier of fact, will objectively consider this evidence in light of the points made on cross-examination and all of the other evidence presented. *See BIC Corp. v. Far Eastern Source Corp.*, 23 F. App'x 36, 39 (2d Cir. 2001) ("admission

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of evidence in a bench trial is rarely ground for reversal, for the trial judge is presumed to be able to exclude improper inferences from his or her own decision analysis.").

Defendant's Motion to Exclude the Testimony of Jason Brydges

Jason Brydges has a B.S. degree and an M.S. degree in Environmental Engineering. (Dkt. No. 40, Exh. L). He has experience determining sources of contamination and conducting environmental remediation, specifically with respect to underground storage tanks, dating back to 1995. (*Id.*). Brydges owns a company that specializes in environmental site remediation. (*Id.*). In preparing his expert report, Brudges inspected the Site himself and reviewed substantial documents related to the Site and the remediations. (*Id.*).

In his report, Brydges identified ten underground storage tanks that were installed in the central and east parcels of the Site over the years. (Dkt. No. 35-14, pg. 5). He explains that most of the recently remediated contamination was found on portions of the Site that were leased to Richfield Oil from 1957 through 1967. (*Id.* at pg. 6). Brydges also opines that the Site was remediated in two separate phases and that the remediation included a significant portion of the total area owned by Richfield Oil. He explains that, as a result of groundwater flow, the remediation can only be fully understood by considering both the southern and northern portion of the east parcel. (*Id.* at 7-11, Dkt. No. 40-1). He will offer an opinion that, based on the historic records, including land title records, as well as the location and type of tanks and remediated contamination, the contamination can be attributed to the operations controlled by Richfield Oil or its predecessors. (Dkt. No. 53-14, pg. 11). He is also anticipated to offer an opinion, contrary to Teeling, that the 2017 remediation was appropriate as requested under New York state law and conducted in accordance with the rules, regulations and directions of the DEC. (*Id.*, Dkt. No. 40-1).

***6** Defendant argues that Brydges testimony should be precluded because it will not assist the trier of fact, is not based on sufficient facts or data, and is not the product of reliable principles and methods. Specifically, defendant argues that Brydges did not conduct any type of forensic age-dating analysis of the contamination where the petroleum release occurred and that his analysis of the remediation lacks regulatory or factual support. Defendant also points to Brydges' deposition testimony that he does not know specifically which, if any, tanks were installed, owned or operated by Richfield Oil during the lease term. Defendant's criticism of the anticipated testimony goes to its weight and not its admissibility. Indeed, defendant may explore problems in Brydges' scientific methods, the lack of factual basis for his conclusions or other faults in his analysis during cross-examination. For the same legal principals and reasons discussed above with respect to the requests to strike or exclude the testimony of Douglas and Teeling, defendant's motion to strike or exclude Brydges' testimony is likewise denied. [3]

CONCLUSION

For the foregoing reasons, both plaintiff's and defendant's cross-motions to strike and exclude expert testimony are denied. (Dkt. Nos. 35, 38). Counsel shall appear before the Court on January 11, 2019 at 12:00 p.m. for a meeting to set a trial date.

SO ORDERED.

All Citations

Slip Copy, 2019 WL 76573

Footnotes

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1 "On any issue triable of right by jury, a party may demand a jury trial by serving the other parties with a written demand ... no later than 14 days after the last pleading directing to the issue is served." Fed. R. Civ. P. 38(b). Here, the civil cover sheet, which was completed by defendant during the removal process, indicated that a jury trial had been demanded. However, "a civil cover sheet that has not been served with the complaint naturally gives no notice of a jury demand necessary to meet the requirements of Rule 38(b)." *Favors v. Coughlin*, 877 F.2d 219, 220 (2d Cir. 1989).

2 The facts discussed herein have been taken from the amended complaint, pleadings, expert reports, motions and all other filings and representations made by the parties.

3 Defendant also moved to strike the portion of plaintiff's counsel's declaration in support of the motion to exclude that included a picture of 68 Main Street on the basis that it incorrectly depicted the location of five underground storage tanks removed from the Site in 2014. It is anticipated that, at trial, each party will offer photographs and maps depicting the location of the underground storage tanks as well as the remediation process. The Court will consider all of the photographs, maps and other related evidence at that time. The map included in plaintiff's counsel's declaration has not been relied on by the Court in determining the instant motions and there is no basis to strike it.

End of Document

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2019 OIL SPILL SYMPOSIUM

ENFORCEMENT CASE LAW

2018 N.Y. ENV LEXIS 34

New York Department of Environmental Conservation

September 12, 2018, Decided; September 12, 2018, Report Issued

DEC Case No. R6-20170926-55DEC Case No. R6-20170926-55

NY Department of Environmental Conservation Decisions

Reporter
2018 N.Y. ENV LEXIS 34 *

In the Matter of Alleged Violations of Article 12 of the Navigation Law by: LAURIE LAFRANCE, Respondent.

Core Terms

staff, drum, navigate, petroleum, default, default judgment, civil penalty, lake, pre-hearing, region, site, summary report, dollar, contractor, route, notice of the hearing, five hundred, spill, sworn, contaminated, photograph, notice, soil

Opinion By: **[*1]** SEGGOS

Initial Decision:

Lisa A. Wilkinson, Administrative Law Judge

DEFAULT SUMMARY REPORT

DEC Case No. R6-20170926-55

Appearances:

- Thomas S. Berkman, Deputy Commissioner and General Counsel (Randall C. Young, **[*7]** Regional Attorney, of counsel), for staff of the Department of Environmental Conservation

- No appearance for respondent Laurie LaFrance.

Procedural History

Respondent Laurie LaFrance (respondent) is the owner of property located at 7190 State Route 3 in the hamlet of Cranberry Lake, Town of Clifton, St. Lawrence County (Site) . On May 3, 2018, staff of the New York State Department of Environmental Conservation (Department) served respondent with a notice of hearing and complaint dated May 3, 2018 (complaint), alleging violations of sections 173 and 176 of the New York Navigation Law for discharging petroleum at the Site and failing to contain the discharge.

The complaint seeks an order of the Commissioner (1) finding respondent in violation of Navigation Law §§ 173 and 176, and (2) imposing a civil penalty in the amount of one thousand five hundred dollars ($ 1,500),

apportioned as follows: $ 500 for violating Navigation Law § 173 by discharging petroleum; and $ 1,000 for violating Navigation Law § 176 by failing to contain the discharge. 3

Department staff served the notice of hearing and complaint on respondent at her residence at 299 Aviation Road, Queensbury, New **[*8]** York 12804-1028 by certified mail on May 3, 2018 (*see* affidavit of April L. Sears, sworn to May 10, 2018 [Sears Aff]). The notice of hearing and complaint were delivered on May 7, 2018, and the receipt was returned signed by Colin Fraser, whom Mr. Young attests, upon information and belief, is respondent's son-in-law (affidavit of Randall C. Young sworn to June 26, 2018 [Young affidavit], PP 14-16). The notice of hearing informed respondent that an answer was due within 20 days, and that a pre-hearing conference was scheduled for May 23, 2018 at the Department's offices at 317 Washington Street, Watertown, New York at 1:30 p.m. Respondent did not appear at the pre-hearing conference and did not answer the complaint within 20 days as required pursuant to 6 NYCRR 622.4(a).

Pursuant to section 622.15 of 6 NYCRR, Department staff moved for a default judgment on June 27, 2018, and served respondent with a notice of motion and motion dated the same day (Motion). Department staff's motion papers included a notice of motion and motion, an affidavit from Randall C. Young, Region 6 Regional Attorney, with two exhibits, and an affidavit of service (affidavit of service of April Sears, **[*9]** sworn to June 27, 2018). Staff also submitted a copy of the notice of hearing and complaint to which eight exhibits were attached and an affidavit of service (affidavit of April Sears, sworn to May10, 2018). A list of exhibits is attached to this report.

Ms. LaFrance did not respond to Department staff's motion. As set forth below, this report recommends that the Commissioner grant Department staff's motion.

Default Provisions

In accordance with section 622.4(a) of 6 NYCRR, a respondent upon whom a complaint has been served must file an answer to the complaint within twenty days of the date of such service. Upon a respondent's failure to answer a complaint or failure to appear for a pre-hearing conference or hearing, Department staff may make a motion to an ALJ for a default judgment. Such motion must contain: (i) proof of service upon respondent of the notice of hearing and complaint; (ii) proof of respondent's failure to appear or to file a timely answer; and (iii) a proposed order (*see* 6 NYCRR 622.15[b][1] - [3]).

As the Commissioner has held, "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences **[*10]** that flow from them [citations omitted]" (*Matter of Alvin Hunt, d/b/a Our Cleaners*, Decision and Order of the Commissioner, July 25, 2006, at 6). In addition, in support of a motion for a default judgment, staff must "submit some proof of facts sufficient to support the claims charged in a complaint" (*Matter of Greene Technologies Inc.*, Ruling of the Commissioner, November 10, 2016, at 3; *see also Matter of American Auto Body & Recovery Inc.*, Ruling of the Commissioner, July 2, 2015, at 3; *Matter of Queen City Recycle Center, Inc.*, Decision and Order of the Commissioner, December 12, 2013, at 3). Staff is required to support their motion for a default judgment with enough facts to enable the ALJ and the Commissioner to determine that staff has a viable claim (*see Matter of Samber Holding Corp.*, Order of the Commissioner, March 12, 2018, at 1 [citing Woodson v Mendon Leasing Corp., 100 NY2d 62, 70-71 (2003)] *see also* State v Williams, 44 AD3d 1149, 1151-1152 [3d Dept 2007] and CPLR 3215[f]). Department staff's motion papers are sufficient to state a claim and to support staff's request for a determination **[*11]** of liability on the part of respondent and an assessment of a civil penalty.

Findings of Fact

1. Respondent Laurie LaFrance owns the property located at 7190 State Route 3, Cranberry Lake, in the Town of Clifton, St. Lawrence County (Site) (Young Affidavit P 4; complaint, Exhibits 1 and 2.)

2. The Site is located between State Highway 3 and the waters of Cranberry Lake (Young Affidavit P 5) and is the site of a former marina (complaint P 4).

3. A photograph of a drum located on the Site on or about July 19, 2017 shows oil coating the sides of the drum and staining the ground at the base of the drum (complaint P 11).

4. As of July 22, 2017, waste oil was leaking from a drum and oily rags left outside at the site (complaint P 10).

5. By letter dated July 25, 2017, Matthew W. Duffany, an Environmental Engineer in the Department's Region 6 office, advised respondent that the contents of one drum located on respondent's property behind a chain link fence were "leaking onto the ground," and that she was responsible as the owner of the property for having the contents of the drums on the property characterized, properly disposing of the drums, and addressing any associated impacts **[*12]** to ground water if applicable. Mr. Duffany also advised respondent that if she failed to complete the work to remove the drums and address any impacts, the Department would retain a contractor and seek reimbursement. (Complaint, Exhibit 4.)

6. By letter dated September 1, 2017, Mr. Duffany advised respondent that Department staff had made several attempts to contact her at the phone number she provided and asked that she call staff to discuss the requirements to remediate the situation. Mr. Duffany reiterated that the State would seek reimbursement if it incurred costs. (Complaint, Exhibit 5.)

7. Department staff referred the matter for enforcement on September 25, 2017 after respondent failed to remove the drum and contaminated soils or grant Department staff access to the property (Young Affidavit P 10).

8. Randall Young, Region 6 Regional Attorney, advised respondent by letter dated October 11, 2017, that the Division of Environmental Remediation had referred the matter for enforcement, provided a consent order for respondent to execute, and requested a response by October 27, 2017 (complaint Exhibit 6).

9. Service of the notice of hearing and complaint dated May 3, 2018 was made **[*13]** by certified mail and was received by Colin R. Fraser on May 7, 2018 (Sears Affidavit P B and C).

10. The notice of hearing notified respondent that a pre-hearing conference was scheduled for May 23, 2018 at 1:30 p.m. at the Department's Region 6 offices located at 317 Washington Street, Watertown, New York (Young Affidavit P 17). Respondent failed to answer the complaint, and did not appear at the pre-hearing conference. (*Id.* PP 19 and 20.)

11. Service of the motion for a default judgment was made by first class mail on June 27, 2018 (affidavit of April Sears sworn to June 27, 2018 [Sears Aff 2] P B). As of the date of this report, respondent has not replied to the motion.

12. Randall Young, Region 6 Regional Attorney, submitted an affidavit in support of the motion for default judgment. He is personally familiar with the proceedings in this matter and has seen the property at 7190 State Route 3, Cranberry Lake, Town of Clifton, New York while spending time in the hamlet of Cranberry Lake and boating on Cranberry Lake. Mr. Young is aware of remedial actions taken at the Site and other facts relevant to this matter through discussions with Department staff and review of the Department's **[*14]** files. (Young Affidavit P 4.)

13. Respondent failed to answer the complaint, failed to appear for the pre-hearing conference on May 23, 2018, and failed to respond to Department Staff's motion for a default judgment (Young Affidavit PP 18-20).

Discussion

Section 173 of the Navigation Law prohibits the discharge of petroleum. Section 176 of the Navigation Law provides that any person discharging petroleum in the manner prohibited by Section 173 shall immediately undertake to control such discharge. An owner of contaminated property who has control over activities occurring on the property, and reason to believe that petroleum products are stored there, may be liable as a discharger (*see* State of New York v Green, 96 NY2d 403, 407 [2001]). Proof of fault is not a predicate to liability (*see id.*).

Department staff's motion was accompanied by an affidavit from Randall Young, Region 6 Regional Attorney. Mr. Young is familiar with the property, the remedial work done at the property and the Department's files in this matter. He has also discussed the matter with Department staff (Young Affidavit P 4). According to Mr. Young, a business known **[*15]** as Emporium Marina formerly operated at the Site and, upon information and belief, respondent's

husband William LaFrance operated Emporium Marina prior to his death in January 2010 (Young Affidavit P 5). Thus, respondent had reason to know that drums were stored on the Site and that the drums contained petroleum products.

Department staff's motion papers include letters from Department staff to respondent that demonstrate staff's attempts to resolve the alleged violations. Department staff wrote to respondent at her residence on July 25, 2017, requesting that she remove the leaking drum and contaminated soils, or provide Site access to Department staff and State contractors so they could address the discharge (*see* complaint, Exhibit 4). Staff wrote a second letter to respondent on September 1, 2017, after she failed to remove the drum and contaminated soils, or grant staff access to the Site (*see* complaint, Exhibit 5). Staff noted that it was under the impression, based on an initial conversation with respondent, that respondent was working with an environmental contractor and that staff had made several subsequent, unsuccessful attempts to contact respondent at the phone **[*16]** number she provided. On October 11, 2017, Mr. Young sent respondent a proposed consent order alleging violations of the Navigation Law (*see* complaint Exhibit 6). Respondent did not execute the consent order. On or about December 4, 2017, a contractor hired by respondent removed the drum and contaminated soils from the Site (*see* Young Affidavit P 12; complaint, Exhibit 8).

Department staff's papers included a photograph of the drum at the Site as of July 19, 2017 and a similar photograph taken on September 14, 2017 showing no changes in Site conditions (*see* complaint, Exhibits 3 and 7). Department staff also submitted a copy of the report dated March 1, 2018 prepared by NRC NY Environmental Services. Inc. for Laurie LaFrance for NYSDEC Spill Number 1704032 (*see* complaint, Exhibit 8). According to the report, NRC provided spill closure services, including the remediation of petroleum impacted soil, at the former Emporium Marine located at 7190 State Route 3 in Cranberry Lake on December 4, 2017 (complaint, Exhibit 8 at 1). The report explains that a spill occurred as a result of a 55-gallon poly drum failure, and approximately one-gallon of petroleum was released (**[*17]** *Id.*).

Department staff's submissions establish that a discharge of petroleum occurred at the Site, and that respondent failed to contain the discharge in a timely manner. As the owner of the property where the discharge occurred, respondent is a responsible party under the Navigation Law (State of New York v Green, 96 NY2d 403, 407). The record also shows that Department staff served respondent with the notice of hearing and complaint and that respondent failed to file an answer to the complaint and failed to appear at a pre-hearing conference scheduled for May 23, 2017. In addition, respondent was served with the motion for default judgment on June 27, 2018 and failed to respond.

Section 192 of the Navigation Law provides for a civil penalty of up to $ 25,000 per day for each violation of the provisions of article 12 of the Navigation Law. Mr. Young states in his affidavit that in his experience, Department staff would generally seek a penalty substantially greater than $ 1,500 for a discharge of petroleum to the environment and provided a copy of DEE-22 showing that a spill to a sump, which is not a discharge to the environment, has a penalty **[*18]** range of $ 2,500 to $ 7,500 (Young Affidavit P 21). Mr. Young states the proposed penalty takes into account mitigating factors, including that the marina operated by respondent's husband at the Site is no longer in business, and that respondent had the contractors take actions beyond addressing the violations alleged by staff, including the removal of drums and a tank that were not subject to this enforcement action (*Id.* P 22). A penalty is warranted here given the effort Department staff had to expend over several months to have respondent remediate the spill. The requested penalty is far below the statutory penalty and below the penalty ranges in DEE-22 for less serious violations. Department staff is entitled to a default judgment in this matter pursuant to section 622.15 of 6 NYCRR.

Recommendations

Based upon the foregoing, the Commissioner should issue an order:

1. Granting Department staff's motion for default, and finding respondent in default pursuant to 6 NYCRR 622.15;

2. Holding respondent in violation of section 173 of the Navigation Law for discharging petroleum at the Site;

3. Holding respondent in violation of section 176 of the Navigation Law for failing **[*19]** to contain the discharge; and

4. Directing respondent to pay a civil penalty of one thousand five hundred ($ 1,500) dollars.

/s/

Lisa A. Wilkinson

Administrative Law Judge

Dated: Albany, New York

August 8, 2018

Opinion

Basil Seggos, Commissioner

ORDER

DEC Case No. R6-20170926-55

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department) that respondent Laurie LaFrance violated Navigation Law §§ 173 and 176 as a result of the discharge of petroleum from a drum on property that respondent owns at 7190 State Route 3 in the hamlet of Cranberry Lake, Town of Clifton, St. Lawrence County (site) . The site is the location of a former marina situated contiguous to Cranberry Lake.

Administrative Law Judge (ALJ) Lisa A. Wilkinson of the Department's Office of Hearings and Mediation Services was assigned to this matter and prepared the attached default summary report, which I adopt as my decision in this matter, subject to my comments below.

As set forth in the ALJ's default summary report, respondent failed to file an answer to the complaint served by Department staff in this matter and failed to appear at a pre-hearing conference scheduled for May 23, 2018 (see Default Summary Report at 4 [Finding of Fact No. 10]).

On June 27, 2018, Department staff served a motion for default judgment upon **[*2]** respondent. An affidavit in support of the motion submitted by Region 6 Regional Attorney Randall C. Young sworn to June 26, 2018 (Young Affidavit) was included with staff's papers.

As a consequence of respondent's failure to answer or appear in this matter, the ALJ recommends that Department staff's motion for a default judgment be granted (see Default Summary Report at 6). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15. The pleadings and the papers submitted with, and in support of the motion, provide enough facts to enable me to determine that petroleum was discharged at the site and that respondent failed to adequately contain the discharge until considerably after the discharge occurred (see e.g. Young Affidavit PP 8-12). As noted in the Draft Summary Report, as of July 22, 2017, waste oil was leaking from a drum and oily rags were left outside at the site (see Default Summary Report, at 3 [Finding of Fact No. 4]; see also Complaint dated May 3, 2018, P 10).

Section 192 of the Navigation Law establishes a penalty of twenty-five thousand dollars ($ 25,000) for each offense of the Navigation Law. Department staff seeks a civil penalty of **[*3]** five hundred dollars ($ 500) for violating Navigation Law § 173 (which prohibits the discharge of petroleum) and one thousand dollars ($ 1,000) for violating Navigation Law § 176 (which obligates a person discharging petroleum to immediately undertake to contain the discharge), for a total civil penalty of one thousand five hundred dollars ($ 1,500).

Department counsel states that Department staff would generally seek a higher penalty for a discharge of petroleum to the environment, but staff took into account several mitigating factors in this case. These factors include that the marina at the site which had been operated by respondent's late husband is no longer in business, the discharge was "comparatively small," respondent engaged a contractor to remediate the site (albeit after the enforcement action was commenced), and respondent's contractor undertook remedial actions that went beyond addressing the violations alleged by staff ("including the removal of drums and a tank that were not subject to this enforcement action") (see Young Affidavit P 22; Default Summary Report at 6). Based on this record, the requested penalty of one thousand five hundred dollars ($ 1,500) is authorized **[*4]** and appropriate.

Although staff has requested that the civil penalty be paid within fifteen (15) days of the service of this order, based on my review of this matter I am providing some additional time for the payment of the civil penalty. I hereby direct that respondent submit the civil penalty to the Department within forty-five (45) days of service of this order upon respondent.

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

1. Department staff's motion for a default judgment pursuant to 6 NYCRR 622.15 is granted. By failing to answer the complaint or appear at the pre-hearing conference, respondent Laurie LaFrance waived her right to be heard in this matter.

2. Based on the pleadings and papers submitted with and in support of Department staff's motion, respondent Laurie LaFrance is determined to have violated Navigation Law § 173 as a result of a discharge of petroleum on property she owns located at 7190 State Route 3 in the hamlet of Cranberry Lake, Town of Clifton, St. Lawrence County, New York and Navigation Law § 176 by failing to contain the discharge.

3. Within forty-five (45) days of service of this order upon **[*5]** respondent Laurie LaFrance, respondent shall pay a civil penalty in the amount of one thousand five hundred dollars ($ 1,500) by certified check, cashier's check, or money order made payable to the New York State Department of Environmental Conservation.

4. The penalty payment shall be sent to the following address:

New York State Department of Environmental Conservation

Region 6

317 Washington Street

Watertown, New York 13601-3787

Attn. Randall Young, Esq.

5. Any questions or other correspondence regarding this order shall be addressed to Randall Young, Esq. at the address indicated in paragraph IV of this order.

6. The provisions, terms, and conditions of this order shall bind respondent Laurie La France, and her agents, successors and assigns in any and all capacities.

/s/
Basil Seggos
Commissioner

Dated: Albany, New York
September 12, 2018

Attachment

EXHIBIT LIST

MATTER OF LAURIE LAFRANCE

DEC CASE NO. R6-20170926-55

Affidavit of Randall C. Young

The following exhibits were attached to the affidavit:

1. Exhibit RY-1 - DEE-22: Petroleum Bulk Storage Inspection Enforcement Policy Penalty Schedule
2. Exhibit RY-2 - Proposed Order Complaint dated May 3, 2018

[*6]

The following exhibits were attached to the complaint:

1. Exhibit 1 - Real property deed for 7190 State Route 3, town of Clifton, St. Lawrence County, Liber 1028, page 688
2. Exhibit 2 - 2017 St. Lawrence County Real Property Tax roll for town of Clifton
3. Exhibit 3 - Photograph of drum at Site
4. Exhibit 4 - Letter from Matthew Duffany, P.E. Environmental Engineer, New York State Department of Environmental Conservation to Laurie LaFrance dated July 25, 2017
5. Exhibit 5 - Letter from Matthew Duffany, P.E. Environmental Engineer, New York State Department of Environmental Conservation to Laurie LaFrance dated September 1, 2017
6. Exhibit 6 - Letter from Randall C. Young, Regional Attorney, Region 6, New York State Department of Environmental Conservation to Laurie LaFrance dated October 11, 2017
7. Exhibit 7 - Photograph dated September 14, 2017 of site and uncontained drum
8. Exhibit 8 - Former Emporium Marine Spill Closure Services Report dated March 1, 2018.

NY Department of Environmental Conservation Decisions

End of Document

2018 N.Y. ENV LEXIS 31

New York Department of Environmental Conservation

September 05, 2018, Decided; August 28, 2018, Report Issued

DEC Case No. PBS.2-609724.5.2018

NY Department of Environmental Conservation Decisions

Reporter
2018 N.Y. ENV LEXIS 31 *

In the Matter of the Alleged Violation of Article 17 of the Environmental Conservation Law (ECL) of the State of New York and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), by PRINCE HALL FOUNDATION, INC., Respondent.

Core Terms

registration, staff, default judgment, renew, motion for default, default, notice of the hearing, expire, bulk storage, petroleum, commissioner's order, civil penalty, ten thousand dollars, pre-hearing, days of service, summary report, street, adjudication hearing, notice, villa

Opinion By: [*1] SEGGOS

Initial Decision:

Maria E. Villa, **[*8]** Administrative Law Judge

DEFAULT SUMMARY REPORT

DEC Case No. PBS.2-609724.5.2018

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent Prince Hall Foundation, Inc. (respondent) with a notice of hearing and complaint, dated March 5, 2018, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 613-1.9(c), for failing to renew the registration of its petroleum bulk storage (PBS) facility located at 454 West 155th Street, New York, New York (facility) on or before October 6, 2009, the date on which its prior registration expired. The complaint seeks an order of the Commissioner: (i) finding respondent in violation of ECL 17-1009 and 6 NYCRR 613-1.9(c); (ii) assessing a civil penalty in the amount of ten thousand dollars ($ 10,000); (iii) directing respondent to register its petroleum bulk storage facility within fifteen (15) days of the service of the Commissioner's order, remit the applicable registration fee, and submit a complete registration application; and (iv) granting such other and further relief as the Commissioner shall deem just and appropriate.

Respondent is an active not-for-profit **[*9]** corporation in the State of New York. Service of the notice of hearing and complaint upon respondent was made by personally serving the New York State Department of State on March 5, 2018 (Motion for Default Judgment, Exhibit C). Department staff also provided additional service by sending the notice of hearing and complaint to respondent by first class mail on or about March 5, 2018. Id . Respondent failed to file an answer to the complaint, and failed to appear at a pre-hearing conference scheduled for April 10, 2018, as directed in the cover letter and notice of hearing served with the complaint (Motion for Default Judgment, Exhibit A).

As stated in the notice of hearing, on May 10, 2018, an adjudicatory hearing was convened before administrative law judge ("ALJ") Michael S. Caruso. Department staff was represented by Deborah Gorman, Esq., Remediation Bureau, Office of General Counsel, New York State Department of Environmental Conservation, 625 Broadway, Albany, New York. No one appeared on behalf of respondent.

ALJ Caruso noted for the record that respondent had failed to answer the complaint, failed to appear for the pre-hearing conference and failed to appear for the reconvened **[*10]** adjudicatory hearing. Department staff moved orally for a default judgment pursuant to 6 NYCRR 622.15. ALJ Caruso reserved on the oral motion, allowing the record to remain open for Department staff to submit the documentation required by 6 NYCRR 622.15(b). On August 20, 2018, staff submitted a written motion for a default judgment with supporting papers. [1] Department staff served the motion and supporting papers on respondent by first class mail on August 20, 2018 (Affirmation of Service of Deborah Gorman, dated August 20, 2018).

Applicable Regulatory Provision

Section 613-1.9. Registration. [2] (c) *Renewal*. Registration must be renewed every five years from the date of the last valid registration certificate until the department receives written notice and documentation from the facility owner **[*11]** that the facility has been permanently closed in accordance with section 613-2.6(b), 613-3.5(b), or 613-4.5(b) of this Part, or that ownership of the facility has been transferred in accordance with subdivision (d) of this section.

Findings of Fact

The following facts are found based upon the pleadings and papers submitted with and in support of staff's motion for a default judgment:

1. Respondent Prince Hall Foundation, Inc. is the owner of a PBS facility having a capacity of over 1,100 gallons located at 454 West 155th Street, New York, New York (facility). PBS tank number 001 at the facility has a capacity of 2,000 gallons and **[*12]** is located underground. Motion for Default Judgment, Exhibits E, F, and H.

2. Respondent is an active not-for-profit corporation in the State of New York. Motion for Default Judgment, Exhibit I.

3. On September 10, 2004, Most Worshipful Prince Hall Grand Lodge of the Most Ancient and Honorable Fraternity of Free and Accepted Masons of the State of New York transferred all right, title and interest in the facility to Prince Hall Foundation, Inc., the facility's current owner. Motion for Default Judgment, Exhibit D.

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[1] The motion includes the affirmation of Deborah Gorman, Esq., as Exhibit B ("Gorman Supporting Affirmation"). The affirmation is dated May 20, 2018, but includes attachments after that date. It is clear that the affirmation date is a typographical error, but the affirmation itself is supported by the attachments. Accordingly, the affirmation has been considered on this motion.

[2] Effective October 11, 2015, 6 NYCRR 613-1.9 replaced 6 NYCRR 612.2, Registration of Facilities, which read in part, "(a) *Existing facilities*. . . . (2) Registration must be renewed every five years from the date of the last valid registration until the department receives written notice that the facility has been permanently closed or that ownership of the facility has been transferred. " ECL 17-1009(2) requires facility registrations to be "renewed every five years or whenever ownership of a facility is transferred, whichever occurs first."

4. Pursuant to a registration application dated September 22, 2004, the Department issued PBS Certificate Number 2-609724 to Most Worshipful Prince Hall, the owner of the facility, on October 6, 2004, with an expiration date of October 6, 2009. The application and certificate identify the owner as "Most Worshipful Prince Hall." Motion for Default Judgment, Exhibits E and F.

5. On March 2, 2018, a search of the Department's PBS registration database revealed that respondent's registration expired on October 6, 2009 and, as of March 2, 2018, had not been renewed. Motion for Default Judgment, Exhibit A, Affirmation of Deborah Gorman, Esq., dated March 5, 2018, PP 9-11; Exhibit **[*13]** F.

6. As of August 20, 2018, respondent had not registered the facility. Gorman Supporting Affirmation, PP 9-10; Exhibit H.

7. Respondent was served personally, on March 5, 2018, pursuant to section 306 of the Not-For-Profit Corporation Law, with a notice of hearing and complaint dated March 5, 2018, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 613-1.9(c), together with a cover letter, statement of readiness and supporting affirmation, for failure to renew the registration of its PBS facility located at 454 West 155th Street, New York, New York on or before October 6, 2009, the date the prior registration expired. Consistent with CPLR 3215(g)(4), Department staff also provided additional service by sending the notice of hearing and complaint to respondent by first class mail on or about March 5, 2018. Motion for Default Judgment, Exhibit C.

8. Respondent failed to file an answer to the complaint, failed to appear at a pre-hearing conference scheduled for April 10, 2018, as directed in the cover letter and notice of hearing served with the complaint, and failed to appear for the adjudicatory hearing scheduled in the matter on May 10, 2018, as directed **[*14]** in the notices of hearing. Gorman Supporting Affirmation, PP 4-6.

Discussion

A respondent upon whom a complaint has been served must serve an answer within 20 days of receiving a notice of hearing and complaint (*see* 6 NYCRR 622.4[a]). A respondent's failure to file a timely answer "constitutes a default and a waiver of respondent's right to a hearing" (6 NYCRR 622.15[a]). In addition, attendance by a respondent at a scheduled pre-hearing conference or hearing is mandatory, "and failure to attend constitutes a default and a waiver of the opportunity for a hearing" (6 NYCRR 622.8[c]; *see also* 6 NYCRR 622.15[a] ["A respondent's … failure to appear at the hearing or the pre-hearing conference … constitutes a default and waiver of respondent's right to a hearing"]).

Upon a respondent's failure to answer a complaint or failure to appear for a pre-hearing conference or hearing, Department staff may make a motion to an ALJ for a default judgment. Such motion must contain: (i) proof of service upon respondent of the notice of hearing and complaint; (ii) proof of respondent's failure to appear or to file a timely answer; and (iii) a proposed order (*see* 6 NYCRR 622.15[b][1] **[*15]** - [3]).

As the Commissioner has held, "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them" (*Matter of Alvin Hunt, d/b/a Our Cleaners*, Decision and Order of the Commissioner, July 25, 2006, at 6 [citations omitted]). In addition, in support of a motion for a default judgment, staff must "provide proof of the facts sufficient to support the claim[s]" alleged in the complaint. *Matter of Queen City Recycle Center, Inc.*, Decision and Order of the Commissioner, December 12, 2013, at 3. Staff is required to support their motion for a default judgment with enough facts to enable the ALJ and the Commissioner to determine that staff has a viable claim (*see Matter of Samber Holding Corp.*, Order of the Commissioner, March 12, 2018, at 1 [citing Woodson v Mendon Leasing Corp., 100 NY2d 62, 70-71 (2003)] *see also* State v Williams, 44 AD3d 1149, 1151-1152 [3d Dept 2007] and CPLR 3215[f]).

The record establishes that: (i) Department staff served the notice of hearing and complaint upon respondent; (ii) respondent failed to file an **[*16]** answer to the complaint and failed to appear at a pre-hearing conference scheduled for April 10, 2018, as directed in the cover letter and notice of hearing served with the complaint; and (iii) respondent failed to appear for the adjudicatory hearing scheduled on May 10, 2018, as directed in the notices of hearing. Department staff has submitted a proposed order (Motion for Default Judgment, Exhibit J). Based upon the foregoing, the Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR

622.15. Staff also served respondent with copies of the motion for default judgment and supporting papers (Affirmation of Service of Deborah Gorman, dated August 20, 2018 P 2).

Department staff's submissions in support of the motion for a default judgment provide proof of facts sufficient to enable me to determine that staff has a viable claim that respondent failed to renew the registration of its petroleum bulk storage facility located at 99 University Place, New York, New York on or before October 6, 2009, the date on which its registration expired, in violation of ECL 17-1009 (*see Matter of Samber Holding Corp.*, Order of **[*17]** the Commissioner at 1). Respondent was in violation of 6 NYCRR 613-1.9(c) from the effective date of the current part 613, October 11, 2015.

Department staff seeks a civil penalty in the amount of ten thousand dollars ($ 10,000), and staff's submissions on the motion for a default judgment elaborate on the requested penalty, discussing the Department's Civil Penalty Policy, DEE-1, and administrative precedent relating to similar violations (Motion for Default Judgment, Exhibit A, Complaint, at Wherefore Clause P II; Gorman Supporting Affirmation, PP 14-19).

Staff's request for a civil penalty in the amount of ten thousand dollars ($ 10,000) is consistent with the Department's penalty policy as well as applicable provisions of ECL article 71 and administrative precedent (*see e.g. Matter of 12 Martense Associates LLC*, Order of the Commissioner, December 19, 2011, at 2).

In addition, respondent should be directed to correct the name of the corporation on the PBS application to reflect the legal name of the corporation as filed with the Department of State.

Conclusion of Law

By failing to renew the registration of its PBS facility located at 454 West 155th Street, New York, **[*18]** New York on or before October 6, 2009, the date the prior registration expired, respondent violated ECL 17-1009 and 6 NYCRR 613-1.9(c).

Recommendation

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

1. Granting Department staff's motion for default judgment, holding respondent Prince Hall Foundation, Inc. in default pursuant to the provisions of 6 NYCRR 622.15;

2. Holding that respondent Prince Hall Foundation, Inc. violated ECL 17-1009 and 6 NYCRR 613-1.9(c) by failing to renew the registration of its PBS facility located at 454 West 155th Street, New York, New York on or before October 6, 2009, the date the prior registration expired;

3. Directing respondent Prince Hall Foundation, Inc. to submit to the Department, within fifteen (15) days of service of the Commissioner's order, a complete registration application for the facility, including correction of the facility owner's corporate name, together with the applicable registration fees;

4. Directing respondent Prince Hall Foundation, Inc. to pay a civil penalty in the amount of ten thousand dollars ($ 10,000) within fifteen (15) days of service of the Commissioner's order; and

5. Directing **[*19]** such other and further relief as he may deem just and appropriate.

/s/

Maria E. Villa

Administrative Law Judge

Dated: Albany, New York

August 28, 2018

Opinion

Basil Seggos, Commissioner

ORDER

DEC Case No. PBS.2-609724.5.2018

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department) that respondent Prince Hall Foundation, Inc. violated ECL 17-1009 and 6 NYCRR 613-1.9(c) by failing to renew the registration of its petroleum bulk storage (PBS) facility on or before October 6, 2009, the date on which its prior registration expired. Respondent's facility is located at 454 West 155th Street, New York, New York, and includes an underground petroleum bulk storage tank with a capacity of 2,000 gallons.

Administrative Law Judge (ALJ) Maria E. Villa of the Department's Office of Hearings and Mediation Services was assigned to this matter and prepared the attached default summary report, which I adopt as my decision in this matter, subject to my comments below.

As set forth in the ALJ's default summary report, respondent failed to file an answer to the complaint served by Department staff in this matter, failed to appear at a pre-hearing conference scheduled for April 10, 2018, and failed to appear for the adjudicatory hearing scheduled **[*2]** for May 10, 2018 (see Default Summary Report at 3 [Finding of Fact No. 8]). At the May 10, 2018 adjudicatory hearing, Department staff made an oral motion for a default judgment before ALJ Michael Caruso. ALJ Caruso reserved on the motion, and Department staff later submitted a written motion for default judgment with supporting papers which was considered by ALJ Villa.

As a consequence of respondent's failure to answer or appear in this matter, ALJ Villa recommends that Department staff's motion for a default judgment be granted (see Default Summary Report at 5). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15. The pleadings and the papers submitted with and in support of the motion provide enough facts to enable me to determine that staff has a viable claim that respondent failed to renew the registration of its PBS facility on or before October 6, 2009, the date on which its registration expired, in violation of ECL 17-1009 and, since October 11, 2015,

6 NYCRR 613-1.9(c). [1] In addition to my review of the record of this proceeding, I am taking official notice (see 6 NYCRR 622.11[a][5]) of the Department's current database on PBS registrations. **[*3]** The database further corroborates that no timely re-registration of the facility has occurred.

Department counsel correctly points out that the requirement to register PBS facilities is one of the "cornerstones" of the PBS regulatory scheme (see Motion for Default Judgment, Exhibit B, Affirmation of Deborah Gorman, Esq., dated May 20, 2018, P 14). Proper registration assists in the oversight of other requirements for a PBS facility (e.g., leak detection, monitoring, and reporting), with the goal of protecting the environment and public health.

Department staff seeks a civil penalty in the amount of ten thousand dollars ($ 10,000). ECL 71-1929(1), which applies to the statutory and regulatory violation at issue in this proceeding, provides for a penalty of up to thirty-seven thousand five hundred dollars ($ 37,500) per day for each violation. Staff's requested civil penalty of ten thousand dollars ($ 10,000) is in accordance with general penalty guidelines for violations of PBS registration requirements for certain facilities **[*4]** in New York City where violations continue for more than five years, as is the case here (see e.g. Matter of 12 Martense Associates, LLC, Order of the Commissioner, December 19, 2011, at 2). Respondent was required to renew the registration of its facility no later than October 6, 2009, but failed to do so

[1] As referenced in the Default Summary Report, 6 NYCRR 613-1.9 replaced former 6 NYCRR 612.2 which similarly included the registration renewal requirement.

(see Default Summary Report at 3 [Findings of Fact Nos. 5-6]). Based on this record, the requested penalty of ten thousand dollars ($ 10,000) is authorized and appropriate.

I direct that respondent submit the civil penalty to the Department within fifteen (15) days of the service of this order upon respondent. In addition, I direct that respondent submit a petroleum bulk storage application for the facility, including the correct corporate name of the facility owner, plus applicable registration fees, to the Department within fifteen (15) days of the service of this order upon respondent.

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

I. Department staff's motion for a default judgment pursuant to 6 NYCRR 622.15 is granted. By failing to answer or appear in this proceeding, respondent Prince Hall Foundation, Inc. waived its **[*5]** right to be heard at the hearing.

II. Based on the pleadings and papers submitted with and in support of Department staff's motion, respondent Prince Hall Foundation, Inc. is determined to have violated ECL 17-1009 and, since October 11, 2015, 6 NYCRR 613-1.9(c), by failing to renew the registration of its petroleum bulk storage facility located at 454 West 155th Street, New York, New York on or before October 6, 2009, the date the prior registration expired.

III. Within fifteen (15) days of the service of this order upon respondent Prince Hall Foundation, Inc., respondent shall submit to the Department a complete petroleum bulk storage application for the facility, including the correct corporate name of the facility owner, plus applicable and past due registration fees.

IV. Within fifteen (15) days of the service of this order upon respondent Prince Hall Foundation, Inc., respondent shall pay a civil penalty in the amount of ten thousand dollars ($ 10,000) by certified check, cashier's check, or money order made payable to the "New York State Department of Environmental Conservation."

V. The petroleum bulk storage application, applicable registration fees, and the penalty **[*6]** payment shall be sent to the following address:

Office of General Counsel (Remediation Bureau)
NYS Department of Environmental Conservation
625 Broadway, 14th Floor
Albany, New York 12233-1500
Attn: Deborah Gorman, Esq.

VI. Any questions or other correspondence regarding this order shall also be addressed to Deborah Gorman, Esq. at the address referenced in paragraph V of this order.

VII. The provisions, terms, and conditions of this order shall bind respondent Prince Hall Foundation, Inc., and its agents, successors, and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: /s/
Basil Seggos
Commissioner

Dated: Albany, New York
September 5, 2018

Attachment

APPENDIX A

Matter of Prince Hall Foundation, Inc.

DEC File No. PBS.2-609724.5.2018

Motion for Default Judgment

1. Cover letter, dated August 20, 2018, addressed to Chief Administrative Law Judge James McClymonds of the Department's Office of Hearings and Mediation Services, attaching staff's motion papers

2. Notice of Motion for Default Judgment dated August 20, 2018

3. Motion for Default Judgment, dated August 20, 2018, attaching Exhibits A and B:

A. Cover **[*7]** letter, Notice of Hearing, Complaint, Statement of Readiness, and Affirmation of Deborah Gorman, Esq., all dated March 5, 2018

B. May 20, 2018 [error in date] Affirmation of Deborah Gorman, Esq., attaching Exhibits C - J:

C. Affidavit of Service of Dale Thiel, sworn to August 20, 2018, attaching March 5, 2018 Department of State Receipt for Service, reflecting service upon respondent pursuant to section 306 of the Business Corporation Law

D. Printout of search on Automated City Register Information System (ACRIS), dated July 5, 2018, attaching deed dated September 10, 2004

E. Petroleum Bulk Storage (PBS) Application from "Most Worshipful Prince Hall Grand Lodge", PBS No. 2-609724, dated September 22, 2004

F. PBS Certificate No. 2-609724 issued to "Most Worshipful Prince Hall" on October 6, 2004, expired October 6, 2009

G. [No Exhibit G]

H. Facility Information Report, PBS No. 2-609724, printed July 5, 2018

I. NYS Department of State, Division of Corporations, Entity Information Sheet regarding Prince Hall Foundation, Inc., reflecting information through July 5, 2018

J. Draft Order

4. August 20, 2018 Affirmation of Service of Deborah Gorman

End of Document

2019 N.Y. ENV LEXIS 6

New York Department of Environmental Conservation

January 31, 2019, Decided

DEC Case No.PBS.2-204528.8.2018

NY Department of Environmental Conservation Decisions

Reporter
2019 N.Y. ENV LEXIS 6 *

In the Matter of the Alleged Violation of Article 17 of the Environmental Conservation Law (ECL) of the State of New York and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), by PARK SANFORD OWNERS CORP., Respondent

Core Terms

staff, registration, motion for default, default, default judgment, renew, notice of the hearing, commissioner's order, ten thousand dollars, civil penalty, street, pre-hearing, expire, adjudication hearing, bulk storage, petroleum, notice, summary report, cover letter, five year, register

Opinion By: [*1] SEGGOS

Initial Decision:

Michael S. Caruso, Administrative Law Judge

DEFAULT SUMMARY REPORT

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent Park Sanford Owners Corp. (respondent) with a notice of hearing and complaint, dated June 6, 2018, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 613-1.9(c), for failing to renew the registration of its petroleum bulk storage (PBS) facility located at 87-70 173rd Street, Jamaica, New York (facility). The complaint seeks an order of the Commissioner: (i) finding respondent in violation of ECL 17-1009 and 6 NYCRR 613-1.9(c); (ii) assessing a civil penalty in the amount of ten thousand dollars ($ 10,000); (iii) directing respondent to register its petroleum bulk storage facility within fifteen (15) days of the service of the Commissioner's order, remit the applicable registration fee, and submit a complete registration application; and (iv) **[*7]** granting such other and further relief as the Commissioner shall deem just and appropriate.

Inasmuch as respondent is an active domestic business corporation in the State of New York, service of the notice of hearing and complaint on respondent was made by personally serving the New York State Department of State on June 6, 2018 (*see* Motion for Default Judgment, Exhibit C). Department staff also provided additional service by

sending the notice of hearing and complaint to respondent by first class mail on June 6, 2018 (*see id.*). Respondent failed to file an answer to the complaint, and failed to appear at a pre-hearing conference scheduled for July 11, 2018, as directed in the cover letter and notice of hearing served with the complaint (*see* Motion for Default Judgment, Exhibit A).

As stated in the notice of hearing, on August 13, 2018, an adjudicatory hearing was convened before the undersigned. Department staff was represented by Deborah Gorman, Esq., Remediation Bureau, Office of General Counsel, New York State Department of Environmental Conservation, 625 Broadway, Albany, New York. No one appeared on behalf of respondent.

I noted for the record that respondent **[*8]** had failed to answer the complaint, failed to appear for the pre-hearing conference and failed to appear for the adjudicatory hearing. Department staff moved orally for a default judgment pursuant to 6 NYCRR 622.15. I reserved on the oral motion, allowing the record to remain open for Department staff to submit the documentation required by 6 NYCRR 622.15(b). On December 11, 2018, staff submitted a written motion for a default judgment with supporting papers (*see* Appendix A, attached hereto [listing documents submitted on motion]). Department staff served the motion and supporting papers on respondent by first class mail on December 20, 2018 (*see* Affirmation of Service of Deborah Gorman, dated December 20, 2018).

Applicable Regulatory Provision

Section 613-1.9. Registration. [1]

[*9]
* * *

"(c) *Renewal*. Registration must be renewed every five years from the date of the last valid registration certificate until the department receives written notice and documentation from the facility owner that the facility has been permanently closed in accordance with section 613-2.6(b), 613-3.5(b), or 613-4.5(b) of this Part, or that ownership of the facility has been transferred in accordance with subdivision (d) of this section."

Findings of Fact

The following facts are found based upon the pleadings and papers submitted with and in support of staff's motion for a default judgment:

1. Respondent Park Sanford Owners Corp. is the owner of a PBS facility having a capacity of over 1,100 gallons located at 87-70 173rd Street, Jamaica, New York (facility). In particular, PBS tank number 100 at the facility has a capacity of 5,000 gallons and is located aboveground. *See* Motion for Default Judgment, Exhibits D, E, F, and G.

2. Respondent is an active domestic business corporation in the State of New York.*See* Motion for Default Judgment, Exhibit H.

3. On August 9, 1988, D & D Associates transferred all right, title and interest in the facility to Park Sanford **[*10]** Owners Corp., the facility's current owner. This deed is recorded in the Office of the City Register of the City of New York, in Reel 2665 Page 2342. *See* Motion for Default Judgment, Exhibit D.

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[1] Effective October 11, 2015, 6 NYCRR 613-1.9 replaced 6 NYCRR 612.2, Registration of Facilities, which read in part, "(a) *Existing facilities*. . . . (2) Registration must be renewed every five years from the date of the last valid registration until the department receives written notice that the facility has been permanently closed or that ownership of the facility has been transferred. " ECL 17-1009(2) requires facility registrations to be "renewed every five years or whenever ownership of a facility is transferred, whichever occurs first."

4. Pursuant to a registration application dated August 6, 2008, the Department issued PBS Certificate Number 2-204528 to respondent Park Sanford Owners Corp. on August 8, 2008 with an expiration date of November 15, 2013. *See* Motion for Default Judgment, Exhibits E, F and G.

5. On May 31, 2018, a search of the Department's PBS registration database revealed that respondent's registration expired on November 15, 2013 and, as of May 31, 2018, had not been renewed. *See* Motion for Default Judgment, Exhibit A, Affirmation of Deborah Gorman, Esq., dated June 6, 2018, PP 9-12; *see also* Exhibit G.

6. As of December 11, 2018, respondent had not registered the facility. *See* Motion for Default Judgment, Exhibit B, Affirmation of Deborah Gorman, Esq., dated December 11, 2018 P 9 *see also* Exhibit G.

7. As shown by Receipt for Service No. 201806130048 issued by the New York State Department of State, respondent was served personally, on June 6, 2018 pursuant **[*11]** to section 306 of the Business Corporation Law, with a notice of hearing and complaint dated June 6, 2018, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 613-1.9(c), together with a cover letter, statement of readiness and supporting affirmation, for failure to renew the registration of its PBS facility located at 87-70 173rd Street, Jamaica, New York. Consistent with CPLR 3215(g)(4), Department staff also provided additional service by sending the notice of hearing and complaint to respondent by first class mail on or about June 6, 2018. *See* Motion for Default Judgment, Exhibit C.

8. Respondent failed to file an answer to the complaint, failed to appear at a pre-hearing conference scheduled for July 11, 2018, as directed in the cover letter and notice of hearing served with the complaint, and failed to appear for the adjudicatory hearing scheduled in the matter on August 13, 2018, as directed in the notice of hearing. *See* Motion for Default Judgment, Exhibit B, Affirmation of Deborah Gorman, Esq., PP 4-6.

Discussion

A respondent upon whom a complaint has been served must serve an answer within 20 days of receiving a notice of hearing **[*12]** and complaint (*see* 6 NYCRR 622.4[a]). A respondent's failure to file a timely answer "constitutes a default and a waiver of respondent's right to a hearing" (6 NYCRR 622.15[a]). In addition, attendance by a respondent at a scheduled pre-hearing conference or hearing is mandatory, "and failure to attend constitutes a default and a waiver of the opportunity for a hearing" (6 NYCRR 622.8[c]; *see also* 6 NYCRR 622.15[a] ["A respondent's … failure to appear at the hearing or the pre-hearing conference … constitutes a default and waiver of respondent's right to a hearing"]).

Upon a respondent's failure to answer a complaint or failure to appear for a pre-hearing conference or hearing, Department staff may make a motion to an ALJ for a default judgment. Such motion must contain: (i) proof of service upon respondent of the notice of hearing and complaint; (ii) proof of respondent's failure to appear or to file a timely answer; and (iii) a proposed order (*see* 6 NYCRR 622.15[b][1] - [3]).

As the Commissioner has held, "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them" (*Matter of* **[*13]** *Alvin Hunt, d/b/a Our Cleaners*, Decision and Order of the Commissioner, July 25, 2006, at 6 [citations omitted]). In addition, in support of a motion for a default judgment, staff must "provide proof of the facts sufficient to support the claim[s]" alleged in the complaint. (*Matter of Queen City Recycle Center, Inc.*, Decision and Order of the Commissioner, December 12, 2013, at 3.) Staff is required to support their motion for a default judgment with enough facts to enable the ALJ and the Commissioner to determine that staff has a viable claim (*see Matter of Samber Holding Corp.*, Order of the Commissioner, March 12, 2018 [*Samber*], at 1 [citing Woodson v Mendon Leasing Corp., 100 NY2d 62, 70-71 (2003)] *see also* CPLR 3215[f]).

The record establishes that: (i) Department staff served the notice of hearing and complaint upon respondent; (ii) respondent failed to file an answer to the complaint and failed to appear at a pre-hearing conference scheduled for July 11, 2018, as directed in the cover letter and notice of hearing served with the complaint; and (iii) respondent failed to appear for the adjudicatory hearing scheduled on August **[*14]** 13, 2018, as directed in the

notice of hearing. Department staff has submitted a proposed order (*see* Motion for Default Judgment, Exhibit J). Based upon the foregoing, the Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15. Staff also served respondent with copies of the motion for default judgment and supporting papers (*see* Affirmation of Service of Deborah Gorman, dated December 20, 2018, P 3).

Department staff's submissions in support of the motion for a default judgment provide proof of facts sufficient to enable me to determine that staff has a viable claim that respondent failed to renew the registration of its petroleum bulk storage facility located at 87-70 173rd Street, Jamaica, New York, on or before November 15, 2013, the date on which its registration expired, in violation of ECL 17-1009 (*see Samber* at 1). Respondent was in violation of 6 NYCRR 613-1.9(c) from the effective date of the current part 613, October 11, 2015.

Department staff seeks a civil penalty in the amount of ten thousand dollars ($ 10,000), and staff's submissions on the motion for a default judgment elaborate on the requested penalty, **[*15]** discussing the Department's Civil Penalty Policy, DEE-1, and administrative precedent relating to similar violations (*see* Motion for Default Judgment, Exhibit A, Complaint, at Wherefore Clause P II; *see also* Exhibit B, Gorman Affirmation, dated December 11, 2018, PP 13-18). In proceedings concerning violations of PBS registration requirements in the New York City area, calculation of an appropriate penalty turns in part on the duration of the violations (*see e.g. Matter of 540 Jackson Realty Corp.*, Order of the Commissioner, May 18, 2016, at 2; *see also Matter of 12 Martense Associates LLC*, Order of the Commissioner, December 19, 2011 [*12 Martense Associates*], at 2).

Department staff has generally requested a penalty of five thousand dollars ($ 5,000) for violations extending up to two years, seven thousand five hundred dollars ($ 7,500) for violations extending from two to five years, and ten thousand dollars ($ 10,000) for violations exceeding five years in duration (*see 12 Martense Associates*, at 2).

In this matter, the five-year threshold for applying a civil penalty of ten thousand dollars ($ 10,000) was reached on November 16, 2018, after service **[*16]** of the notice of hearing and complaint but before staff's motion for a default judgment. Staff's papers demonstrate the violation continued as of December 11, 2018. "In cases, such as here, in which one of the penalty date "thresholds" under *12 Martense Associates* and its progeny is passed during the period between service of the notice of hearing and complaint and the date of the adjudicatory hearing or submission of default motion papers, it is appropriate to seek the penalty amount related to the longer period" (*see Matter of Promesa Court Residences Limited Partnership*, Order of the Commissioner, September 11, 2017, at 3; *see also Matter of 1160 President Street Housing Development Fund Corporation*, Order of the Commissioner, October 3, 2017, at 2).

Accordingly, I find that staff's request for a civil penalty in the amount of ten thousand dollars ($ 10,000) is consistent with the Department's penalty policy as well as applicable provisions of ECL article 71 and administrative precedent (*see e.g. 12 Martense Associates*, at 2).

Conclusion of Law

By failing to renew the registration of its PBS facility located at 87-70 173rd Street, Jamaica, New York on or **[*17]** before November 15, 2013, respondent violated ECL 17-1009 and 6 NYCRR 613-1.9(c).

Recommendation

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

1. Granting Department staff's motion for default judgment, holding respondent Park Sanford Owners Corp. in default pursuant to the provisions of 6 NYCRR 622.15;

2. Holding that respondent Park Sanford Owners Corp. violated ECL 17-1009 and 6 NYCRR 613-1.9(c) by failing to renew the registration of its PBS facility located at 87-70 173rd Street, Jamaica, New York on or before November 15, 2013, the date the prior registration expired;

3. Directing respondent Park Sanford Owners Corp. to pay a civil penalty in the amount of ten thousand dollars ($ 10,000) within fifteen (15) days of service of the Commissioner's order; and

4. Directing such other and further relief as he may deem just and appropriate.

APPENDIX A

Motion for Default Judgment

1. Cover letter, dated December 11, 2018, addressed to Chief Administrative Law Judge James McClymonds of the Department's Office of Hearings and Mediation Services, attaching staff's motion papers

2. Notice of Motion for Default Judgment dated December 11, 2018

[*18] 3. Motion for Default Judgment, dated December 11, 2018, attaching Exhibits A and B:

1. Cover letter, Notice of Hearing, Complaint, Statement of Readiness, and Affirmation of Deborah Gorman, Esq., all dated June 6, 2018

2. Affirmation of Deborah Gorman, Esq., dated December 11, 2018, attaching Exhibits C - H and J:

3. Affidavit of Service of Dale Thiel, sworn to December 11, 2018, attaching Department of State Receipt for Service, dated June 6, 2018, reflecting service upon respondent pursuant to section 306 of the Business Corporation Law

4. Printout of search on Automated City Register Information System (ACRIS), dated December 11, 2018, attaching deed dated August 9, 1988

5. Petroleum Bulk Storage (PBS) Application from Park Sanford Owners Corp., PBS No. 2-204528, dated August 6, 2008

6. PBS Certificate, PBS No. 2-204528 issued to Park Sanford Owners Corp. on August 8, 2008, with an expiration date of November 15, 2013

7. Facility Information Report, PBS No. 2-204528, printed December 11, 2018

8. NYS Department of State, Division of Corporations, Entity Information Sheet regarding Park Sanford Owners Corp., reflecting information through December 10, 2018

9. Draft Order [2]

[*19]

4. Affirmation of Service of Deborah Gorman, dated December 20, 2018

Opinion

Basil Seggos, Commissioner

ORDER

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department) that respondent Park Sanford Owners Corp. violated ECL 17-1009 and 6 NYCRR 613-1.9(c) by failing to renew the registration of its petroleum bulk storage (PBS) facility on or before November 15, 2013, the date on which its prior registration expired. Respondent's facility is located at 87-70 173rd Street, Jamaica, New York, and includes an aboveground petroleum bulk storage tank with a capacity of 5,000 gallons.

Administrative Law Judge (ALJ) Michael S. Caruso of the Department's Office of Hearings and Mediation Services was assigned to this matter and prepared the attached default summary report, which I adopt as my decision in this matter, subject to my comments below.

As set forth in the ALJ's default summary report, respondent failed to file an answer to the complaint served by Department staff in this matter, failed to appear at a pre-hearing conference scheduled for July 11, 2018, and

[2] There is no Exhibit I.

failed to appear for the adjudicatory hearing scheduled for August 13, 2018 (*see* Default Summary **[*2]** Report at 3 [Finding of Fact No. 8]). At the August 13, 2018 adjudicatory hearing, Department staff made an oral motion for a default judgment. ALJ Caruso reserved on the motion, and Department staff later submitted a written motion for default judgment with supporting papers.

As a consequence of respondent's failure to answer or appear in this matter, the ALJ recommends that Department staff's motion for a default judgment be granted (*see*Default Summary Report at 5). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15. The pleadings and the papers submitted with and in support of the motion provide sufficient facts to enable me to determine that staff has a viable claim that respondent failed to renew the registration of its PBS facility on or before November 15, 2013, the date on which its prior registration expired and, therefore, is in violation of ECL 17-1009 and, since October 11, 2015, 6 NYCRR 613-1.9(c). [1]

Department counsel correctly **[*3]** points out that the requirement to register PBS facilities is one of the "cornerstones" of the PBS regulatory scheme (*see* Motion for Default Judgment, Exhibit B, Affirmation of Deborah Gorman, Esq., dated December 11, 2018, P 14). Proper registration assists in the oversight of other requirements for a PBS facility (e.g., leak detection, monitoring, and reporting), with the goal of protecting the environment and public health.

Department staff, in its complaint and default motion, seeks a civil penalty of ten thousand dollars ($ 10,000). ECL 71-1929(1), which applies to the statutory and regulatory violation at issue in this proceeding, provides for a penalty of up to thirty-seven thousand five hundred dollars ($ 37,500) per day for each violation. In proceedings similar to this one, Department staff has requested penalties that take into account the duration of the violation (*see Matter of 12 Martense Associates*, *LLC*, Order of the Commissioner, December 19, 2011, at 2).

In this case, the date of the penalty "threshold, " for imposition of a ten thousand dollar ($ 10,000) penalty, occurs during the period between service of the notice of hearing and complaint and the **[*4]** date of the default motion papers. Under these circumstances, it is appropriate to assess a penalty based on the longer period of time that the respondent is out of compliance (*see Matter of Promesa Court Residences Ltd. Partnership*, Order of the Commissioner, September 11, 2017, at 3). Accordingly, I am imposing a civil penalty of ten thousand dollars ($ 10,000) because respondent's violation exceeded five years as of the date of staff's motion for default judgment.

I direct that respondent submit the civil penalty to the Department within fifteen (15) days of the service of this order upon respondent.

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

1. Department staff's motion for a default judgment pursuant to 6 NYCRR 622.15 is granted. By failing to answer or appear in this proceeding, respondent Park Sanford Owners Corp. waived its right to be heard at the hearing.

2. Based on the pleadings and papers submitted with and in support of Department staff's motion, respondent Park Sanford Owners Corp. is determined to have violated ECL 17-1009 and, since October 11, 2015, 6 NYCRR 613-1.9(c), by failing to renew the registration **[*5]** of its PBS facility located at 87-70 173rd Street, Jamaica, New York on or before November 15, 2013, the date on which its prior registration expired.

3. Within fifteen (15) days of the service of this order upon respondent Park Sanford Owners Corp., respondent shall submit to the Department a complete petroleum bulk storage application for the facility together with applicable and past due registration fees.

4. Within fifteen (15) days of the service of this order upon respondent Park Sanford Owners Corp., respondent shall pay a civil penalty in the amount of ten thousand dollars ($ 10,000) by certified check, cashier's check, or money order made payable to the "New York State Department of Environmental Conservation."

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[1] As referenced in the Default Summary Report, 6 NYCRR 613-1.9 replaced former 6 NYCRR 612.2 which similarly included the registration renewal requirement (see Default Summary Report at 2 n1).

5. The penalty payment shall be sent to the following address:

Office of General Counsel (Remediation Bureau)

NYS Department of Environmental Conservation

625 Broadway, 14th Floor

Albany, New York 12233-1500

Attn: Deborah Gorman, Esq.

6. Any questions or other correspondence regarding this order shall also be addressed to Deborah Gorman, Esq. at the address referenced in paragraph V of this order.

7. The provisions, terms, and conditions of this order shall bind **[*6]** respondent Park Sanford Owners Corp., and its agents, successors, and assigns, in any and all capacities.

For the New York State Department of Environmental Conservation

Dated: Albany, New York

January 31, 2019

NY Department of Environmental Conservation Decisions

End of Document

2018 N.Y. ENV LEXIS 48

New York Department of Environmental Conservation

October 29, 2018, Decided; October 25, 2018, Report Issued

DEC Case No.R2-20160408-141

NY Department of Environmental Conservation Decisions

Reporter
2018 N.Y. ENV LEXIS 48 *

In the Matter of the Alleged Violations of Article 17 and 71 of the Environmental Conservation Law (ECL) of the State of New York and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), -by- JAMES BULLOCH, Respondent.

Core Terms

staff, civil penalty, registration, dollar, bulk storage, two hundred, petroleum, days of service, consent order, renew, commissioner's order, registration fee, cause of action, expire, ten thousand dollars, thousand dollars, recommend, harbor, street, beach, fail to comply, first cause, tank, gallons

Opinion By: **[*1]** SEGGOS

Initial Decision:

SUMMARY REPORT

P. Nicholas Garlick

Administrative Law Judge

DEC Case No.R2-20160408-141

This report recommends that the Commissioner grant a motion for order without hearing in lieu of complaint, dated January 30, 2018, brought by Staff of the New York State Department of Environmental Conservation (Department) against James Bulloch (respondent). The motion alleges two violations. The first cause of action asserts respondent violated ECL **[*7]** 71-1929(1) by failing to comply with an order on consent (file # R2-20160408-141), executed on April 18, 2017, by failing to pay the agreed to five thousand two hundred and fifty dollar ($ 5,250) civil penalty. The second cause of action alleges respondent violated 6 NYCRR 613.1.9(c) by failing to renew the registration of petroleum bulk storage (PBS) facility # 2-327530, located at 441 Beach 129ThStreet, Belle Harbor, New York (facility) on or before August 28, 2017, the date on which its prior registration expired.

The motion seeks an order of the Commissioner: (i) finding respondent liable for the violations alleged; (ii) assessing a total civil penalty in the amount of twenty thousand dollars ($ 20,000), ten thousand ($ 10,000) dollars for each violation; (iii) requiring respondent to pay the civil penalty assessed in the consent order, five thousand two hundred and fifty dollars ($ 5,250); and (iv) granting such other and further relief as the Commissioner shall deem just and appropriate. [1]

[*8]

Service of the motion for order without hearing was made on respondent by personal service, pursuant to CPLR 308(2) (*see* affidavit of Moses Ajoku dated August 21, 2018, PP 6-7)). The notice of motion for an order without a hearing stated that respondent must serve a response within twenty days of receipt and that such response must be directed to the Chief Administrative Law Judge in the Department's Office of Hearings and Mediation Services. As of the date of this report, no such response has been received. In his letter dated January 30, 2018, Department staff counsel requested a ruling on the merits of the motion.

Procedural History

Department staff's motion papers, dated January 30, 2018, include: a cover letter; a notice of motion for an order without hearing; the affirmation of James L. Simpson, Esq., with four exhibits (listed in the attached exhibit chart); an affirmation of service by certified mail (without proof of receipt); and the affidavit of Regina Seetahal.

With a cover letter dated May 8, 2018, Department staff provided a second affirmation of service by certified mail, again without proof of receipt, as well as an affidavit from Moses Ajoku purporting **[*9]** to have personally served respondent James Bulloch.

On May 16, 2018, I was assigned to this matter.

By letter dated August 10, 2018, I contacted Department staff counsel regarding deficiencies in Department staff's papers. In response, with a cover letter dated August 22, 2018, Department staff filed a revised affirmation of James L. Simpson, Esq. (with four exhibits), and the revised affidavit of Moses Ajoku.

Applicable Regulatory Provisions

ECL 71-1929(1) reads in relevant part:

A person who violates any of the provisions of, or who fails to perform any duty imposed by titles 1 through 11 inclusive and title 19 of article 17, or the rules, regulations, orders or determinations of the commissioner promulgated thereto or the terms of any permit issued thereunder, shall be liable to a penalty of not to exceed thirty-seven thousand five hundred dollars per day for each violation, and, in addition thereto, such person may be enjoined from continuing such violation as hereinafter provided.

6 NYCRR 613-1.9, entitled "Registration" , reads, in relevant part:

(c) *Renewal*. Registration must be renewed every five years from the date of the last valid registration certificate **[*10]** until the department receives written notice and documentation from the facility owner that the facility has been permanently closed in accordance with section 613-2.6(b), 613-3.5(b), or 613-4.5(b) of this Part, or that ownership of the facility has been transferred in accordance with subdivision (d) of this section.

Findings of Fact

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[1] Department staff does not request specific language in the order directing respondent to renew the registration for its petroleum bulk storage facility within fifteen (15) days of the service of the Commissioner's order, to remit the applicable registration fee, and to submit a complete registration application. However, in the circumstances of this case, I am recommending the Commissioner order such just and appropriate relief.

The following facts are found based upon the pleadings and papers submitted with and in support of Department staff's motion:

1. Respondent James Bulloch. is the owner of PBS facility # 2-327530 having a capacity of over 1,100 gallons located at 441 Beach 129Th Street, Belle Harbor, New York (facility). The facility contains five tanks: tank number 004 has a capacity of 550 gallons; tank number 100 has a capacity of 4,000 gallons; tank number 200 has a capacity of 4,000 gallons; and tank number 300 has a capacity of 4,000 gallons. All tanks are located underground. *See* Exh. A.

2. The petroleum bulk storage certificate for PBS facility # 2-327530 expired on August 8, 2017 (*see* Exh. A). As of late August 2018, Department staff had not: received a registration renewal; received notice that the facility had been permanently closed; or that **[*11]** the facility had been transferred to another owner (*see* affirmation of James L. Simpson, Esq. dated August 21, 2018, PP 11-12, and affidavit of Moses Ajoku dated August 21, 2018, P 8)

3. Order on consent # R2-20160408-141, effective April 18, 2017, required, among other things, that respondent James Bulloch pay a civil penalty to resolve certain violations discovered at the facility during an inspection on March 2, 2016. The total civil penalty agreed to was five thousand two hundred and fifty dollars ($ 5,250) which was to be paid in ten monthly installments of five hundred and twenty-five dollars ($ 525) commencing on April 15, 2017 and ending on January 15, 2018 (*see* Exh. B). Department staff has not received any payments from respondent James Bulloch as required by the consent order (see affidavit of Regina Seetahal, PP 4-5).

Discussion

Department staff has requested an order on the merits, and based upon review of the evidence attached to the motion, I recommend the Commissioner conclude that Department staff has established a prima facie case that respondent James Bullock is liable for the violations alleged in the two causes of action. The respondent was personally **[*12]** served with Department staff's motion papers on April 20, 2018 (Affidavit of Moses Ajoku, dated August 21, 2018, P 6).

The first cause of action alleges that respondent violated ECL 71-1929(1) by failing to comply with an order on consent (file # R2-20160408-141), executed on April 18, 2017, by failing to pay the required five thousand two hundred and fifty dollars $ 5,250 civil penalty. Included with the motion is a copy of the consent order in which respondent agreed to pay a total civil penalty offive thousand two hundred and fifty dollars ($ 5,250) which was to be paid in ten monthly installments of five hundred and twenty-five dollars ($ 525) commencing on April 15, 2017 and ending on January 15, 2018 (*see* Exh. B). Department staff has provided proof that no payments were received from respondent James Bulloch (Affidavit of Regina Seetahal, PP 4-5). Based on the above, the Commissioner should hold the respondent liable for the first cause of action.

The second cause of action alleges respondent violated 6 NYCRR 613.1.9(c) by failing to renew the registration of its petroleum bulk storage facility (PBS # 2-32-7530) located at 441 Beach 129Th Street, Belle Harbor, New York **[*13]** on or before August 28, 2017, the date on which its prior registration expired. Department staff has provided the facility's PBS bulk storage certificate which has an expiration date of August 28, 2017 (*see* Exh. A). Department staff has also provided proof that: (1) no PBS registration renewal application has been received; (2) no registration fee for the facility has been received; (3) there has been no notification that the facility has been permanently closed pursuant to applicable regulations; and (4) there has been no notification that the facility has been transferred to another owner pursuant to applicable regulations (see, affirmation of James L. Simpson dated August 21, 2018, PP 11-12; and affidavit of Moses Ajoku dated August 21, 2018, P 8). Based on the above, the Commissioner should hold the respondent liable for the second cause of action.

In addition to a finding of liability, Department staff seeks a total civil penalty in the amount of twenty thousand dollars ($ 20,000) and requiring respondent to pay the agreed to civil penalty amount owed under the consent order (five thousand two hundred and fifty dollars ($ 5,250). For the first cause of action, failing to **[*14]** comply with consent order, Department staff seeks a civil penalty of ten thousand dollars ($ 10,000). As justification for

this penalty amount, Department staff cites the Department's Civil Penalty Policy (DEE-1), the Department's Order on Consent Enforcement Policy (DEE-2), and administrative precedent relating to similar violations. Specifically, Department staff cites the respondent's failure to comply with the consent order as subverting a vital enforcement tool that deters PBS violations in order to protect the public health, welfare, and the lands and waters of the State.*See* affirmation of James L. Simpson dated August 21, 2018, PP 21-26). Based on the above, the Commissioner should determine a civil penalty of ten thousand dollars ($ 10,000) for the first cause of action is appropriate. In addition, Department staff has shown that the agreed to penalty imposed by the consent order has not been paid and the Commissioner should require respondent to pay this amount, five thousand two hundred and fifty dollars ($ 5,250). For the second cause of action, failing to reregister his PBS facility, Department staff seeks a civil penalty of ten thousand dollars ($ 10,000). As justification **[*15]** for this penalty amount, Department staff cites the respondent's repeated violation of PBS regulations. (*see* affirmation of James L. Simpson dated August 21, 2018, PP 27-29). Based on the above, the Commissioner should determine a civil penalty of ten thousand dollars ($ 10,000) for the second cause of action is appropriate

Department staff does not request specific language in the order directing respondent to register its petroleum bulk storage facility within fifteen (15) days of the service of the Commissioner's order, remit the applicable registration fee, and submit a complete registration application. However, in the circumstances of this case, I am recommending that the Commissioner order such just and appropriate relief.

In conclusion, I find that staff's request for a civil penalty in the amount of ten thousand dollars ($ 10,000) for each cause of action and requiring respondent to pay the amount owed under the consent order, five thousand two hundred and fifty dollars ($ 5,250), is consistent with the Department's penalty policies and relevant administrative precedents, as well as applicable provisions of ECL article 71. In addition, the order should direct respondent **[*16]** to register the petroleum bulk storage facility within fifteen (15) days of the service of the Commissioner's order, remit the applicable registration fee, and submit a complete registration application.

Conclusions of Law

1. By failing to comply with order on consent # R2-20160408-141, effective April 18, 2017, respondent James Bulloch violated ECL 71-1929(1).

2. By failing to renew the registration of his PBS facility located at 441 Beach 129th Street, Belle Harbor, New York on or before August 28, 2017, the date the prior registration expired, respondent James Bulloch violated 6 NYCRR 613-1.9(c).

Recommendation

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

1. Holding that respondent James Bulloch violated ECL 71-1929(1) by failing to comply with an order on consent (file # R2-20160408-141), executed on April 18, 2017, by failing to pay the required five thousand two hundred and fifty dollar ($ 5,250) civil penalty;

2. Holding that respondent James Bulloch violated 6 NYCRR 613.1.9(c) by failing to renew the registration of his petroleum bulk storage (PBS) facility located at 441 Beach 129Th Street, Belle Harbor, New York (facility) on **[*17]** or before August 28, 2017, the date on which its prior registration expired;

3. Directing respondent James Bulloch to pay a total civil penalty in the amount of twenty thousand dollars ($ 20,000) within fifteen (15) days of service of the Commissioner's order;

4. Directing respondent James Bulloch to submit to the Department, within fifteen (15) days of service of the Commissioner's order, a complete registration application for the facility together with the applicable registration fees;

5. Directing respondent James Bulloch to submit to the Department, within fifteen (15) days of service of the Commissioner's order, the civil penalty of five thousand two hundred and fifty dollars ($ 5,250) due under order on consent file # R2-20160408-141, executed on April 18, 2017; and

6. Directing such other and further relief as he may deem just and appropriate.

/s/

P. Nicholas Garlick

Administrative Law Judge

Dated: Albany, New York

October 25, 2018

Opinion

Basil Seggos, Commissioner

ORDER

DEC Case No.R2-20160408-141

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department) that respondent James Bulloch committed two violations. The first cause of action asserts respondent violated ECL 71-1929(1) by failing to comply with an Order on Consent File No. R2-20160408-141, which addressed various petroleum bulk storage (PBS) violations at respondent's facility at 441 Beach 129th Street, Belle Harbor, New York and which became effective on April 18, 2017 (2017 Consent Order). Specifically, Department staff alleged that respondent failed to pay the agreed to $ 5,250 civil penalty under the 2017 Consent Order. The second cause of action alleges that respondent violated 6 NYCRR 613.1.9(c) by failing to renew the registration of its petroleum bulk storage (PBS) facility on or before August 28, 2017, the date on which its prior PBS registration expired.

Administrative Law Judge (ALJ) P. Nicholas Garlick of the Department's Office of Hearings and Mediation Services was assigned to this matter and prepared the attached summary report, which **[*2]** I adopt as my decision in this matter, subject to my comments below.

As set forth in the ALJ's summary report, respondent failed to file an answer to the motion for order without hearing in lieu of complaint. As a consequence of respondent's failure to answer in this matter, and based on the evidence included with Department staff's motion, the ALJ recommends that Department staff's motion be granted (see Summary Report at 5). I concur. The pleadings and the papers submitted with and in support of the motion establish a prima facie case that respondent is liable for the two violations alleged.

Department staff seeks a total civil penalty in the amount of twenty thousand dollars ($ 20,000) - ten thousand dollars ($ 10,000) for the violation of the 2017 Consent Order and ten thousand dollars ($ 10,000) for the failure to renew the PBS facility's registration. ECL 71-1929(1), which applies to the statutory and regulatory violations at issue in this proceeding, provides for a penalty of up to thirty-seven thousand five hundred dollars ($ 37,500) per day for each violation. Staff's requested civil penalty is in accordance with the Department's Civil Penalty Policy (DEE-1), the Department's **[*3]** Order on Consent Enforcement Policy (DEE-2), and administrative precedent relating to similar violations. Based on this record, the requested civil penalty of twenty thousand dollars ($ 20,000) is authorized and appropriate.

I direct that respondent submit the civil penalty of twenty thousand dollars ($ 20,000) imposed for these two violations within fifteen (15) days of the service of this order upon respondent. I also further direct that respondent

submit the civil penalty of five thousand two hundred fifty dollars ($ 5,250) that is due and owing under the 2017 Consent Order within fifteen (15) days of the service of this order upon respondent.

In addition to the payment of these civil penalties, respondent is directed to submit a petroleum bulk storage application for the facility, plus applicable registration fees, to the Department within fifteen (15) days of the service of this order upon respondent (see Summary Report at 1 n 1, 4-5).

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

I. Department staff's motion for an order without hearing in lieu of complaint is granted. By failing to answer or appear in this proceeding, **[*4]** respondent James Bulloch waived his right to be heard.

II. Based on the pleadings and papers submitted with and in support of Department staff's motion, respondent James Bulloch is determined to have violated: (1) ECL 71-1929(1) by failing to comply with Order on Consent File No. R2-20160408-141, which became effective on April 18, 2017, by failing to pay the agreed to civil penalty of five thousand two hundred and fifty dollars ($ 5,250); and (2) 6 NYCRR 613.1.9(c) by failing to renew the registration of his petroleum bulk storage (PBS) facility located at 441 Beach 129th Street, Belle Harbor, New York on or before August 28, 2017, the date on which the prior registration expired.

III. Within fifteen (15) days of the service of this order upon respondent James Bulloch, respondent shall pay a civil penalty in the amount of twenty thousand dollars ($ 20,000) by certified check, cashier's check, or money order made payable to the "New York State Department of Environmental Conservation" for the violations referenced in paragraph II of this order.

IV. Within fifteen (15) days of the service of this order upon respondent James Bulloch, respondent shall pay the amount of the civil **[*5]** penalty agreed to in Order on Consent File No. R2-20160408-141 in the amount of five thousand two hundred and fifty dollars ($ 5,250) by certified check, cashier's check, or money order made payable to the "New York State Department of Environmental Conservation."

V. Within fifteen (15) days of the service of this order upon respondent James Bulloch, respondent shall submit to the Department a complete petroleum bulk storage application for the facility, plus applicable current and past due registration fees.

VI. The petroleum bulk storage application, applicable registration fees, the civil penalty payment, and the payment required under Order on Consent File No. R2-20160408-141 (which became effective on April 18, 2017), shall be sent to the following address:

NYS Department of Environmental Conservation

Office of General Counsel, Region 2

One Hunter's Point Plaza

47-40 21st Street

Long Island City, New York 11101

Attn: James L. Simpson, Esq.

VII. Any questions or other correspondence regarding this order shall also be addressed to James L. Simpson, Esq. at the address referenced in paragraph VI of this order.

VIII. The provisions, terms, and conditions of this order **[*6]** shall bind James Bulloch and his agents, successors, and assigns, in any and all capacities.

or the New York State Department

of Environmental Conservation

By: /s/

Basil Seggos

Commissioner

Dated: Albany, New York
October 29, 2018

Attachment

APPENDIX A

Matter of James Bulloch

DEC File No. PBS R2-20160408-141

Attached to the affirmation of James L. Simpson, dated January 30, 2018 and revised affirmation dated August 21, 2018.

Exh.	Description
A	PBS facility information report for respondent's facility and respondent's PBS certificate
B	Order on consent file number R2-20160408-141 executed on April 18, 2017
C	Emails between Department staff members and respondent
D	Follow up email from Department staff counsel

End of Document

2018 N.Y. ENV LEXIS 33

New York Department of Environmental Conservation

September 12, 2018, Decided; July 25, 2018, Report Issued

DEC Case No. PBS.2-370320.4.2018

NY Department of Environmental Conservation Decisions

Reporter
2018 N.Y. ENV LEXIS 33 *

In the Matter of the Alleged Violation of Article 17 of the Environmental Conservation Law (ECL) of the State of New York and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), by STONE POINT PROPERTIES, LLC, Respondent.

Core Terms

staff, registration, bulk storage, petroleum, stone, renew, notice of the hearing, commissioner's order, civil penalty, street, default judgment, expire, adjudication hearing, ten thousand dollars, pre-hearing, default, hearing report, notice, days of service, reconvene

Opinion By: **[*1]** SEGGOS

Initial Decision:

Michael S. Caruso, Administrative Law Judge

HEARING REPORT

DEC Case No. PBS.2-370320.4.2018

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent Stone Point Properties, LLC (respondent) with a notice of hearing and complaint, dated February 1, 2018, alleging a violation of ECL 17-1009 and 6 NYCRR 613-1.9(c) for failing to renew the registration of its petroleum bulk storage facility located at 15-35 126th Street, College Point, New York on or before **[*6]** June 25, 2008, the date on which its prior registration expired. The complaint seeks an order of the Commissioner: (1) finding respondent in violation of ECL 17-1009 and 6 NYCRR 613-1.9(c); (2) assessing a civil penalty in the amount of ten thousand dollars ($ 10,000); (3) directing respondent to register its petroleum bulk storage facility within fifteen (15) days of service of the Commissioner's order by remitting the applicable registration fee along with a complete registration application; and (4) granting such other and further relief as the Commissioner shall deem just and appropriate.

Because respondent is an active domestic limited liability company in the State of New York, service of the notice of hearing and complaint on respondent was made by serving the New York State Department of State on February

1, 2018 (see Staff Exhibit 3). Department staff provided additional service by sending the notice of hearing and complaint to respondent by first class mail on or about February 1, 2018 (see id.). Respondent failed to file an answer to the complaint, and failed to appear at a pre-hearing conference scheduled for March 9, 2018, as directed in the notice of hearing and **[*7]** accompanying cover letter (see Staff Exhibit 2).

As stated in the notice of hearing, on April 10, 2018, an adjudicatory hearing was convened before the undersigned. Department staff was represented by Deborah Gorman, Esq., Senior Attorney, Office of General Counsel, New York State Department of Environmental Conservation, 625 Broadway, Albany, New York. No one appeared on behalf of respondent.

Department staff indicated that it was prepared to proceed with the hearing, and proffered a staff witness. Noting for the record that respondent had not answered the complaint, had not appeared for the pre-hearing conference, and failed to appear for the adjudicatory hearing, Department staff moved orally for a default judgment pursuant to 6 NYCRR 622.15. I reserved on the default motion, allowing the record to remain open for Department staff to submit the documentation required by 6 NYCRR 622.15(b), and indicated that, upon staff's request, the hearing would be reconvened on a subsequent date and on notice to respondent.

On June 13, 2018, the Office of Hearings and Mediation Services served a Notice of Hearing on respondent by first class mail, advising respondent that the hearing **[*8]** would be reconvened on July 16, 2018. On July 16, 2018, the adjudicatory hearing was reconvened before me at the Department's Central Office at 625 Broadway, Albany, New York. Department staff was represented by law student intern Monica Mercola, under the supervision of the Office of General Counsel. No one appeared on behalf of respondent.

Department staff orally renewed its motion for a default judgment. Department staff called one witness, Benjamin Conlon, Associate Attorney with the Department's Office of General Counsel, and Section Chief in the Bureau of Remediation. In all, ten (10) exhibits were received in evidence. [1]

Applicable Regulatory Provision

613-1.9 Registration [2]

[*9]
* * *

"(c) *Renewal*. Registration must be renewed every five years from the date of the last valid registration certificate until the department receives written notice and documentation from the facility owner that the facility has been permanently closed in accordance with section 613-2.6(b), 613-3.5(b), or 613-4.5(b) of this Part, or that ownership of the facility has been transferred in accordance with subdivision (d) of this section."

Findings of Fact

The following facts are found based upon the preponderance of evidence presented at the hearing, see 6 NYCRR 622.11(c):

1. Respondent Stone Point Properties, LLC (respondent) is the owner of a petroleum bulk storage facility having a capacity of over 1,100 gallons located at 15-35 126th Street, College Point, New York (facility). In

[1] At hearing, Department staff moved to keep the record open to allow staff time to correct a date reference in the affidavit of service (Exhibit 3). I granted staff's motion, and staff submitted the corrected affidavit on July 19, 2018, which was received into evidence, and the record was closed.

[2] Effective October 11, 2015, 6 NYCRR 613-1.9 replaced 6 NYCRR 612.2, Registration of Facilities, which read in part, "(a) *Existing facilities*. . . . (2) Registration must be renewed every five years from the date of the last valid registration until the department receives written notice that the facility has been permanently closed or that ownership of the facility has been transferred. " ECL 17-1009(2) requires facility registrations to be "renewed every five years or whenever ownership of a facility is transferred, whichever occurs first."

particular, petroleum storage tank number 001 at the facility has a capacity of 3,000 gallons and is located aboveground in a subterranean vault with access for inspections. See Testimony of Benjamin Conlon (Conlon Testimony); Staff Exhibits 5, 6, 7, and 8.

2. Respondent is an active domestic limited liability company in the State of New York. See Conlon Testimony; Staff Exhibit 4.

[*10] 3. Pursuant to a registration application received June 25, 2003, the Department issued Petroleum Bulk Storage (PBS) Registration Certificate No. 2-370320 to "Stone Point Properties, LLC" identified on the certificate as the owner of the facility, on June 25, 2003 with an expiration date of June 25, 2008. The PBS Application received by Department staff on June 25, 2003 identifies the owner as Stone Point Properties, LLC. See Conlon Testimony; Staff Exhibits 5 and 6.

4. On November 6, 2001, Arthur and Hildegard Wenig and Stanley and Janet Ryman, by deed, transferred all right, title and interest in the facility to respondent Stone Point Properties, LLC, the facility's current owner. This deed is recorded in the Office of the City Register of the City of New York, on Reel 6132, Page 0316. See Conlon Testimony; Staff Exhibit 8.

5. Benjamin Conlon is an Associate Attorney in the Department's Office of General Counsel, serving as a Section Chief in the Bureau of Remediation, whose responsibilities include enforcement of the Petroleum Bulk Storage, Chemical Bulk Storage, and Major Oil Storage Facilities laws and regulations. Mr. Conlon is authorized to access and inspect the Department's **[*11]** unified information system (UIS) and the electronic repository for scanned documents known as DecDOCS. The UIS and DecDOCS are databases maintained by the Department and contain petroleum bulk storage facility records filed with the Department, which records include petroleum bulk storage facility registrations filed pursuant to 6 NYCRR 613-1.9. See Conlon Testimony.

6. On July 16, 2018, Benjamin Conlon searched the petroleum bulk storage facility records contained in the Department's UIS and DecDOCS databases for any petroleum bulk storage facility registration application filed by respondent for the facility. Mr. Conlon determined that respondent's registration expired on June 25, 2008 and, as of July 16, 2018, had not been renewed. See Conlon Testimony; see also Staff Exhibits 6 and 7.

7. As shown by Receipt for Service No. 201802070587 issued by the New York State Department of State, respondent was served personally, on February 1, 2018, pursuant to section 303 of the Limited Liability Company Law, with a notice of hearing and complaint dated February 1, 2018 alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 613-1.9(c), together with a cover letter, **[*12]** statement of readiness and supporting affirmation, for failure to renew the registration of its petroleum bulk storage facility located at 15-35 126th Street, College Point, New York on or before June 25, 2008, the date the prior registration expired. Consistent with CPLR 3215(g)(4), Department staff also provided additional service by sending the notice of hearing and complaint to respondent by first class mail on or about February 1, 2018. See Staff Exhibits 2 and 3; see also Hearing Record.

8. Respondent failed to file an answer to the complaint, failed to appear at a pre-hearing conference scheduled for March 9, 2018 as directed in the notice of hearing and the accompanying cover letter, and failed to appear for the adjudicatory hearing scheduled in the matter for April 10, 2018 and reconvened on July 16, 2018, as directed in the notices of hearing. See Hearing Record.

Discussion

A respondent upon whom a complaint has been served must serve an answer within 20 days of receiving a notice of hearing and complaint (see 6 NYCRR 622.4[a]). A respondent's failure to file a timely answer "constitutes a default and a waiver of respondent's right to a hearing" (6 NYCRR 622.15[a]). **[*13]** In addition, attendance by a respondent at a scheduled pre-hearing conference or hearing is mandatory, "and failure to attend constitutes a default and a waiver of the opportunity for a hearing" (6 NYCRR 622.8[c]; see also 6 NYCRR 622.15[a] ["A respondent's … failure to appear at the hearing or the pre-hearing conference … constitutes a default and a waiver of respondent's right to a hearing"]).

Upon a respondent's failure to answer a complaint or failure to appear for a pre-hearing conference or hearing, Department staff may make a motion to an ALJ for a default judgment. Such motion must contain (i) proof of service upon respondent of the notice of hearing and complaint; (ii) proof of respondent's failure to appear or to file a timely answer; and (iii) a proposed order (see 6 NYCRR 622.15[b][1]-[3]).

As the Commissioner has held, "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them" (Matter of Alvin Hunt, d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 6 [citations omitted]). In addition, in support of a motion for a default judgment, staff must "provide **[*14]** proof of the facts sufficient to support the claim" (Matter of Queen City Recycle Center, Inc., Decision and Order of the Commissioner, December 12, 2013, at 3). Staff is required to support their motion for a default judgment with enough facts to enable the ALJ and the Commissioner to determine that staff has a viable claim (see Matter of Samber Holding Corp., Order of the Commissioner, March 12, 2018, at 1 [citing Woodson v Mendon Leasing Corp., 100 NY2d 62, 70-71 (2003)] see also State v Williams, 44 AD3d 1149, 1151-1152 [3d Dept 2007] and CPLR 3215[f]).

The record establishes that: (i) Department staff served the notice of hearing and complaint upon respondent; (ii) respondent failed to file an answer to the complaint and failed to appear at a pre-hearing conference scheduled for March 9, 2018, as directed in the cover letter and notice of hearing served with the complaint; and (iii) respondent failed to appear for the adjudicatory hearing scheduled for April 10, 2018 and reconvened on July 16, 2018, as directed in the notices of hearing. Department staff has submitted a proposed order.

Department staff's submissions **[*15]** in support of the motion for a default judgment provide proof of facts sufficient to enable me to determine that staff has a viable claim that respondent failed to renew the registration of its petroleum bulk storage facility located at 15-35 126th Street, College Point, New York on or before June 25, 2008, the date on which its registration expired, in violation of ECL 17-1009 and 6 NYCRR 613-1.9(c) (see Matter of Samber Holding Corp., Order of the Commissioner at 1). Based upon the foregoing, the Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15.

Moreover, the proof adduced at the hearing, conducted in respondent's absence, demonstrates by a preponderance of the evidence that respondent failed to renew the registration of its petroleum bulk storage facility located at 15-35 126th Street, College Point, New York, in violation of ECL 17-1009 and 6 NYCRR 613-1.9(c). The Department is entitled to judgment upon the facts proven.

In its complaint, Department staff seeks an order imposing a civil penalty of ten thousand dollars ($ 10,000). ECL § 71-1929(1) provides for a civil penalty of up to thirty-seven thousand five hundred **[*16]** dollars ($ 37,500) per day for each violation. In proceedings concerning violations of PBS registration requirements in the New York City area, calculation of an appropriate penalty turns in part on the duration of the violations. See e.g. Matter of 540 Jackson Realty Corp., Order of the Commissioner, May 18, 2016, at 2; see also Matter of 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011 (12 Martense Associates), at 2.

Department staff's proposed order seeks a civil penalty of ten thousand dollars ($ 10,000). This requested civil penalty is consistent with the Department's penalty policy as well as applicable provisions of ECL article 71 and administrative precedent (see 12 Martense Associates, at 2).

Conclusion of Law

By failing to renew the registration of its PBS facility located at 15-35 126th Street, College Point, New York on or before June 25, 2008, the date the prior registration expired, respondent violated ECL 17-1009 and 6 NYCRR 613-1.9(c).

Recommendations

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

1. Granting Department staff's motion for default, holding Stone Point Properties, LLC in default **[*17]** pursuant to the provisions of 6 NYCRR 622.15;

2. Holding that, based upon the proof adduced at the adjudicatory hearing, respondent Stone Point Properties, LLC violated ECL 17-1009 and 6 NYCRR 613-1.9(c) by failing to renew the registration of its petroleum bulk storage facility located at 15-35 126th Street, College Point, New York on or before June 25, 2008, the date the prior registration expired;

3. Directing respondent Stone Point Properties, LLC to submit to the Department, within fifteen (15) days of service of the Commissioner's order, a complete petroleum bulk storage registration application for the facility, together with applicable registration fees;

4. Directing respondent Stone Point Properties, LLC to pay a civil penalty in the amount of ten thousand dollars ($ 10,000) within fifteen (15) days of service of the Commissioner's order; and

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

/s/

Michael S. Caruso

Administrative Law Judge

Dated: July 25, 2018

Albany, New York

Opinion

Basil Seggos, Commissioner

ORDER

DEC Case No. PBS.2-370320.4.2018

This administrative enforcement proceeding addresses allegations of staff of the New York State Department of Environmental Conservation (Department or DEC) that respondent Stone Point Properties, LLC violated ECL 17-1009 and 6 NYCRR 613-1.9(c) by failing to renew the registration of its petroleum bulk storage facility at 15-35 126th Street, College Point, New York (facility) on or before June 25, 2008, the date on which its prior registration expired. At the facility is a petroleum bulk storage tank which is located aboveground in a subterranean vault and which has a capacity of 3,000 gallons.

On July 16, 2018, an adjudicatory hearing was convened before Michael S. Caruso, Administrative Law Judge (ALJ) of DEC's Office of Hearings and Mediation Services. ALJ Caruso prepared the attached hearing report, which I adopt as my decision in this matter, subject to my comments below. As set forth in the ALJ's hearing report, respondent failed to file an answer to the complaint served by Department staff in this matter, failed to appear at a pre-hearing conference scheduled for March 9, 2018, and failed **[*2]** to appear for the adjudicatory hearing scheduled in the matter for April 10, 2018 and reconvened on July 16, 2018 (see Hearing Report at 4 [Finding of Fact No. 8]).

As a consequence of respondent's failure to answer or appear in this matter, the ALJ recommends that Department staff's motion for a default judgment be granted (see Hearing Report at 5). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15.

At the hearing on July 16, 2018, Department staff presented proof of facts sufficient to enable me to determine that staff has a viable claim and proved its case on the merits by a preponderance of the evidence (see Hearing Report at 5). Accordingly, staff is entitled to a judgment based on record evidence.

The record demonstrates that respondent was required to renew the registration of its facility on or before June 25, 2008 (see ECL 17-1009[2]; Hearing Report at 5). Respondent's failure to properly renew the registration of its facility violated ECL 17-1009 and 6 NYCRR 613-1.9(c).

ECL 71-1929 provides for a civil penalty of up to thirty-seven thousand five hundred dollars ($ 37,500) per day for each violation of title 10 of ECL article **[*3]** 17 and its implementing regulations. Department staff, in its papers, sought a civil penalty in the amount of ten thousand dollars ($ 10,000). Where, as here, an owner has not registered the facility for more than five years, and no other violations or mitigating or aggravating factors exist, a civil penalty of ten thousand dollars ($ 10,000) is consistent with administrative precedent (see Matter of 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011, at 2). The requested penalty of ten thousand dollars ($ 10,000) is authorized and appropriate.

I also direct that respondent submit to the Department a petroleum bulk storage application for the facility within fifteen (15) days of service of this order upon it, together with all applicable registration fees.

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

1. Department staff's motion for a default judgment pursuant to 6 NYCRR 622.15 is granted. By failing to answer or appear in this proceeding, respondent Stone Point Properties, LLC waived its right to be heard at the hearing.

2. Moreover, based upon record evidence, respondent Stone Point Properties, LLC **[*4]** violated ECL 17-1009 and 6 NYCRR 613-1.9(c), by failing to renew the registration of its petroleum bulk storage facility located at 15-35 126th Street, College Point, New York on or before June 25, 2008, the date the prior registration expired.

3. Within fifteen (15) days of the service of this order upon respondent Stone Point Properties, LLC, respondent shall submit to the Department a complete petroleum bulk storage application for the facility, plus applicable registration fees.

4. Within fifteen (15) days of the service of this order upon respondent Stone Point Properties, LLC, respondent shall pay a civil penalty in the amount of ten thousand dollars ($ 10,000) by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation.

5. The petroleum bulk storage application, applicable registration fees, and the penalty payment shall be sent to the following address:

Office of General Counsel (Remediation Bureau)

NYS Department of Environmental Conservation

625 Broadway, 14th Floor

Albany, New York 12233-1500

Attn: Deborah Gorman, Esq.

6. Any questions or other correspondence regarding this order shall also be addressed **[*5]** to Deborah Gorman, Esq. at the address referenced in paragraph V of this order.

7. The provisions, terms and conditions of this order shall bind respondent Stone Point Properties, LLC, and its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: /s/

Basil Seggos

Commissioner

Dated: September 12, 2018

Albany, New York

Attachment

EXHIBIT CHART - PBS EXPEDITED PROCEEDINGS

Matter of Stone Point Properties, LLC

15-35 126th Street, College Point, New York - DEC Case No. PBS.2-370320.4.2018
July 16, 2018 - Central Office
Edirol File No. 180716133809

[SEE TABLE IN ORIGINAL]

End of Document

2018 N.Y. ENV LEXIS 35

New York Department of Environmental Conservation

September 17, 2018, Decided; August 23, 2018, Report Issued

DEC Case No. PBS.OP.4-106186.5.2017

NY Department of Environmental Conservation Decisions

Reporter
2018 N.Y. ENV LEXIS 35 *

In the Matter of the Alleged Violation of Title 10 of Article 17 of the Environmental Conservation Law (ECL) of the State of New York, as implemented pursuant to Part 613 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), -by- YOGIJI REAL ESTATE LLC, Respondent.

Core Terms

staff, registration, motion for default, tank, civil penalty, default judgment, default, petroleum, gallons, sworn, bulk storage, cover letter, registration application, notice of the hearing, commissioner's order, mail, adjudication hearing, thousand dollars, underground tank, notice, days of service, summary report, gasoline

Opinion By: [*1] SEGGOS

Initial Decision:

Michael S. Caruso, Administrative Law Judge

DEFAULT SUMMARY REPORT

DEC Case No. PBS.OP.4-106186.5.2017

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent Yogiji Real Estate LLC (respondent) with a notice of hearing and complaint, dated May 24, 2018, alleging a violation of 6 NYCRR 613-1.9(a), for failing to ensure that the registration information, including the identity of any authorized class A or class B operator, remained current and accurate for its petroleum **[*9]** bulk storage (PBS) facility located at 176 Erie Blvd., Canajoharie, New York (facility). The complaint seeks an order of the Commissioner: (i) finding respondent in violation of 6 NYCRR 613-1.9(a); (ii) assessing a civil penalty in the amount of five thousand dollars ($ 5,000); (iii) directing respondent to submit a completed PBS registration application form to the Department including information identifying the authorized class A operator and authorized class B operator for the relevant tank systems within 30 days after the date the order is signed by the Commissioner; and (iv) imposing such other and further relief as the Commissioner may deem just and appropriate.

Department staff served the notice of hearing and complaint on respondent by certified mail return receipt requested (*see* Motion for Default Judgment, Exhibit C) on May 24, 2018. Respondent received the certified mail on May 29, 2018 (*Id.*). Respondent failed to file an answer to the complaint, and failed to appear at the adjudicatory hearing scheduled for July 24, 2018, as directed in the cover letter and notice of hearing served with the complaint (*see* Motion for Default Judgment, Exhibit A).

As stated **[*10]** in the notice of hearing, an adjudicatory hearing was convened on July 24, 2018 before the undersigned Administrative Law Judge (ALJ) at the Department's Region 4 offices, located at 1130 North Westcott Road, Rotterdam, New York. Department staff was represented by Stephen Repsher, Esq., Assistant Regional Attorney, Office of General Counsel, New York State Department of Environmental Conservation, 1130 North Westcott Road, Rotterdam, New York. No one appeared on behalf of respondent.

I noted for the record that respondent had failed to answer the complaint and failed to appear for the adjudicatory hearing. Department staff moved orally for a default judgment pursuant to 6 NYCRR 622.15. I reserved on the oral motion, allowing the record to remain open for Department staff to submit the documentation required by 6 NYCRR 622.15(b). At the July 24, 2018 hearing, staff submitted a written motion for a default judgment with supporting papers (*see* Appendix A, attached hereto [listing documents submitted on motion]). Department staff served the motion and supporting papers on respondent by first class mail on July 24, 2018 (*see* Motion for Default Judgment, Exhibit F).

By letter **[*11]** dated August 10, 2018, I requested additional documents from Department staff. On August 13, 2018, Department staff provided the additional documents and served them on respondent (*see* Affidavit of Service of Jill Viscusi, sworn to August 13, 2018).

Applicable Regulatory Provision

Section 613-1.9. Registration.

* * *

"(a) General. The facility owner must obtain an initial or revised registration certificate from the department prior to the first receipt of petroleum into a new or replaced tank system. The facility owner must ensure that the registration information identified in subdivision (e) of this section remains current and accurate. In addition, every temporary tank system that is not removed within 180 days after installation must either be included on a new facility registration or be added to an existing facility's registration. The facility owner may rely on an authorized representative to satisfy any obligation imposed on the owner by the provisions of this section. (emphasis added)

* * *

"(e) Application procedure for information corrections.

(1) The facility owner must submit information corrections for registered facilities using forms or electronic **[*12]** means as provided by the department. Forms are available online at www.dec.ny.gov and at all department offices.

(2) The registration application must be signed by the facility owner.

(3) Changes in the following registration items are considered information corrections:

(i) contact information;

(ii) class A or class B Operator;

(iii) tank system status;

(iv) tank system equipment; or

(v) type of petroleum stored.

(4) No registration fee is required for submitting information corrections. "

Findings of Fact

The following facts are found based upon the pleadings and papers submitted with and in support of staff's motion for a default judgment:

1. Respondent Yogiji Real Estate LLC is the owner of a PBS facility having a capacity of over 1,100 gallons located at 176 Erie Blvd., Canajoharie, New York (facility). In particular, PBS tank number 11 at the facility has a capacity of 10,000 gallons, contains gasoline and is located underground; tank number 12 has a capacity of 6,000 gallons, contains gasoline and is located underground; tank number 13 has a capacity of 6,000 gallons, contains diesel fuel and is located underground; tank number 14 has a capacity of **[*13]** 4,000 gallons, contains gasoline and is located underground; and tank number 15 has a capacity of 2,000 gallons, contains kerosene and is located aboveground. *See* Motion for Default Judgment, Exhibit D.

2. The Department issued PBS Certificate Number 4-106186 to Yogiji Real Estate LLC, the owner of the facility, on August 25, 2014 with an expiration date of August 25, 2019. *See* Motion for Default Judgment, Exhibit D (Addendum).

3. On March 19, 2018, a search of the Department's PBS registration database revealed that respondent's facility contains a tank system or systems that is or are subject to the requirements of 6 NYCRR 613-2 and that respondent had not designated an authorized class A operator or class B operator for each tank system on the registration. *See* Motion for Default Judgment, Exhibit E, Affidavit of Amiel Lagatic, sworn to May 23, 2018, P 16 (a) and (b); *see also* Exhibit D. [1]

4. As shown by the Affidavit of Service of Jill Viscusi, sworn to July 23, 2018, Department staff served a notice of hearing and complaint on respondent by certified mail return receipt requested, on May 24, 2018, which were received by respondent on May 29, 2018, alleging a **[*14]** violation of 6 NYCRR 613-1.9(a), together with a cover letter, order on consent, statement of readiness and affidavit of Amiel Lagatic, for failure to maintain a current and accurate registration of its PBS facility located at 176 Erie Blvd., Canajoharie, New York. *See* Motion for Default Judgment, Exhibit C.

5. Respondent failed to file an answer to the complaint and failed to appear for the adjudicatory hearing scheduled in the matter on July 24, 2018, as directed in the notice of hearing. *See* Motion for Default Judgment, Exhibit B, Affirmation of Stephen Repsher, Esq., dated July 24, 2018, PP 4-5; Hearing Record.

6. As shown by the Affidavit of Service of Jill Viscusi, sworn to July 24, 2018, Department staff served the Notice of Motion and Motion for Default Judgment, with a cover letter and exhibits, on respondent by first class mail. *See* Motion for Default Judgment, Exhibit F.

7. As shown by the Affidavit of Service of Jill Viscusi, sworn to August 13, 2018, Department staff served a copy of the May 24, 2018 cover letter from Stephen Repsher to respondent and the statement of readiness that were served with the complaint along with a copy of the PBS Certificate, dated **[*15]** August 25, 2014, on respondent by first class mail. *See*Affidavit of Service of Jill Viscusi, sworn to August 13, 2018.

Discussion

A respondent upon whom a complaint has been served must serve an answer within 20 days of receiving a notice of hearing and complaint (*see* 6 NYCRR 622.4[a]). A respondent's failure to file a timely answer "constitutes a

[1] Although the PBS Certificate issued on August 25, 2014 identifies a "Class B (Daily On-Site) Operator", staff's sworn affidavit demonstrates that as of March 19, 2018 respondent had not designated an authorized Class A or authorized Class B operator on the registration.

default and a waiver of respondent's right to a hearing" (6 NYCRR 622.15[a]). In addition, attendance by a respondent at a scheduled pre-hearing conference or hearing is mandatory, "and failure to attend constitutes a default and a waiver of the opportunity for a hearing" (6 NYCRR 622.8[c]; *see also* 6 NYCRR 622.15[a] ["A respondent's … failure to appear at the hearing or the pre-hearing conference … constitutes a default and waiver of respondent's right to a hearing"]).

Upon a respondent's failure to answer a complaint or failure to appear **[*16]** for a pre-hearing conference or hearing, Department staff may make a motion to an ALJ for a default judgment. Such motion must contain: (i) proof of service upon respondent of the notice of hearing and complaint; (ii) proof of respondent's failure to appear or to file a timely answer; and (iii) a proposed order (*see* 6 NYCRR 622.15[b][1] - [3]).

As the Commissioner has held, "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them" (*Matter of Alvin Hunt, d/b/a Our Cleaners*, Decision and Order of the Commissioner, July 25, 2006, at 6 [citations omitted]). In addition, in support of a motion for a default judgment, staff must "provide proof of the facts sufficient to support the claim[s]" alleged in the complaint. *Matter of Queen City Recycle Center, Inc.*, Decision and Order of the Commissioner, December 12, 2013, at 3. Staff is required to support their motion for a default judgment with enough facts to enable the ALJ and the Commissioner to determine that staff has a viable claim (*see Matter of Samber Holding Corp.*, Order of the Commissioner, March 12, 2018, at 1 [citing Woodson v Mendon Leasing Corp., 100 NY2d 62, 70-71 (2003)] **[*17]** *see also* State v Williams, 44 AD3d 1149, 1151-1152 [3d Dept 2007] and CPLR 3215[f]).

The record establishes that: (i) Department staff served the notice of hearing and complaint upon respondent; (ii) respondent failed to file an answer to the complaint; and (iii) respondent failed to appear for the adjudicatory hearing scheduled on July 24, 2018, as directed in the notice of hearing. Department staff has submitted a proposed order (see Motion for Default Judgment, Exhibit G). Based upon the foregoing, the Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15. Staff also served respondent with copies of the motion for default judgment and supporting papers (see Findings of Fact Nos. 6 and 7).

Department staff's submissions in support of the motion for a default judgment provide proof of facts sufficient to enable me to determine that staff has a viable claim that respondent failed to ensure that the registration information for its petroleum bulk storage facility located at 176 Erie Blvd., Canajoharie, New York, remained current and accurate, in violation of 6 NYCRR 613-1.9(a) (*see Matter of Samber* **[*18]** *Holding Corp.*, Order of the Commissioner at 1). In particular, respondent failed to designate an authorized class A operator or authorized class B operator for each tank system on the registration by October 11, 2016, as required by 6 NYCRR 613-2.5(a). Respondent was in violation of 6 NYCRR 613-1.9(a) from October 11, 2016.

Department staff seeks a civil penalty in the amount of five thousand dollars ($ 5,000), and staff's submissions on the motion for a default judgment elaborate on the requested penalty, discussing the Department's Civil Penalty Policy, DEE-1, and administrative precedent relating to similar violations (*see* Motion for Default Judgment, Exhibit A, Complaint, at Wherefore Clause P II; *see also* Exhibit B, Repsher Affirmation, PP 12-16).

I find that staff's request for a civil penalty in the amount of five thousand dollars ($ 5,000) is consistent with the Department's penalty policy as well as applicable provisions of ECL article 71.

Department staff does not request payment of the civil penalty within any specified period of time, but staff's complaint requests that a registration application be submitted within thirty (30) days of the date of a Commissioner's **[*19]** order. Although Department staff's proposed order directs respondent to submit the PBS registration application form within fifteen (15) days of the order, I recommend the Commissioner direct submission of the PBS registration application and payment of the civil penalty within thirty (30) days of respondent's receipt of the order.

Conclusion of Law

By failing to maintain an accurate and current registration for its PBS facility located at 176 Erie Blvd., Canajoharie, New York, respondent violated 6 NYCRR 613-1.9(a).

Recommendation

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

1. Granting Department staff's motion for default judgment, holding respondent Yogiji Real Estate LLC in default pursuant to the provisions of 6 NYCRR 622.15;

2. Holding that respondent Yogiji Real Estate LLC violated 6 NYCRR 613-1.9(a) by failing to maintain an accurate and current registration for its PBS facility located at 176 Erie Blvd., Canajoharie, New York;

3. Directing respondent Yogiji Real Estate LLC to submit to the Department, within thirty (30) days of service of the Commissioner's order, a complete registration application for the facility, including **[*20]** the information identifying the authorized class A operator and class B operator for all relevant tank systems;

4. Directing respondent Yogiji Real Estate LLC to pay a civil penalty in the amount of five thousand dollars ($ 5,000) within thirty (30) days of service of the Commissioner's order; and

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

/s/

Michael S. Caruso

Administrative Law Judge

Dated: Albany, New York

August 23, 2018

Opinion

Basil Seggos, Commissioner

ORDER

DEC Case No. PBS.OP.4-106186.5.2017

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department) that respondent Yogiji Real Estate LLC violated 6 NYCRR 613-1.9(a) by failing to ensure that the registration information, including the identity of any authorized class A or authorized class B operator, remained current and accurate for its petroleum bulk storage (PBS) facility.

Respondent's facility is located at 176 Erie Blvd., Canajoharie, New York, and includes the following petroleum bulk storage tanks: No. 11, an underground tank with a capacity of 10,000 gallons, containing gasoline; No. 12, an underground tank with a capacity of 6,000 gallons, containing gasoline; No. 13, an underground tank with a capacity of 6,000 gallons, containing diesel fuel; No. 14, an underground tank with a capacity of 4,000 gallons, containing gasoline; and No. 15, an aboveground tank with a capacity of 2,000 gallons, containing kerosene.

Administrative Law Judge (ALJ) Michael S. Caruso of the Department's Office of Hearings and Mediation Services was assigned **[*2]** to this matter and prepared the attached default summary report, which I adopt as my decision in this matter, subject to my comments below.

As set forth in the ALJ's default summary report, respondent failed to file an answer to the complaint served by Department staff in this matter and failed to appear for the adjudicatory hearing scheduled for July 24, 2018 (see Default Summary Report at 3 [Finding of Fact No. 5]). At the July 24, 2018 adjudicatory hearing, Department staff

made an oral motion for a default judgment. ALJ Caruso reserved on the motion, and Department staff submitted a written motion for default judgment with supporting papers.

As a consequence of respondent's failure to answer or appear in this matter, the ALJ recommends that Department staff's motion for a default judgment be granted (see Default Summary Report at 5). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15. The pleadings and the papers submitted with and in support of the motion provide enough facts to enable me to determine that staff has a viable claim that respondent failed to ensure that the registration information for its petroleum bulk storage facility located **[*3]** at 176 Erie Blvd., Canajoharie, New York, remained current and accurate, in violation of 6 NYCRR 613-1.9(a). In particular, respondent failed to designate an authorized class A operator or authorized class B operator for each tank system on the registration by October 11, 2016, as required by 6 NYCRR 613-2.5(a).

Department counsel correctly points out that the requirement to register PBS facilities and maintain current and accurate information on the registration is one of the "cornerstones" of the PBS regulatory scheme (see Motion for Default Judgment, Exhibit B, Affirmation of Stephen Repsher, Esq., dated July 24, 2018 [Repsher Affirmation], P 12). Proper registration assists in the oversight of other requirements for a PBS facility (e.g., leak detection, monitoring, and reporting), with the goal of protecting the environment and public health.

Respondent was required to designate an authorized class A operator and an authorized class B operator on the registration for its facility no later than October 11, 2016 but failed to do so (see Default Summary Report at 3 [Finding of Fact No. 3]). Accordingly, respondent has been in violation of 6 NYCRR 613-1.9(a) from October 11, 2016.

[*4]

ECL 71-1929(1), which applies to the regulatory violation at issue in this proceeding, provides for a penalty of up to thirty-seven thousand five hundred dollars ($ 37,500) per day for each violation. For this violation, Department staff seeks a civil penalty in the amount of five thousand dollars ($ 5,000) and addresses the penalty in the context of ECL 71-1929(1) and the Department's Civil Penalty Policy (DEE-1) dated June 20, 1990 (Civil Penalty Policy)(see Repsher Affirmation PP 12-14, 16). In this matter the civil penalty of five thousand dollars ($ 5,000) that staff requests is supported by the record and is in accordance with ECL 71-1929(1) and the Civil Penalty Policy. [1]

[*5]

I direct that respondent submit the civil penalty to the Department within thirty (30) days of the service of this order upon respondent. In addition, I direct that respondent submit to the Department a complete petroleum bulk storage registration application for the facility, including the information identifying the authorized class A operator and authorized class B operator for all relevant tank systems, within thirty (30) days of the service of this order upon respondent.

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

1. Department staff's motion for a default judgment pursuant to 6 NYCRR 622.15 is granted. By failing to answer or appear in this proceeding, respondent Yogiji Real Estate LLC waived its right to be heard at the hearing.

2. Based on the pleadings and papers submitted with and in support of Department staff's motion, respondent Yogiji Real Estate LLC is determined to have violated 6 NYCRR 613-1.9(a) by failing to maintain an accurate and current registration for its PBS facility located 176 Erie Blvd., Canajoharie, New York.

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[1] In its evaluation of the civil penalty, staff also cites to the Commissioner's order dated December 19, 2011 in Matter of 12 Martense Associates LLC (12 Martense Associates)(see Repsher Affirmation P 15). The Commissioner in 12 Martense Associates established a penalty structure that applies to violations of PBS registration requirements for heating oil tanks in New York City (see 12 Martense Associate, at 2), specifically PBS registration renewals and PBS re-registrations when the ownership of a PBS facility is transferred. It would not be applicable to violations involving the failure to identify an authorized Class A or Class B operator as is the case here.

3. Within thirty (30) days of the service of this order upon respondent Yogiji Real **[*6]** Estate LLC, respondent shall submit to the Department a complete petroleum bulk storage registration application for the facility, including the information identifying the authorized class A operator and authorized class B operator for all relevant tank systems.

4. Within thirty (30) days of the service of this order upon respondent Yogiji Real Estate LLC, respondent shall pay a civil penalty in the amount of five thousand dollars ($ 5,000) by certified check, cashier's check, or money order made payable to the "New York State Department of Environmental Conservation."

5. The petroleum bulk storage application and the penalty payment shall be sent to the following address:

Office of General Counsel

NYS Department of Environmental Conservation

1130 North Westcott Road

Rotterdam, New York 12306

Attn: Stephen Repsher, Esq.

6. Any questions or other correspondence regarding this order shall also be addressed to Stephen Repsher, Esq. at the address referenced in paragraph V of this order.

7. The provisions, terms, and conditions of this order shall bind respondent Yogiji Real Estate LLC, and its agents, successors, and assigns, in any and all capacities.

For the New York State **[*7]** Department of Environmental Conservation

By: /s/

Basil Seggos

Commissioner

Dated: Albany, New York

September 17, 2018

Attachment

APPENDIX A

Matter of Yogiji Real Estate LLC
DEC File No. PBS.OP.4-106186.5.2017

Motion for Default Judgment

1. Cover letter, dated July 24, 2018, addressed to Chief Administrative Law Judge James McClymonds of the Department's Office of Hearings and Mediation Services, attaching staff's motion papers

2. Notice of Motion for Default Judgment dated July 24, 2018

3. Motion for Default Judgment, dated July 24, 2018, attaching Exhibits A and B:

1. Notice of Hearing and Complaint dated May 24, 2018

2. Affirmation of Stephen Repsher, Esq., dated July 24, 2018, attaching Exhibits C - G:

3. Affidavit of Service of Jill Viscusi, sworn to July 23, 2018, attaching USPS Return Receipt, dated May 29, 2018, reflecting service of cover letter, notice hearing, complaint, order on consent, statement of readiness and affidavit of Amiel Lagatic, upon respondent by certified mail

4. Undated and unsigned Petroleum Bulk Storage (PBS) Application from Yogiji Real Estate LLC, PBS No. 4-106186; PBS Facility Information Report, PBS No. 4-106186, printed July 10, 2018

[*8] 5. Affidavit of Amiel Lagatic, sworn to May 23, 2018

6. Affidavit of Service of Jill Viscusi, sworn to July 24, 2018, reflecting service of cover letter, notice of motion and motion for default judgment, with exhibits, upon respondent by mail

7. Proposed Order

5. Cover letter, dated August 13, 2018, from Stephen Repsher, Esq., attaching the May 24, 2018 cover letter and statement of readiness (Addendum to Exhibit A) that were served with the notice of hearing and complaint, the PBS Certificate (Addendum to Exhibit C) issued to respondent on August 25, 2014, and the Affidavit of Service of Jill Viscusi, sworn to August 13, 2018

NY Department of Environmental Conservation Decisions

End of Document

2018 N.Y. ENV LEXIS 36

New York Department of Environmental Conservation

September 24, 2018, Decided; September 19, 2018, Report Issued

DEC Case No. PBS.2-609008.3.2018

NY Department of Environmental Conservation Decisions

Reporter
2018 N.Y. ENV LEXIS 36 *

In the Matter of the Alleged Violation of Article 17 of the Environmental Conservation Law (ECL) of the State of New York and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR -by- LAWRENCE DARROW, Respondent.

Core Terms

staff, registration, petroleum, bulk storage, renew, tank, notice of the hearing, civil penalty, adjudication hearing, ten thousand dollars, pre-hearing, default judgment, default, ozone, days of service, registration fee, hearing report, five year, notice, fail to answer, cover letter, tightness, expire

Opinion By: [*1] SEGGOS

Initial Decision:

Daniel P. O'Connell, Administrative Law Judge

HEARING REPORT

DEC Case No. PBS.2-609008.3.2018

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) duly served Lawrence Darrow (respondent) with a notice of hearing and complaint, dated January 2, 2018, alleging that respondent violated ECL 17-1009 and its implementing regulation, 6 NYCRR 613-1.9(c), when respondent failed to timely renew the registration for his petroleum bulk storage facility located at 103-02 Rockaway Boulevard, Ozone Park (Queens County), New York 11417 before the registration expired on May 29, 2008. Based on the alleged violation, Department staff requested an order from the Commissioner: (1) concluding that respondent violated ECL 17-1009 and 6 NYCRR 613-1.9(c); (2) assessing a civil penalty in the amount of ten thousand dollars ($ 10,000); (3) directing respondent to register his petroleum bulk storage facility within fifteen (15) days of the service of the Commissioner's order by remitting the applicable registration fee, including any past registration fees, along with a complete registration application; and (4) granting such other and **[*7]** further relief as the Commissioner shall deem just and appropriate.

Department staff served the notice of hearing and complaint upon respondent by certified mail, return receipt requested on or about January 2, 2018. Mr. Darrow received the notice of hearing and complaint on January 12, 2018. (*See* Exhibit 3.) Respondent failed to answer the complaint. The notice of hearing and accompanying cover letter directed respondent to appear at a pre-hearing conference scheduled for February 7, 2018, and to appear at an adjudicatory hearing scheduled for March 9, 2018 (*see* Exhibit 2). Respondent did not appear at either the pre-hearing conference or the adjudicatory hearing.

As stated in the notice of hearing, on March 9, 2018, an adjudicatory hearing was convened at 12:43 p.m. by video conference before administrative law judge (ALJ) Michael S. Caruso. The ALJ was at the Department's Central offices located at 625 Broadway, Albany, New York, and counsel for staff was at the Department's Region 2 offices located at 1 Hunter's Point Plaza, 47-40 21st Street, Long Island City, New York. Department staff was represented by Deborah Gorman, Esq. of the Remediation Bureau in the Department's **[*8]** Office of General Counsel. No one appeared on behalf of respondent.

Ms. Gorman said that staff was prepared to proceed with the hearing, and proffered a witness. Noting for the record that respondent had failed to answer the complaint, failed to appear for the pre-hearing conference, and failed to appear for the adjudicatory hearing, Department staff moved orally for a default judgment pursuant to 6 NYCRR 622.15. ALJ Caruso reserved on the motion, and the hearing was rescheduled for July 17, 2018. At the hearing held on July 17, 2018 before ALJ Daniel P. O'Connell, respondent again failed to appear. Department staff renewed the motion for default judgment. Department staff was represented by Chuqiao Wang, a legal intern with the Department (*see* Exhibit 1), and Deborah Gorman, Esq., Senior Attorney, Office of General Counsel.

Applicable Regulatory Provision

Section 613-1.9(c) of 6 NYCRR requires the facility owner to renew the facility's registration every five years from the date of the last valid registration certificate until the Department receives written notice and documentation from the facility owner that either the facility has been permanently closed in accordance **[*9]** the prescribed regulatory requirements, or the ownership has been duly transferred. [1]

Findings of Fact

Section 622.11(c) states that the party bearing the burden of proof must sustain that burden by a preponderance of the evidence. The following findings are based upon the preponderance of evidence presented by Department staff, the party with the burden of proof, at the hearing:

1. Lawrence Darrow owns a petroleum bulk storage facility having a capacity of over 1,100 gallons located at 103-02 Rockaway Boulevard, Ozone Park (Queens County), New York 11417 (facility). Petroleum storage tank number 001 at the facility has a capacity of 2,500 gallons and is located underground. (*See* Exhibits 4, 5, 6, 7, and 8; testimony of Benjamin Conlon [Conlon Testimony]). [2]

2. On May 29, 2003, the Department issued Petroleum Bulk Storage Certificate No. 2-609008 to Lawrence Darrow. The expiration date of the certificate was May 29, 2008. (*See* Exhibit 8; Conlon Testimony.)

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[1] ECL 17-1009(2) requires facility registrations to be "renewed every five years or whenever ownership of a facility is transferred, whichever occurs first."

[2] Benjamin Conlon, Esq. is an associate attorney in the Department's Office of General Counsel. Mr. Conlon is a Section Chief in the Bureau of Remediation. His responsibilities include enforcement of the Petroleum Bulk Storage laws and regulations. He is authorized to access and inspect the Department's unified information system ("UIS"), and the electronic repository for scanned documents ("DecDOCS"). The UIS and DecDOCS are databases maintained by the Department, and contain petroleum bulk storage facility records, including registrations filed pursuant to section 613-1.9 of 6 NYCRR. (*See* Conlon Testimony.)

3. By letter dated September 18, 2008, Department **[*10]** staff advised respondent that his recently filed petroleum bulk storage registration application was incomplete because the tank at the facility was overdue for tightness testing (*see* Exhibit 7; Conlon Testimony).

4. On December 27, 2017, a search of the Department's PBS registration database revealed that respondent had not submitted an application to renew the tank registration (*see* Exhibit 2 [January 2, 2018 Affirmation of Deborah Gorman, Esq., PP 9-12]). Similar searches conducted on July 13 and 16, 2018 showed that respondent had failed to file any application to renew the tank registration (*see* Conlon Testimony).

5. On January 2, 2018, pursuant to 6 NYCRR 622.3(a)(3), Department staff served respondent with a cover letter, notice of hearing and complaint, a statement of readiness, and supporting affirmation, all dated January 2, 2018. In the complaint, staff alleged that respondent violated ECL 17-1009 and its implementing regulation at 6 NYCRR 613-1.9(c) by failing to renew the registration of his petroleum bulk storage facility located at 103-02 Rockaway Boulevard, Ozone Park (Queens County), New York 11417 prior to May 29, 2008. (*See* Exhibits 2 and 3 [Affidavit **[*11]** of Service of Dale Thiel, sworn to July 2, 2018, PP 3-4].)

6. The Department had prior contact with respondent, and although settlement was discussed, Department staff was unable to make further contact with respondent (*see* Exhibit 9 [June 22, 2018 Affirmation of Deborah Gorman, PP 3, 5].)

7. Respondent failed to file an answer to the complaint, failed to appear at a pre-hearing conference scheduled for February 7, 2018, and failed to appear for the adjudicatory hearing scheduled in the matter for March 9, 2018, and reconvened on July 17, 2018 (*see* Hearing Record).

Discussion

[*12]

A respondent upon whom a complaint has been served must serve an answer within 20 days of receiving a notice of hearing and complaint (*see* 6 NYCRR 622.4[a]). A respondent's failure to file a timely answer "constitutes a default and a waiver of respondent's right to a hearing" (6 NYCRR 622.15[a]). In addition, attendance by a respondent at a scheduled pre-hearing conference or hearing is mandatory, "and failure to attend constitutes a default and a waiver of the opportunity for a hearing" (6 NYCRR 622.8[c]). Finally, 6 NYCRR 622.15(a) states that "[a] respondent's … failure to appear at the hearing or the pre-hearing conference … constitutes a default and a waiver of respondent's right to a hearing."

When, as here, a respondent fails to answer a complaint or does not appear for a pre-hearing conference or hearing, Department staff may move for a default judgment. Such a motion must contain the following: (1) proof of service upon respondent of the notice of hearing and complaint; (2) proof of respondent's failure to appear or to file a timely answer; and (3) a proposed order (*see* 6 NYCRR 622.15[b][1-3]).

The Commissioner has held that "a defaulting respondent is deemed **[*13]** to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them" (*Matter of Alvin Hunt, d/b/a Our Cleaners*, Decision and Order of the Commissioner, July 25, 2006, at 6 [citations omitted]). In addition, in support of a motion for a default judgment, staff must "also submit some proof of the facts sufficient to support the claims charged in the complaint" (*Matter of Greene Technologies Incorporated*, Ruling of the Commissioner, November 10, 2016, at 3; *see also Matter of American Auto Body & Recovery Inc.*, Ruling of the Commissioner, July 2, 2015, at 3; *Matter of Queen City Recycle Center, Inc.*, Decision and Order of the Commissioner, December 12, 2013, at 3). The proof submitted must be sufficient to enable the ALJ and the Commissioner to determine that Department staff has a viable claim (*see Matter of Samber Holding Corp.*, Order of the Commissioner, March 12, 2018, at 1).

The record in this matter establishes the following. First, Department staff duly served the notice of hearing and complaint upon respondent. Second, respondent failed to file an answer to the complaint and failed to appear at a pre-hearing conference **[*14]** scheduled for February 7, 2018 as directed in the cover letter served with the notice of hearing and complaint, and in the notice of hearing. Third, respondent failed to appear for the adjudicatory

hearing scheduled in the matter on March 9, 2018, as directed in both the cover letter and the notice of hearing, and reconvened on July 17, 2018, as directed in the June 13, 2018 notice of hearing. (*See* Exhibit 11.) Department staff has submitted a proposed order with his motion (*see* Exhibit 10). Staff also served respondent with copies of the motion for default judgment and supporting papers.

Department staff's submissions in support of the motion for a default judgment provide proof of the facts sufficient to enable the ALJ to determine that Department staff has a viable claim that respondent violated ECL 17-1009 and section 613-1.9(c) of 6 NYCRR by failing to renew the registration of his petroleum bulk storage facility located at 103-02 Rockaway Boulevard, Ozone Park, New York (*see Matter of Samber Holding Corp.*, Order of the Commissioner, March 12, 2018, at 1). Department staff is entitled to a default judgment in this matter pursuant to 6 NYCRR 622.15.

Moreover, the **[*15]** proof presented at the hearing, conducted in respondent's absence, demonstrates by a preponderance of the evidence that respondent failed to renew the registration for his petroleum bulk storage tank. As of the date of the hearing, the tank remained unregistered. (*See* Conlon Testimony.) The Department is entitled to judgment on the merits.

Department staff requested a civil penalty of ten thousand dollars ($ 10,000). ECL 71-1929(1) provides for a civil penalty of up to thirty-seven thousand five hundred dollars ($ 37,500) per day for each violation. In proceedings concerning violations of PBS registration requirements in the New York City area, calculating an appropriate penalty depends, in part, on the duration of the violations (*see e.g. Matter of 540 Jackson Realty Corp.*, Order of the Commissioner, May 18, 2016, at 2; *see also Matter of 12 Martense Associates LLC*, Order of the Commissioner, December 19, 2011 [*12 Martense Associates*], at 2). Department staff has generally requested a civil penalty of five thousand dollars ($ 5,000) for violations extending up to two years, seven thousand five hundred dollars ($ 7,500) for violations extending from two to five years, **[*16]** and ten thousand dollars ($ 10,000) for violations exceeding five years in duration (*see 12 Martense Associates* at 2).

The record in this matter reflects that, as of the date of the service and filing of the notice of hearing and complaint in this matter, respondent's failure to renew his registration exceeds five years. I therefore recommend that the Commissioner assess a civil penalty in the amount of ten thousand dollars ($ 10,000), as requested by Department staff.

Conclusion of Law

By failing to timely renew the registration of his PBS facility at 103-02 Rockaway Boulevard, Ozone Park, New York 11417, respondent violated ECL 17-1009 and section 613-1.9(c) of 6 NYCRR.

Recommendations

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

1. Granting Department staff's motion for default, holding Lawrence Darrow in default pursuant to 6 NYCRR 622.15;

2. Holding that, based upon the proof presented at the adjudicatory hearing, respondent violated ECL 17-1009 and 6 NYCRR 613-1.9(c) by failing to renew the registration of his petroleum bulk storage facility located at 103-02 Rockaway Boulevard, Ozone Park, New York 11417;

3. Directing respondent **[*17]** to submit to the Department, within fifteen (15) days of service of the Commissioner's order, a complete registration application for the facility, together with all applicable registration fees, as well as proof of tank tightness;

4. Directing Lawrence Darrow to pay a civil penalty in the amount of ten thousand dollars ($ 10,000) within fifteen (15) days of service of the Commissioner's order; and

5. Directing such other and further relief as the Commissioner may deem just and appropriate.

/s/

Daniel P. O'Connell

Administrative Law Judge

Dated: September 19, 2018

Albany, New York

Opinion

Basil Seggos, Commissioner

ORDER

DEC Case No. PBS.2-609008.3.2018

This administrative enforcement proceeding addresses allegations of staff of the New York State Department of Environmental Conservation (Department or DEC) that respondent Lawrence Darrow violated ECL 17-1009 and 6 NYCRR 613-1.9(c) by failing to renew the registration for his petroleum bulk storage facility located at 103-02 Rockaway Boulevard, Ozone Park, New York (facility) before it expired on May 29, 2008. An underground storage tank with a capacity of 2,500 gallons is located at the facility.

On July 17, 2018, an adjudicatory hearing was convened before Daniel P. O'Connell, an administrative law judge (ALJ) of DEC's Office of Hearings and Mediation Services. ALJ O'Connell prepared the attached hearing report, which I adopt as my decision in this matter, subject to my comments below. As set forth in the ALJ's hearing report, respondent failed to file an answer to the complaint served by Department staff in this matter, failed to appear at a pre-hearing conference scheduled for February 7, 2018, and failed to appear for the adjudicatory hearing scheduled for March 9, 2018 and reconvened on July **[*2]** 17, 2018 (see Hearing Report at 3 [Finding of Fact No.7]).

Respondent failed to answer or appear in this matter, and the ALJ recommends that Department staff's motion for a default judgment be granted (see Hearing Report at 4-5). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15.

At the hearing on July 17, 2018, Department staff presented proof of facts sufficient to enable me to determine that staff has a viable claim, and proved its case on the merits by a preponderance of the evidence (see id.). Accordingly, staff is entitled to a judgment based on record evidence.

The record demonstrates that respondent was required to renew the registration for the facility prior to May 29, 2008 (see ECL 17-1009[2]; Hearing Report at 2 [Finding of Fact No. 2] 4; Exhibit 8). By letter dated September 18, 2008, Department advised respondent that his recently filed petroleum bulk storage application was incomplete because the tank at the facility was overdue for tightness testing (see Hearing Report at 3 [Finding of Fact No. 3; Exhibit 7]). Respondent did not provide the information necessary to renew the registration. Respondent's failure to renew the registration **[*3]** for the facility violated ECL 17-1009 and 6 NYCRR 613-1.9(c).

ECL 71-1929 provides for a civil penalty of up to thirty-seven thousand five hundred dollars ($ 37,500) per day for each violation of title 10 of article 17 and its implementing regulations. Department staff, in its papers, sought a civil penalty in the amount of ten thousand dollars ($ 10,000). Where, as here, an owner has not renewed the registration for the facility for more than five years a civil penalty of ten thousand dollars ($ 10,000) is consistent with administrative precedent (see Matter of 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011, at 2). The requested penalty of ten thousand dollars ($ 10,000) is authorized and appropriate. The civil penalty is to be submitted to the Department within fifteen (15) days of the service of this order upon respondent.

I also direct that respondent submit to the Department a petroleum bulk storage application for the facility within fifteen (15) days of service of this order upon respondent, together with proof of tank tightness and all applicable registration fees. Respondent's failure to test his petroleum bulk storage tank in accordance with **[*4]** the legal requirements may justify further proceedings and the imposition of substantial additional penalties.

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

I. Department staff's motion for a default judgment pursuant to 6 NYCRR 622.15 is granted. By failing to answer or appear in this proceeding, Lawrence Darrow waived his right to be heard at the hearing.

II. Moreover, based upon record evidence, Lawrence Darrow violated ECL 17-1009 and 6 NYCRR 613-1.9(c), by failing to timely renew the registration of his petroleum bulk storage facility located at 103-02 Rockaway Boulevard, Ozone Park, New York prior to the expiration of the facility's registration on May 29, 2008.

III. Within fifteen (15) days of the service of this order upon respondent, Lawrence Darrow shall submit to the Department a complete petroleum bulk storage application for the facility, with proof of tank tightness as well as all applicable registration fees.

IV. Within fifteen (15) days of the service of this order upon respondent, Lawrence Darrow shall pay a civil penalty in the amount of ten thousand dollars ($ 10,000) by certified check, cashier's check **[*5]** or money order made payable to the New York State Department of Environmental Conservation.

V. The petroleum bulk storage application, applicable registration fees, and the penalty payment shall be sent to the following address:

Office of General Counsel (Remediation Bureau)

NYS Department of Environmental Conservation

625 Broadway, 14th Floor

Albany, New York 12233-1500

Attn: Deborah Gorman, Esq.

VI. Any questions or other correspondence regarding this order shall also be addressed to Deborah Gorman, Esq. at the address referenced in paragraph V of this order.

VII. The provisions, terms and conditions of this order shall bind Lawrence Darrow, and his agents, successors and assigns, in any and all capacities.

For the New York State Department

of Environmental Conservation

By: /s/

Basil Seggos

Commissioner

Dated: September 24, 2018

Albany, New York

Attachment

Exhibit Chart - PBS Expedited Proceeding

Matter of Lawrence Darrow

DEC Case No. PBS.2-609008.3.2018
July 17, 2018 - DEC Central Office
Edirol File No. 180717110336

Exhibit	Description
1	May 29, 2018 Practice Order
2	Cover Letter from Deborah Gorman, Esq. to respondent, with Notice of Hearing, Complaint, Statement of Readiness, and Affirmation of Deborah Gorman, all dated January 2, 2018
3	Affidavit of Service of Dale Thiel, sworn to July 2, 2018, upon Lawrence Darrow by certified mail, return receipt requested on January 2, 2018
4	New York City Department of Finance July 13, 2018 ACRIS search, with July 9, 2002 deed to respondent
5	PBS Program Facility Information Report, printed June 13, 2018
6	PBS Application (marked received on May 8, 2003)
7	PBS Application (marked received on September 18, 2008)
8	Petroleum Bulk Storage Certificate No. 2-609008, issued May 29, 2003; expiration date: May 29, 2008
9	June 22, 2018 Affirmation of Deborah Gorman
10	Proposed Order
11	June 13, 2018 Notice of Hearing

[*6]

End of Document

2018 N.Y. ENV LEXIS 51

New York Department of Environmental Conservation

November 15, 2018, Decided; October 26, 2018, Report Issued

DEC Case No.PBS.2-346071.7.2018

NY Department of Environmental Conservation Decisions

Reporter
2018 N.Y. ENV LEXIS 51 *

In the Matter of the Alleged Violation of Article 17 of the Environmental Conservation Law (ECL) of the State of New York and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), -by- 1534 SELWYN LLC, Respondent.

Core Terms

staff, motion for default, default judgment, notice of the hearing, default, thousand dollars, register, civil penalty, commissioner's order, fail to register, pre-hearing, registration, adjudication hearing, cover letter, summary report, bulk storage, petroleum

Opinion By: **[*1]** SEGGOS

Initial Decision:

DEFAULT SUMMARY REPORT

Michael S. Caruso

Administrative Law Judge

DEC Case No.PBS.2-346071.7.2018

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent 1534 Selwyn LLC (respondent) with a notice of hearing and complaint, dated May 7, 2018, alleging a violation of ECL 17-1009 and its implementing regulation, **[*8]** 6 NYCRR 613-1.9, for failing to register its petroleum bulk storage (PBS) facility located at 1534 Selwyn Avenue, Bronx, New York (facility) within thirty (30) days of the date (April 18, 2016) it acquired the property. The complaint seeks an order of the Commissioner: (i) finding respondent in violation of ECL 17-1009 and 6 NYCRR 613-1.9; (ii) assessing a civil penalty in the amount of five thousand dollars ($ 5,000); and (iii) granting such other and further relief as the Commissioner shall deem just and appropriate. [1]

[1] Specifically, 6 NYCRR 613-1.9(d)(1) requires a new owner to register the facility within thirty days after transfer of ownership.

Inasmuch as respondent is an active domestic limited liability company in the State of New York, service of the notice of hearing and complaint on respondent was made by personally serving the New York State Department of State on May 7, 2018 (*see* Motion for Default Judgment, Exhibit C). Department staff also provided additional service by sending the notice of hearing and complaint to respondent by first class mail on May 7, 2018 (*see id.*). Respondent failed to file an answer to the complaint, and failed to appear at **[*9]** a pre-hearing conference scheduled for June 11, 2018, as directed in the cover letter and notice of hearing served with the complaint (*see* Motion for Default Judgment, Exhibit A).

As stated in the notice of hearing, on July 11, 2018, an adjudicatory hearing was convened before Chief Administrative Law Judge (Chief ALJ) James T. McClymonds. Department staff was represented by Deborah Gorman, Esq., Remediation Bureau, Office of General Counsel, New York State Department of Environmental Conservation, 625 Broadway, Albany, New York. No one appeared on behalf of respondent.

Chief ALJ McClymonds noted for the record that respondent had failed to answer the complaint, failed to appear for the pre-hearing conference and failed to appear for the adjudicatory hearing. Department staff moved orally for a default judgment pursuant to 6 NYCRR 622.15. The Chief ALJ reserved on the oral motion, allowing the record to remain open for Department staff to submit the documentation required by 6 NYCRR 622.15(b). On September 27, 2018, staff submitted a written motion for a default judgment with supporting papers (*see* Appendix A, attached hereto [listing documents submitted on motion]). Department **[*10]** staff served the motion and supporting papers on respondent by first class mail on September 27, 2018 (*see* Affirmation of Service of Deborah Gorman, dated September 27, 2018). Thereafter, the motion was assigned to the undersigned ALJ.

Applicable Regulatory Provision

Section 613-1.9. Registration.

* * *

"(d) *Application procedure for initial registration or transfer of ownership* .

"(1) If ownership of the real property on which a facility is located is transferred, the new facility owner must submit an application to initially register the facility with the department within 30 days after transfer."

Findings of Fact

The following facts are found based upon the pleadings and papers submitted with and in support of staff's motion for a default judgment:

1. Respondent 1534 Selwyn LLC is the owner of a PBS facility having a capacity of over 1,100 gallons located at 1534 Selwyn Avenue, Bronx, New York (facility). In particular, PBS tank number 001 at the facility has a capacity of 5,000 gallons and is located aboveground. *See* Motion for Default Judgment, Exhibits D, E, F, and G.

2. Respondent is an active domestic limited liability company in the State of New **[*11]** York.*See* Motion for Default Judgment, Exhibit H.

3. On April 18, 2016, 1534 Selwyn Ave. Co. LLC transferred all right, title and interest in the facility to 1534 Selwyn LLC, the facility's current owner. This deed is recorded in the Office of the City Register of the City of New York, as City Register File No. 2016000174902. *See* Motion for Default Judgment, Exhibit D.

4. Pursuant to a registration application dated October 25, 2017, the Department issued PBS Certificate Number 2-346071 to respondent 1534 Selwyn LLC on November 10, 2017 with an expiration date of November 10, 2022. *See* Motion for Default Judgment, Exhibits E, F and G.

5. On May 2, 2018, a search of the Department's PBS registration database revealed that respondent registered the facility eighteen months later than required by 6 NYCRR 613-1.9(d)(1). *See*Motion for Default

Judgment, Exhibit A, Affirmation of Deborah Gorman, Esq., dated May 7, 2018, PP 11-13; *see also* Exhibit B, Affirmation of Deborah Gorman, Esq., dated September 27, 2018, P 8; Exhibit G.

6. As shown by Receipt for Service No. 201805140254 issued by the New York State Department of State, respondent was served personally, on May 7, **[*12]** 2018 pursuant to section 303 of the Limited Liability Company Law, with a notice of hearing and complaint dated May 7, 2018, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 613-1.9, together with a cover letter, statement of readiness and supporting affirmation, for failure to register its PBS facility located at 1534 Selwyn Avenue, Bronx, New York within thirty (30) days of the date it acquired the facility. Consistent with CPLR 3215(g)(4), Department staff also provided additional service by sending the notice of hearing and complaint to respondent by first class mail on or about May 7, 2018. *See* Motion for Default Judgment, Exhibit C.

7. Respondent failed to file an answer to the complaint, failed to appear at a pre-hearing conference scheduled for June 11, 2018, as directed in the cover letter and notice of hearing served with the complaint, and failed to appear for the adjudicatory hearing scheduled in the matter on July 11, 2018, as directed in the notice of hearing. *See* Motion for Default Judgment, Exhibit B, Affirmation of Deborah Gorman, Esq., PP 4-6.

Discussion

A respondent upon whom a complaint has been served must serve an answer **[*13]** within 20 days of receiving a notice of hearing and complaint (*see* 6 NYCRR 622.4[a]). A respondent's failure to file a timely answer "constitutes a default and a waiver of respondent's right to a hearing" (6 NYCRR 622.15[a]). In addition, attendance by a respondent at a scheduled pre-hearing conference or hearing is mandatory, "and failure to attend constitutes a default and a waiver of the opportunity for a hearing" (6 NYCRR 622.8[c]; *see also* 6 NYCRR 622.15[a] ["A respondent's … failure to appear at the hearing or the pre-hearing conference … constitutes a default and waiver of respondent's right to a hearing"]).

Upon a respondent's failure to answer a complaint or failure to appear for a pre-hearing conference or hearing, Department staff may make a motion to an ALJ for a default judgment. Such motion must contain: (i) proof of service upon respondent of the notice of hearing and complaint; (ii) proof of respondent's failure to appear or to file a timely answer; and (iii) a proposed order (*see* 6 NYCRR 622.15[b][1] - [3]).

As the Commissioner has held, "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable **[*14]** inferences that flow from them" (*Matter of Alvin Hunt, d/b/a Our Cleaners*, Decision and Order of the Commissioner, July 25, 2006, at 6 [citations omitted]). In addition, in support of a motion for a default judgment, staff must "provide proof of the facts sufficient to support the claim[s]" alleged in the complaint. (*Matter of Queen City Recycle Center, Inc.*, Decision and Order of the Commissioner, December 12, 2013, at 3.) Staff is required to support their motion for a default judgment with enough facts to enable the ALJ and the Commissioner to determine that staff has a viable claim (*see Matter of Samber Holding Corp.*, Order of the Commissioner, March 12, 2018 [*Samber*], at 1 [citing Woodson v Mendon Leasing Corp., 100 NY2d 62, 70-71 (2003)] *see also* CPLR 3215[f]).

The record establishes that: (i) Department staff served the notice of hearing and complaint upon respondent; (ii) respondent failed to file an answer to the complaint and failed to appear at a pre-hearing conference scheduled for June 11, 2018, as directed in the cover letter and notice of hearing served with the complaint; and (iii) respondent failed to appear for **[*15]** the adjudicatory hearing scheduled on July 11, 2018, as directed in the notice of hearing. Department staff has submitted a proposed order (*see* Motion for Default Judgment, Exhibit I). Based upon the foregoing, the Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15. Staff also served respondent with copies of the motion for default judgment and supporting papers (*see* Affirmation of Service of Deborah Gorman, dated September 27, 2018, P 2).

Department staff's submissions in support of the motion for a default judgment provide proof of facts sufficient to enable me to determine that staff has a viable claim that respondent failed to register its petroleum bulk storage facility located at 1534 Selwyn Avenue, Bronx, New York within thirty (30) days after it acquired the facility, in violation of ECL 17-1009 and 6 NYCRR 613-1.9(d)(1) (*see Samber* at 1).

Staff's complaint requested a civil penalty in the amount of five thousand dollars ($ 5,000). Staff's submissions on the motion for a default judgment elaborate on the requested penalty, discussing the Department's Civil Penalty Policy, DEE-1, and administrative precedent **[*16]** relating to similar violations (*see* Motion for Default Judgment, Exhibit A, Complaint, at Wherefore Clause P II; *see also* Exhibit B, Gorman Affirmation, dated September 27, 2018, PP 13-18).

I find that staff's request for a civil penalty in the amount of five thousand dollars ($ 5,000) is consistent with the Department's penalty policy as well as applicable provisions of ECL article 71 and administrative precedent (*see e.g. Matter of 12 Martense Associates LLC*, Order of the Commissioner, December 19, 2011, at 2).

Conclusion of Law

By failing to register its PBS facility located at 1534 Selwyn Avenue, Bronx, New York within thirty (30) days of the date (April 18, 2016) that it acquired the facility, respondent violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1).

Recommendation

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

1. Granting Department staff's motion for default judgment, holding respondent 1534 Selwyn LLC in default pursuant to the provisions of 6 NYCRR 622.15;

2. Holding that respondent 1534 Selwyn LLC violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1) by failing to register its PBS facility located at 1534 Selwyn Avenue, Bronx, **[*17]** New York within thirty (30) days of the date (April 18, 2016) that it acquired the facility;

3. Directing respondent 1534 Selwyn LLC to pay a civil penalty in the amount of five thousand dollars ($ 5,000) within fifteen (15) days of service of the Commissioner's order; and

4. Directing such other and further relief as he may deem just and appropriate.

/s/

Michael S. Caruso

Administrative Law Judge

Dated: Albany, New York

October 26, 2018

Opinion

Basil Seggos, Commissioner

ORDER

DEC Case No.PBS.2-346071.7.2018

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department) that respondent 1534 Selwyn LLC violated ECL 17-1009 and 6 NYCRR 613-1.9 by failing to register its petroleum bulk storage (PBS) facility within thirty (30) days of the date (April 18, 2016) it acquired the property. Respondent's facility is located at 1534 Selwyn Avenue, Bronx, New York, and includes an aboveground petroleum bulk storage tank with a capacity of 5,000 gallons.

Administrative Law Judge (ALJ) Michael S. Caruso of the Department's Office of Hearings and Mediation Services was assigned to this matter and prepared the attached default summary report, which I adopt as my decision in this matter, subject to my comments below.

As set forth in the ALJ's default summary report, respondent failed to file an answer to the complaint served by Department staff in this matter, failed to appear at a pre-hearing conference scheduled for June 11, 2018, and failed to appear for the adjudicatory hearing scheduled for July 11, 2018 (*see* Default Summary **[*2]** Report at 3 [Finding of Fact No. 7]). At the July 11, 2018 adjudicatory hearing, Department staff made an oral motion for a default judgment. Chief ALJ James T. McClymonds reserved on the motion, and Department staff later submitted a written motion for default judgment with supporting papers.

As a consequence of respondent's failure to answer or appear in this matter, the ALJ recommends that Department staff's motion for a default judgment be granted (*see* Default Summary Report at 5). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15. The pleadings and the papers submitted with and in support of the motion provide sufficient facts to enable me to determine that staff has a viable claim that respondent failed to register its PBS facility within thirty (30) days of the date it acquired the facility and, therefore, is in violation of ECL 17-1009 and 6 NYCRR 613-1.9(d)(1). [1]

[*3]

Department counsel correctly points out that the requirement to register PBS facilities is one of the "cornerstones" of the PBS regulatory scheme (*see* Motion for Default Judgment, Exhibit B, Affirmation of Deborah Gorman, Esq., dated September 27, 2018, P 14). Proper registration assists in the oversight of other requirements for a PBS facility (e.g., leak detection, monitoring, and reporting), with the goal of protecting the environment and public health.

Department staff seeks a civil penalty in the amount of five thousand dollars ($ 5,000). ECL 71-1929(1), which applies to the statutory and regulatory violation at issue in this proceeding, provides for a penalty of up to thirty-seven thousand five hundred dollars ($ 37,500) per day for each violation. In proceedings similar to this one, Department staff has requested penalties that take into account the duration of the violation. For those facilities that have violated the registration requirement within the past two years, Department staff has, absent other violations, generally requested a penalty of five thousand dollars ($ 5,000) (*see Matter of 12 Martense Associates*, *LLC*, Order of the Commissioner [*12* **[*4]** *Martense*], December 19, 2011, at 2). In this matter, respondent was required to register its facility on or before May 18, 2016. Respondent, however, did not submit an application to register the facility until October 25, 2017.

Department staff, in its papers, sought a penalty of five thousand dollars ($ 5,000). Staff's requested civil penalty of five thousand dollars ($ 5,000) is in accordance with general penalty guidelines for violations of PBS registration requirements for certain facilities in New York City where a violation is less than two years, as is the case here (*see 12 Martense* at 2). Respondent was required to register its facility within thirty (30) days of the date (April 18, 2016) that it acquired the facility, but failed to do so (*see* Default Summary Report at 2-3 [Findings of Fact Nos. 3, 4 and 5]). Based on this record, the requested penalty of five thousand dollars ($ 5,000) is authorized and appropriate.

I direct that respondent submit the civil penalty to the Department within fifteen (15) days of the service of this order upon respondent.

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

1. **[*5]** Department staff's motion for a default judgment pursuant to 6 NYCRR 622.15 is granted. By failing to answer or appear in this proceeding, respondent 1534 Selwyn LLC waived its right to be heard at the hearing.

2. Based on the pleadings and papers submitted with and in support of Department staff's motion, respondent 1534 Selwyn LLC is determined to have violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1), by failing to

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[1] Although staff's papers provide a basis to find liability under 6 NYCRR 613-1.9(d)(1), staff cited the general provision 6 NYCRR 613-1.9. Where a section is comprised of a number of subsections, paragraphs, or subparagraphs, staff should designate the particular subsection(s), paragraph(s) and subparagraph(s) at issue (*see Matter of Queen City Recycle Center, Inc.*, Decision and Order of the Commissioner, December 12, 2013, at 2 n 6).

register its PBS facility located at 1534 Selwyn Avenue, Bronx, New York within thirty (30) days of the date (April 18, 2016) that it acquired the facility.

3. Within fifteen (15) days of the service of this order upon respondent 1534 Selwyn LLC, respondent shall pay a civil penalty in the amount of five thousand dollars ($ 5,000) by certified check, cashier's check, or money order made payable to the "New York State Department of Environmental Conservation."

4. The penalty payment shall be sent to the following address:

Office of General Counsel (Remediation Bureau)

NYS Department of Environmental Conservation

625 Broadway, 14th Floor

Albany, New York 12233-1500

Attn: Deborah Gorman, Esq.

5. Any questions or other correspondence regarding this order shall also be addressed **[*6]** to Deborah Gorman, Esq. at the address referenced in paragraph IV of this order.

6. The provisions, terms, and conditions of this order shall bind respondent 1534 Selwyn LLC, and its agents, successors, and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: /s/

Basil Seggos

Commissioner

Dated: Albany, New York

November 15, 2018

Attachment

APPENDIX A

Matter of 1534 Selwyn LLC
DEC File No. PBS.2-346071.7.2018
Motion for Default Judgment

1. Cover letter, dated September 27, 2018, addressed to Chief Administrative Law Judge James McClymonds of the Department's Office of Hearings and Mediation Services, attaching staff's motion papers

2. Notice of Motion for Default Judgment dated September 27, 2018

3. Motion for Default Judgment, dated September 27, 2018, attaching Exhibits A and B:

1. Cover letter, Notice of Hearing, Complaint, Statement of Readiness, and Affirmation of Deborah Gorman, Esq., all dated May 7, 2018

2. Affirmation of Deborah Gorman, Esq., dated September 27, 2018, attaching Exhibits C - I:

3. Affidavit of Service of Dale Thiel, sworn to September 27, 2018, attaching Department of State Receipt for Service, **[*7]** dated May 7, 2018, reflecting service upon respondent pursuant to section 303 of the Limited Liability Company Law

4. Printout of search on Automated City Register Information System (ACRIS), dated September 27, 2018, attaching deed dated April 18, 2016

5. Petroleum Bulk Storage (PBS) Application from 1534 Selwyn LLC, PBS No. 2-346071, dated October 25, 2017

6. PBS Certificate, PBS No. 2-346071 issued to 1534 Selwyn LLC on November 10, 2017, with an expiration date of November 10, 2022

7. Facility Information Report, PBS No. 2-346071, printed September 27, 2018

8. NYS Department of State, Division of Corporations, Entity Information Sheet regarding 1534 Selwyn LLC, reflecting information through September 26, 2018

9. Draft Order

4. Affirmation of Service of Deborah Gorman, dated September 27, 2018

NY Department of Environmental Conservation Decisions

End of Document

2018 N.Y. ENV LEXIS 56

New York Department of Environmental Conservation

December 03, 2018, Decided; November 29, 2018, Report Issued

DEC Case No.PBS.2-604603.5.2018

NY Department of Environmental Conservation Decisions

Reporter
2018 N.Y. ENV LEXIS 56 *

In the Matter of the Alleged Violation of Article 17 of the Environmental Conservation Law (ECL) of the State of New York and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), -by- ZB PROSPECT REALTY LLC, Respondent.

Core Terms

staff, realty, registration, default judgment, dollar, default, notice of the hearing, commissioner's order, fail to register, bulk storage, petroleum, five hundred, thirty days, ownership, motion for default, civil penalty, pre-hearing, days of service, summary report, register, adjudicatory, notice, tank

Opinion By: [*1] SEGGOS

Initial Decision:

DEFAULT SUMMARY REPORT

Maria E. Villa

Administrative Law Judge

DEC Case No.PBS.2-604603.5.2018

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent ZB Prospect Realty LLC (respondent) with a notice of hearing and complaint, dated March 5, 2018, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 613-1.9(d)(1), for failing to register its petroleum bulk storage (PBS) facility located at 846-848 Prospect Place, Brooklyn, New York (facility) within thirty days of the transfer of the facility to respondent on July 8, 2011. The complaint seeks an order of the Commissioner: (i) finding respondent in violation of ECL 17-1009 and 6 NYCRR 613-1.9(d)(1); (ii) assessing a civil **[*8]** penalty in the

amount of ten thousand dollars ($ 10,000); [1] (iii) directing respondent to register its petroleum bulk storage facility within fifteen (15) days of the service of the Commissioner's order, remit the applicable registration fee, and submit a complete registration application; and (iv) granting such other and further relief as the Commissioner shall deem just and appropriate.

Respondent is an active limited liability company in the State of New York. Service of the notice of hearing and complaint upon respondent was made by personally serving the New York State Department of State on March 5, 2018 (Exhibit C). Department staff also provided additional service by sending the notice of hearing and complaint to respondent by first class mail on or about March 5, 2018. Id . Respondent failed to file an answer to the complaint, and failed to appear at a pre-hearing conference scheduled for April 10, 2018, as directed in the cover letter and notice of hearing served with the complaint (Exhibit A).

As stated **[*9]** in the notice of hearing, on May 10, 2018, an adjudicatory hearing was convened before administrative law judge ("ALJ") Michael S. Caruso. Department staff was represented by Deborah Gorman, Esq., Remediation Bureau, Office of General Counsel, New York State Department of Environmental Conservation, 625 Broadway, Albany, New York. No one appeared on behalf of respondent.

ALJ Caruso noted for the record that respondent had failed to answer the complaint, failed to appear for the pre-hearing conference and failed to appear for the adjudicatory hearing. Department staff moved orally for a default judgment pursuant to 6 NYCRR 622.15. ALJ Caruso reserved on the oral motion, allowing the record to remain open for Department staff to submit the documentation required by 6 NYCRR 622.15(b). On August 20, 2018, staff submitted a written motion for a default judgment with supporting papers. Department staff served the motion and supporting papers on respondent by first class mail on August 20, 2018 (Affirmation of Service of Deborah Gorman, dated August 20, 2018).

As discussed below, Department staff identified only one violation (failure to register the facility upon transfer of ownership) **[*10]** in the complaint and the subsequent motion for default judgment. In fact, the documents submitted indicate that there were a series of violations related to respondent's PBS tank at the facility. Nevertheless, in the complaint and in Department staff's motion, respondent only received notice of a single violation, and Department staff is entitled to relief only with respect to that violation.

Applicable Regulatory Provisions

Section 613-1.9. Registration. [2] (c) *Renewal*. Registration must be renewed every five years from the date of the last valid registration certificate until the department receives written notice and documentation from the facility owner that the facility has been permanently closed in accordance with section 613-2.6(b), 613-3.5(b), or 613-4.5(b) of this Part, or that ownership of the facility has been transferred in accordance with subdivision (d) of this section.

[*11]

(d). *Application procedure for initial registration or transfer of ownership* . (1) If ownership of the real property on which a facility is located is transferred, the new facility owner must submit an application to initially register the facility with the department within 30 days after the transfer.

Findings of Fact

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[1] As discussed below, in its motion for default judgment, Department staff reduced the penalty amount requested to seven thousand five hundred dollars ($ 7,500).

[2] Effective October 11, 2015, 6 NYCRR 613-1.9 replaced 6 NYCRR 612.2, Registration of Facilities, which read in part, "(a) *Existing facilities*. . . . (2) Registration must be renewed every five years from the date of the last valid registration until the department receives written notice that the facility has been permanently closed or that ownership of the facility has been transferred. " ECL 17-1009(2) requires facility registrations to be "renewed every five years or whenever ownership of a facility is transferred, whichever occurs first."

The following facts are found based upon the pleadings and papers submitted with and in support of staff's motion for a default judgment:

1. Respondent ZB Prospect Realty LLC is the owner of a PBS facility having a capacity of over 1,100 gallons located at 846-848 Prospect Place, Brooklyn, New York (facility). PBS tank number 001 at the facility has a capacity of 3,000 gallons and is located aboveground. Exhibits E, F, and H.

2. Respondent is an active limited liability company in the State of New York. Exhibit I.

3. On July 15, 2003, 848 Prospect Place, the prior owner, conveyed the facility to ZB Prospect Realty LLC. Exhibit D.

4. Pursuant to a registration application dated May 5, 2008, the Department issued PBS Certificate Number 2-604603 to ZB Prospect Realty LLC, the owner of the facility, on May 14, 2008, with an expiration date of July 15, 2013. **[*12]** The application and certificate identify the owner as "ZB Prospect Realty LLC." Exhibits E and F.

5. On December 17, 2009, ZB Prospect Realty LLC conveyed the facility to Zalmen Biederman. Exhibit D.

6. On July 8, 2011, Zalmen Biederman conveyed the facility to ZB Prospect Realty LLC, the facility's current owner. Exhibit D.

7. As of August 20, 2018, respondent had not registered the facility. Exhibit B, Affirmation of Deborah Gorman, Esq., dated August 20, 2018, PP 9-10; Exhibit H.

8. Respondent was served personally, on March 5, 2018, pursuant to section 303 of the Limited Liability Company Law, with a notice of hearing and complaint dated March 5, 2018, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 613-1.9(d)(1), together with a cover letter, statement of readiness and supporting affirmation, for failure to register its PBS facility located at 846-848 Prospect Place, Brooklyn, New York within thirty days of the transfer of the property to respondent on July 8, 2011. Consistent with CPLR 3215(g)(4), Department staff also provided additional service by sending the notice of hearing and complaint to respondent by first class mail on or about March 5, **[*13]** 2018. Exhibit C.

9. Respondent failed to file an answer to the complaint, failed to appear at a pre-hearing conference scheduled for April 10, 2018, as directed in the cover letter and notice of hearing served with the complaint, and failed to appear for the adjudicatory hearing scheduled in the matter on May 10, 2018, as directed in the notices of hearing. Exhibit B, Affirmation of Deborah Gorman, Esq., dated August 20, 2018, PP 4-6.

Discussion

A respondent upon whom a complaint has been served must serve an answer within 20 days of receiving a notice of hearing and complaint (6 NYCRR 622.4(a)). A respondent's failure to file a timely answer "constitutes a default and a waiver of respondent's right to a hearing" (6 NYCRR 622.15(a)). In addition, attendance by a respondent at a scheduled pre-hearing conference or hearing is mandatory, "and failure to attend constitutes a default and a waiver of the opportunity for a hearing" (6 NYCRR 622.8(c); 6 NYCRR 622.15(a) ("A respondent's … failure to appear at the hearing or the pre-hearing conference … constitutes a default and waiver of respondent's right to a hearing")).

Upon a respondent's failure to answer a complaint or failure **[*14]** to appear for a pre-hearing conference or hearing, Department staff may make a motion to an ALJ for a default judgment. Such motion must contain: (i) proof of service upon respondent of the notice of hearing and complaint; (ii) proof of respondent's failure to appear or to file a timely answer; and (iii) a proposed order (6 NYCRR 622.15(b)(1) - (3)).

As the Commissioner has held, "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them" (Matter of Alvin Hunt, d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 6 (citations omitted)). In addition, in support of a motion for a default judgment, staff must "provide proof of the facts sufficient to support the claim[s]" alleged in the complaint. Matter of Queen City Recycle Center, Inc., Decision and Order of the Commissioner, December 12, 2013, at 3. Staff is required to support their motion for a default judgment with enough facts to enable the ALJ and the

Commissioner to determine that staff has a viable claim (see Matter of Samber Holding Corp., Order of the Commissioner, March 12, 2018, at 1 (citing Woodson v. Mendon Leasing Corp., 100 N.Y.2nd 62, 70-71 (2003)

[*15]

The record establishes that: (i) Department staff served the notice of hearing and complaint upon respondent; (ii) respondent failed to file an answer to the complaint and failed to appear at a pre-hearing conference scheduled for April 10, 2018, as directed in the cover letter and notice of hearing served with the complaint; and (iii) respondent failed to appear for the adjudicatory hearing scheduled on May 10, 2018, as directed in the notices of hearing. Department staff has submitted a proposed order. Exhibit J. Based upon the foregoing, the Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15. Staff also served respondent with copies of the motion for default judgment and supporting papers (Affirmation of Service of Deborah Gorman, dated August 20, 2018, P 2).

Department staff's complaint, and the motion, only address respondent's failure to register the facility within thirty days of the transfer of ownership on July 8, 2011. Nevertheless, based upon the submissions on the motion, Department staff could have charged another violation. Specifically, it appears from the documents that Zalmen Bierderman, who acquired the facility **[*16]** when the property was transferred on December 17, 2009, did not register the facility at that time. Exhibit D. The facility registration remained in the name of ZB Prospect Realty, LLC.

By letter dated October 26, 2018, the ALJ requested clarification with respect to the potential violation. Department staff responded in a letter dated November 20, 2018, acknowledging the additional potential violation, but concluding that due to the need to prioritize the matters sent to hearing in expedited petroleum bulk storage cases, "generally we serve the current owner only based on their current duration of legal or equitable ownership. " November 20, 2018 letter, at 1.

The potential violation was not part of the pleadings or the submissions on the motion, and therefore cannot be considered here. Consequently, Department staff's submissions in support of the motion for a default judgment only provide proof of facts sufficient to determine that staff has a viable claim that respondent failed to register its petroleum bulk storage facility located at 846-848 Prospect Place, Brooklyn, New York within thirty days of the transfer of the property to respondent on July 8, 2011, in violation of **[*17]** ECL 17-1009 (see Matter of Samber Holding Corp ., Order of the Commissioner at 1). Respondent was in violation of 6 NYCRR 613-1.9(d)(1) from the effective date of the current part 613, October 11, 2015.

In the March 5, 2018 complaint, Department staff requested that the Commissioner impose a $ 10,000 civil penalty. Exhibit A, Wherefore Clause, P II. Department staff requested a reduced civil penalty in the amount of seven thousand five hundred dollars ($ 7,500) in its motion for default judgment. Department staff's submissions on the motion for a default judgment elaborate on the requested penalty, discussing the Department's Civil Penalty Policy, DEE-1, and administrative precedent relating to similar violations (Exhibit A, Complaint, at Wherefore Clause P II; Exhibit B, August 20, 2018 Gorman Affirmation, PP 14-19).

ECL 71-1929(1) provides for a civil penalty of up to thirty-seven thousand five hundred dollars ($ 37,500) per day for each violation. In proceedings concerning violations of PBS registration requirements in the New York City area, calculation of an appropriate penalty turns in part on the duration of the violations. See e.g. Matter of 540 Jackson Realty Corp., **[*18]** Order of the Commissioner, May 18, 2016, at 2; see also Matter of 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011 (12 Martense Associates), at 2. Department staff has generally requested a penalty of five thousand dollars ($ 5,000) for violations extending up to two years, seven thousand five hundred dollars ($ 7,500) for violations extending from two to five years, and ten thousand dollars ($ 10,000) for violations exceeding five years in duration. See 12 Martense Associates at 2.

In this case, the violation charged occurred in 2011, when respondent failed to register the tank upon transfer of the facility to ZB Prospect Realty LLC. Department staff's motion for default judgment was filed in August of 2018, more than seven years from the time the tank should have been registered to respondent. Although ordinarily this amount of time would warrant the imposition of a $ 10,000 penalty, Department staff stated in its affirmation in

support that Department staff previously served this matter in 2016, and at that time respondent and Department staff were attempting to settle the matter. Exhibit B, at P 12. Due to continued non-compliance, the matter was re-served. **[*19]** Given the circumstances of this default, staff's request to reduce the penalty to seven thousand five hundred dollars ($ 7,500) should be granted.

Conclusion of Law

By failing to register its PBS facility located at 846-848 Prospect Place, Brooklyn, New York within thirty days of the transfer of the facility to respondent, respondent violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1).

Recommendation

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

1. Granting Department staff's motion for default judgment, holding respondent ZB Prospect Realty LLC in default pursuant to the provisions of 6 NYCRR 622.15;

2. Holding that respondent ZB Prospect Realty LLC violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1) by failing to register its PBS facility located at 846-848 Prospect Place, Brooklyn, New York within thirty days of the transfer of the facility to respondent on July 8, 2011;

3. Directing respondent ZB Prospect Realty LLC to submit to the Department, within fifteen (15) days of service of the Commissioner's order, a complete registration application for the facility, together with the applicable registration fees;

4. Directing respondent ZB Prospect Realty **[*20]** LLC to pay a civil penalty in the amount of seven thousand five hundred dollars ($ 7,500) within fifteen (15) days of service of the Commissioner's order; and

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

/s/

Maria E. Villa

Administrative Law Judge

Dated: Albany, New York

November 29, 2018

Opinion

Basil Seggos, Commissioner

ORDER

DEC Case No.PBS.2-604603.5.2018

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department) that respondent ZB Prospect Realty LLC violated ECL 17-1009 and 6 NYCRR 613-1.9(d) (1) by failing to register its petroleum bulk storage (PBS) facility within thirty days of the transfer of the facility to respondent, on July 8, 2011. Respondent's facility is located at 846-848 Prospect Place, Brooklyn, New York, and includes an aboveground petroleum bulk storage tank with a capacity of 3,000 gallons.

Administrative Law Judge (ALJ) Maria E. Villa of the Department's Office of Hearings and Mediation Services was assigned to this matter and prepared the attached default summary report, which I adopt as my decision in this matter, subject to my comments below.

As set forth in the ALJ's default summary report, respondent failed to file an answer to the complaint served by Department staff in this matter, failed to appear at a pre-hearing conference scheduled for April 10, 2018, and

failed to appear for the adjudicatory hearing on May 10, 2018 (see Default **[*2]** Summary Report at 3 [Finding of Fact No. 9]). At the May 10, 2018 adjudicatory hearing, Department staff made an oral motion for a default judgment before ALJ Michael Caruso. ALJ Caruso reserved on the motion, and Department staff later submitted a written motion for default judgment with supporting papers.

Because respondent failed to answer or appear in this matter, ALJ Villa recommends that Department staff's motion for a default judgment be granted (see Default Summary Report at 6). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15. The pleadings and the papers submitted with and in support of staff's motion provide enough facts to enable me to determine that staff has a viable claim that respondent failed to register its PBS facility within thirty days of the transfer of the facility to respondent, on July 8, 2011, in violation of ECL 17-1009 and, since October 11, 2015, 6 NYCRR 613-1.9(d)(1). [1]

Department counsel correctly points out that the requirement to register PBS facilities is one of the "cornerstones" of the **[*3]** PBS regulatory scheme (see Motion for Default Judgment, Exhibit B, Affirmation of Deborah Gorman, Esq., dated August 20, 2018, P 14). Proper registration assists in the oversight of other requirements for a PBS facility (e.g., leak detection, monitoring, and reporting), with the goal of protecting the environment and public health.

ECL 71-1929(1), which applies to the statutory and regulatory violation at issue in this proceeding, provides for a penalty of up to thirty-seven thousand five hundred dollars ($ 37,500) per day for each violation. Department staff is seeking a civil penalty in the amount of seven thousand five hundred dollars ($ 7,500). Staff's penalty request is less than the amount typically imposed for this type of violation by similar New York City facilities (see Matter of 12 Martense Associates, LLC, Order of the Commissioner, December 19, 2011, at 2). Nevertheless, based on the circumstances noted in the default summary report (see Default Summary Report at 5) and considering staff's explanation, the requested penalty of seven thousand five hundred dollars ($ 7,500) is authorized and appropriate in this case.

I direct that respondent submit the civil penalty **[*4]** to the Department within fifteen (15) days of the service of this order upon respondent. In addition, I direct that respondent submit a petroleum bulk storage application for the facility, plus applicable registration fees, to the Department within fifteen (15) days of the service of this order upon respondent.

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

1. Department staff's motion for a default judgment pursuant to 6 NYCRR 622.15 is granted. By failing to answer or appear in this proceeding, respondent ZB Prospect Realty LLC waived its right to be heard at the hearing.

2. Based on the pleadings and papers submitted with and in support of Department staff's motion, respondent ZB Prospect Realty LLC is determined to have violated ECL 17-1009 and, since October 11, 2015, 6 NYCRR 613-1.9(d)(1), by failing to register its petroleum bulk storage facility located at 846-848 Prospect Place, Brooklyn, New York within thirty days of the transfer of the facility to respondent on July 8, 2011.

3. Within fifteen (15) days of the service of this order upon respondent ZB Prospect Realty LLC, respondent shall submit to the Department a **[*5]** complete petroleum bulk storage application for the facility, plus applicable and past due registration fees.

4. Within fifteen (15) days of the service of this order upon respondent ZB Prospect Realty LLC, respondent shall pay a civil penalty in the amount of seven thousand five hundred dollars ($ 7,500) by certified check, cashier's check, or money order made payable to the "New York State Department of Environmental Conservation."

5. The petroleum bulk storage application, applicable registration fees, and the penalty payment shall be sent to the following address:

---

[1] 6 NYCRR 613-1.9 replaced former 6 NYCRR 612.2 which similarly included requirements governing transfer of ownership.

Office of General Counsel (Remediation Bureau)

NYS Department of Environmental Conservation

625 Broadway, 14th Floor

Albany, New York 12233-1500

Attn: Deborah Gorman, Esq.

6. Any questions or other correspondence regarding this order shall also be addressed to Deborah Gorman, Esq. at the address referenced in paragraph V of this order.

7. The provisions, terms, and conditions of this order shall bind respondent ZB Prospect Realty LLC, and its agents, successors, and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: /s/

Basil Seggos

Commissioner

Dated: **[*6]** Albany, New York

December 3, 2018

Attachment

APPENDIX A

Matter of ZB Prospect Realty LLC

DEC File No. PBS.2-604603.5.2018

Motion for Default Judgment

1. Cover letter, dated August 20, 2018, addressed to Chief Administrative Law Judge James McClymonds of the Department's Office of Hearings and Mediation Services, attaching staff's motion papers

2. Notice of Motion for Default Judgment dated August 20, 2018

3. Motion for Default Judgment, dated August 20, 2018, attaching Exhibits A and B:

1. Cover letter, Notice of Hearing, Complaint, Statement of Readiness, and Affirmation of Deborah Gorman, Esq., all dated March 5, 2018

2. August 20, 2018 Affirmation of Deborah Gorman, Esq., attaching Exhibits C - J:

3. Affidavit of Service of Dale Thiel, sworn to August 20, 2018, attaching March 5, 2018 Department of State Receipt for Service, reflecting service upon respondent pursuant to section 303 of the Limited Liability Company Law

4. Printout of search on Automated City Register Information System (ACRIS), dated July 5, 2018, attaching deed dated July 8, 2011

5. Petroleum Bulk Storage (PBS) Application from "ZB Prospect Realty LLC," PBS No. 2-604603, dated May 5, 2008

6. PBS Certificate **[*7]** No. 2-604603 issued to "ZB Prospect Realty" on May 14, 2008, expired July 15, 2013

7. [No Exhibit G]

8. Facility Information Report, PBS No. 2-604603, printed July 5, 2018

9. NYS Department of State, Division of Corporations, Entity Information Sheet regarding ZB Prospect Realty LLC, reflecting information through July 5, 2018

10. Draft Order

5. 4. August 20, 2018 Affirmation of Service of Deborah Gorman

NY Department of Environmental Conservation Decisions

End of Document

2019 N.Y. ENV LEXIS 7

New York Department of Environmental Conservation

February 04, 2019, Decided

DEC Case No.PBS.2-154539.8.2018

NY Department of Environmental Conservation Decisions

Reporter
2019 N.Y. ENV LEXIS 7 *

In the Matter of the Alleged Violation of Article 17 of the Environmental Conservation Law (ECL) of the State of New York and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), by 144-80 SANFORD APARTMENT CORP., Respondent

Core Terms

staff, registration, motion for default, default judgment, notice of the hearing, default, thousand dollars, renew, civil penalty, commissioner's order, pre-hearing, flush, bulk storage, petroleum, register, expire, adjudication hearing, cover letter, days of service, summary report, notice, deed

Opinion By: **[*1]** SEGGOS

Initial Decision:

Michael S. Caruso, Administrative Law Judge

DEFAULT SUMMARY REPORT

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent 144-80 Sanford Apartment Corp. (respondent) with a notice of hearing **[*6]** and complaint, dated June 6, 2018, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 613-1.9(c), for failing to renew the registration of its petroleum bulk storage (PBS) facility located at 144-80 Sanford Avenue, Flushing, New York (facility). The complaint seeks an order of the Commissioner: (i) finding respondent in violation of ECL 17-1009 and 6 NYCRR 613-1.9(c); (ii) assessing a civil penalty in the amount of ten thousand dollars ($ 10,000); (iii) directing respondent to register its petroleum bulk storage facility within fifteen (15) days of the service of the Commissioner's order, remit the applicable registration fee, and submit a complete registration application; and (iv) granting such other and further relief as the Commissioner shall deem just and appropriate.

Inasmuch as respondent is an active domestic business corporation in the State of New York, service of the notice of hearing and complaint on respondent was made by personally serving the New York State Department of State on June 6, 2018 (*see* Motion for Default Judgment, Exhibit C). Department staff also provided additional service by

sending the notice of hearing and complaint to **[*7]** respondent by first class mail on June 6, 2018 (*see id.*). Respondent failed to file an answer to the complaint, and failed to appear at a pre-hearing conference scheduled for July 11, 2018, as directed in the cover letter and notice of hearing served with the complaint (*see* Motion for Default Judgment, Exhibit A).

As stated in the notice of hearing, on August 13, 2018, an adjudicatory hearing was convened before the undersigned. Department staff was represented by Deborah Gorman, Esq., Remediation Bureau, Office of General Counsel, New York State Department of Environmental Conservation, 625 Broadway, Albany, New York. No one appeared on behalf of respondent.

I noted for the record that respondent had failed to answer the complaint, failed to appear for the pre-hearing conference and failed to appear for the adjudicatory hearing. Department staff moved orally for a default judgment pursuant to 6 NYCRR 622.15. I reserved on the oral motion, allowing the record to remain open for Department staff to submit the documentation required by 6 NYCRR 622.15(b). On December 11, 2018, staff submitted a written motion for a default judgment with supporting papers (*see* Appendix **[*8]** A, attached hereto [listing documents submitted on motion]). Department staff served the motion and supporting papers on respondent by first class mail on December 11, 2018 (*see* Affirmation of Service of Deborah Gorman, dated December 20, 2018).

Applicable Regulatory Provision

Section 613-1.9. Registration .

* * *

"(c) *Renewal*. Registration must be renewed every five years from the date of the last valid registration certificate until the department receives written notice and documentation from the facility owner that the facility has been permanently closed in accordance with section 613-2.6(b), 613-3.5(b), or 613-4.5(b) of this Part, or that ownership of the facility has been transferred in accordance with subdivision (d) of this section."

Findings of Fact

The following facts are found based upon the pleadings and papers submitted with and in support of staff's motion for a default judgment:

1. Respondent 144-80 Sanford Apartment Corp. is the owner of a PBS facility having a capacity of over 1,100 gallons located at 144-80 Sanford Avenue, Flushing, New York (facility). In particular, PBS tank number 001 at the facility has a capacity of 5,000 gallons **[*9]** and is located aboveground. *See* Motion for Default Judgment, Exhibits D, E, F, and G.

2. Respondent is an active domestic business corporation in the State of New York. *See* Motion for Default Judgment, Exhibit H.

3. On May 28, 1986, Anna Maultasch transferred all right, title and interest in the facility to 144-80 Sanford Apartment Corp., the facility's current owner. This deed is recorded in the Office of the City Register of the City of New York, in Reel 2105 Page 267. *See* Motion for Default Judgment, Exhibit D. [1]

4. Pursuant to a registration application received November 17, 2012, the Department issued PBS Certificate Number 2-154539 to respondent 144-80 Sanford Apartment Corp. on December 12, 2012 with an expiration date of June 5, 2017. *See* Motion for Default Judgment, Exhibits E, F and G.

---

[1] Anna Maultasch conveyed grantor's 14% fee interest in the premises. By separate deeds dated May 26, 1986, Esther Kruglin and Meyer Kruglin conveyed the remaining fee interest in the premises to 144-80 Sanford Apartment Corp. I take official notice of those deeds recorded in the Office of the City Register of the City of New York, in Reel 2105 Pages 259 and 261, respectively. In the future, Department staff must include copies of all deeds transferring the premises to the current owner.

5. On May 31, 2018, a search of the Department's PBS registration database revealed that respondent's registration expired on June 5, 2017 and, as of May 31, 2018, had not been renewed. *See* Motion for Default Judgment, Exhibit A, Affirmation of Deborah Gorman, Esq., dated June 6, 2018, PP 9-12; *see also* Exhibit G.

6. As of December 11, 2018, respondent had not registered **[*10]** the facility. *See* Motion for Default Judgment, Exhibit B, Affirmation of Deborah Gorman, Esq., dated December 11, 2018 P 9*see also* Exhibit G.

7. As shown by Receipt for Service No. 201806130052 issued by the New York State Department of State, respondent was served personally, on June 6, 2018 pursuant to section 306 of the Business Corporation Law, with a notice of hearing and complaint dated June 6, 2018, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 613-1.9(c), together with a cover letter, statement of readiness and supporting affirmation, for failure to renew the registration of its PBS facility located at 144-80 Sanford Avenue, Flushing, New York. Consistent with CPLR 3215(g)(4), Department staff also provided additional service by sending the notice of hearing and complaint to respondent by first class mail on or about June 6, 2018. *See* Motion for Default Judgment, Exhibit C.

8. Respondent failed to file an answer to the complaint, failed to appear at a pre-hearing conference scheduled for July 11, 2018, as directed in the cover letter and notice of hearing served with the complaint, and failed to appear **[*11]** for the adjudicatory hearing scheduled in the matter on August 13, 2018, as directed in the notice of hearing. *See* Motion for Default Judgment, Exhibit B, Affirmation of Deborah Gorman, Esq., PP 4-6.

Discussion

A respondent upon whom a complaint has been served must serve an answer within 20 days of receiving a notice of hearing and complaint (*see* 6 NYCRR 622.4[a]). A respondent's failure to file a timely answer "constitutes a default and a waiver of respondent's right to a hearing" (6 NYCRR 622.15[a]). In addition, attendance by a respondent at a scheduled pre-hearing conference or hearing is mandatory, "and failure to attend constitutes a default and a waiver of the opportunity **[*12]** for a hearing" (6 NYCRR 622.8[c]; *see also* 6 NYCRR 622.15[a] ["A respondent's … failure to appear at the hearing or the pre-hearing conference … constitutes a default and waiver of respondent's right to a hearing"]).

Upon a respondent's failure to answer a complaint or failure to appear for a pre-hearing conference or hearing, Department staff may make a motion to an ALJ for a default judgment. Such motion must contain: (i) proof of service upon respondent of the notice of hearing and complaint; (ii) proof of respondent's failure to appear or to file a timely answer; and (iii) a proposed order (*see* 6 NYCRR 622.15[b][1] - [3]).

As the Commissioner has held, "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them" (*Matter of Alvin Hunt, d/b/a Our Cleaners*, Decision and Order of the Commissioner, July 25, 2006, at 6 [citations omitted]). In addition, in support of a motion for a default judgment, staff must "provide proof of the facts sufficient to support the claim[s]" alleged in the complaint. (*Matter of Queen City Recycle Center, Inc.*, Decision and Order of the Commissioner, **[*13]** December 12, 2013, at 3.) Staff is required to support its motion for a default judgment with enough facts to enable the ALJ and the Commissioner to determine that staff has a viable claim (*see Matter of Samber Holding Corp.*, Order of the Commissioner, March 12, 2018 [*Samber*], at 1 [citing Woodson v Mendon Leasing Corp., 100 NY2d 62, 70-71 (2003)] *see also* CPLR 3215[f]).

The record establishes that: (i) Department staff served the notice of hearing and complaint upon respondent; (ii) respondent failed to file an answer to the complaint and failed to appear at a pre-hearing conference scheduled for July 11, 2018, as directed in the cover letter and notice of hearing served with the complaint; and (iii) respondent failed to appear for the adjudicatory hearing scheduled on August 13, 2018, as directed in the notice of hearing. Department staff has submitted a proposed order (*see* Motion for Default Judgment, Exhibit J). Based upon the foregoing, the Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15. Staff also served respondent with copies of the motion for default judgment and supporting **[*14]** papers (*see* Affirmation of Service of Deborah Gorman, dated December 20, 2018, P 3).

Department staff's submissions in support of the motion for a default judgment provide proof of facts sufficient to enable me to determine that staff has a viable claim that respondent failed to renew the registration of its petroleum bulk storage facility located at 144-80 Sanford Avenue, Flushing, New York, in violation of ECL 17-1009 and 6 NYCRR 613-1.9(c) (*see Samber* at 1).

Staff's complaint requested a civil penalty in the amount of ten thousand dollars ($ 10,000). In its motion for default judgment and proposed order, Department staff seeks to reduce the civil penalty to five thousand dollars ($ 5,000). Staff's submissions on the motion for a default judgment elaborate on the requested penalty, discussing the Department's Civil Penalty Policy, DEE-1, and administrative precedent relating to similar violations (*see* Motion for Default Judgment, Exhibit A, Complaint, at Wherefore Clause P II; *see also* Exhibit B, Gorman Affirmation, dated December 11, 2018, PP 13-19). Accordingly, staff's motion to reduce the civil penalty to five thousand dollars ($ 5,000) should be granted **[*15]** because respondent is not prejudiced by reducing the penalty requested.

I find that staff's request for a civil penalty in the amount of five thousand dollars ($ 5,000) is consistent with the Department's penalty policy as well as applicable provisions of ECL article 71 and administrative precedent (*see e.g. Matter of 12 Martense Associates LLC*, Order of the Commissioner, December 19, 2011, at 2).

Conclusion of Law

By failing to renew the registration of its PBS facility located at 144-80 Sanford Avenue, Flushing, New York on or before June 5, 2017, respondent violated ECL 17-1009 and 6 NYCRR 613-1.9(c).

Recommendation

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

1. Granting Department staff's motion for default judgment, holding respondent 144-80 Sanford Apartment Corp. in default pursuant to the provisions of 6 NYCRR 622.15;

2. Holding that respondent 144-80 Sanford Apartment Corp. violated ECL 17-1009 and 6 NYCRR 613-1.9(c) by failing to renew the registration of its PBS facility located at 144-80 Sanford Avenue, Flushing, New York on or before June 5, 2017, the date the prior registration expired;

3. Directing respondent 144-80 **[*16]** Sanford Apartment Corp. to pay a civil penalty in the amount of five thousand dollars ($ 5,000) within fifteen (15) days of service of the Commissioner's order; and

4. Directing such other and further relief as he may deem just and appropriate.

APPENDIX A

Motion for Default Judgment

1. Cover letter, dated December 11, 2018, addressed to Chief Administrative Law Judge James McClymonds of the Department's Office of Hearings and Mediation Services, attaching staff's motion papers

2. Notice of Motion for Default Judgment dated December 11, 2018

3. Motion for Default Judgment, dated December 11, 2018, attaching Exhibits A and B:

    1. Cover letter, Notice of Hearing, Complaint, Statement of Readiness, and Affirmation of Deborah Gorman, Esq., all dated June 6, 2018

    2. Affirmation of Deborah Gorman, Esq., dated December 11, 2018, attaching Exhibits C - H and J:

    3. Affidavit of Service of Dale Thiel, sworn to December 11, 2018, attaching Department of State Receipt for Service, dated June 6, 2018, reflecting service upon respondent pursuant to section 306 of the Business Corporation Law

    4. Printout of search on Automated City Register Information System (ACRIS), dated December **[*17]** 11, 2018, attaching deed dated May 28, 1986

5. Petroleum Bulk Storage (PBS) Application from 144-80 Sanford Apartment Corp., PBS No. 2-154539, received November 19, 2012

6. PBS Certificate, PBS No. 2-154539 issued to 144-80 Sanford Apartment Corp. on December 12, 2012, with an expiration date of June 5, 2017

7. Facility Information Report, PBS No. 2-154539, printed December 11, 2018

8. NYS Department of State, Division of Corporations, Entity Information Sheet regarding 144-80 Sanford Apartment Corp., reflecting information through December 10, 2018

10. Draft Order [2]

Affirmation of Service of Deborah Gorman, dated December 20, 2018

Opinion

Basil Seggos, Commissioner

ORDER

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department) that respondent 144-80 Sanford Apartment Corp. violated ECL 17-1009 and 6 NYCRR 613-1.9(c) by failing to renew the registration of its petroleum bulk storage (PBS) facility on or before June 5, 2017, the date on which its prior registration expired. Respondent's facility is located at 144-80 Sanford Avenue, Flushing, New York, and includes an aboveground petroleum bulk storage tank with a capacity of 5,000 gallons.

Administrative Law Judge (ALJ) Michael S. Caruso of the Department's Office of Hearings and Mediation Services was assigned to this matter and prepared the attached default summary report, which I adopt as my decision in this matter, subject to my comments below.

As set forth in the ALJ's default summary report, respondent failed to file an answer to the complaint served by Department staff in this matter, failed to appear at a pre-hearing conference scheduled for July 11, 2018, and failed to appear for the adjudicatory hearing scheduled for August 13, 2018 (*see* Default **[*2]** Summary Report at 3 [Finding of Fact No. 8]). At the August 13, 2018 adjudicatory hearing, Department staff made an oral motion for a default judgment. ALJ Caruso reserved on the motion, and Department staff later submitted a written motion for default judgment with supporting papers.

As a consequence of respondent's failure to answer or appear in this matter, the ALJ recommends that Department staff's motion for a default judgment be granted (*see* Default Summary Report at 5). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15. The pleadings and the papers submitted with and in support of the motion provide sufficient facts to enable me to determine that staff has a viable claim that respondent failed to renew the registration of its PBS facility on or before June 5, 2017, the date on which its prior registration expired and, therefore, is in violation of ECL 17-1009 and 6 NYCRR 613-1.9(c).

Department counsel correctly points out that the requirement to register PBS facilities is one of the "cornerstones" of the PBS regulatory scheme (*see* Motion for Default Judgment, Exhibit B, Affirmation of Deborah Gorman, Esq., dated December 11, 2018, **[*3]** P 14). Proper registration assists in the oversight of other requirements for a PBS facility (e.g., leak detection, monitoring, and reporting), with the goal of protecting the environment and public health.

Department staff, in its complaint, sought a penalty of ten thousand dollars ($ 10,000). In its default papers and proposed order, Department staff seeks to reduce the civil penalty to five thousand dollars ($ 5,000). ECL 71-

[2] There is no Exhibit I.

1929(1), which applies to the statutory and regulatory violation at issue in this proceeding, provides for a penalty of up to thirty-seven thousand five hundred dollars ($ 37,500) per day for each violation. In proceedings similar to this one, Department staff has requested penalties that take into account the duration of the violation. For those facilities that have violated the registration requirement within the past two years, Department staff has, absent other violations, generally requested a penalty of five thousand dollars ($ 5,000) (*see Matter of 12 Martense Associates*, *LLC*, Order of the Commissioner, December 19, 2011, at 2). In this matter, respondent was required to register its facility on or before June 5, 2017. Based on this record, **[*4]** the requested penalty of five thousand dollars ($ 5,000) is authorized and appropriate.

I direct that respondent submit the civil penalty to the Department within fifteen (15) days of the service of this order upon respondent.

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

1. Department staff's motion for a default judgment pursuant to 6 NYCRR 622.15 is granted. By failing to answer or appear in this proceeding, respondent 144-80 Sanford Apartment Corp. waived its right to be heard at the hearing.

2. Based on the pleadings and papers submitted with and in support of Department staff's motion, respondent 144-80 Sanford Apartment Corp. is determined to have violated ECL 17-1009 and 6 NYCRR 613-1.9(c), by failing to renew the registration of its PBS facility located at 144-80 Sanford Avenue, Flushing, New York on or before June 5, 2017, the date on which its prior registration expired.

3. Within fifteen (15) days of the service of this order upon respondent 144-80 Sanford Apartment Corp., respondent shall submit to the Department a complete petroleum bulk storage application for the facility together with applicable and past **[*5]** due registration fees.

4. Within fifteen (15) days of the service of this order upon respondent 144-80 Sanford Apartment Corp., respondent shall pay a civil penalty in the amount of five thousand dollars ($ 5,000) by certified check, cashier's check, or money order made payable to the "New York State Department of Environmental Conservation."

5. The penalty payment shall be sent to the following address:

Office of General Counsel (Remediation Bureau)

NYS Department of Environmental Conservation

625 Broadway, 14th Floor

Albany, New York 12233-1500

Attn: Deborah Gorman, Esq.

Any questions or other correspondence regarding this order shall also be addressed to Deborah Gorman, Esq. at the address referenced in paragraph V of this order.

6. The provisions, terms, and conditions of this order shall bind respondent 144-80 Sanford Apartment Corp., and its agents, successors, and assigns, in any and all capacities.

End of Document

Gas Station Development, Redevelopment, and Due Diligence

Seth D. Friedland, Esq.
Friedland Law, LLC | New York, NY
Richard Levato
Advanced Site Restoration, LLC | New York, NY

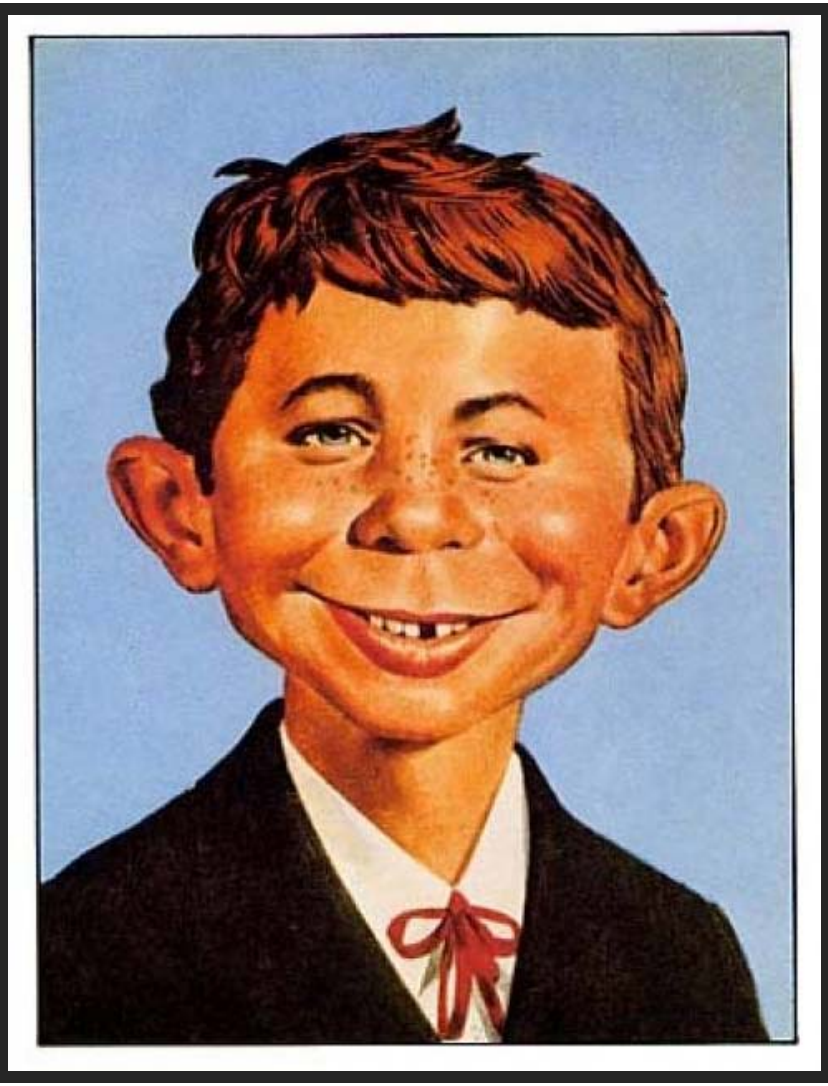
Gas Station Development, Redevelopment and Due Diligence

Seth Friedland, Friedland Law, LLC

Rich Levato, President, Advanced Site Restoration, LLC

NYSBA Oil Spill Symposium, Albany, NY

May 8, 2019



Gas Stations in Manhattan

2009: 58 Gas Stations *(Crains)*

2011: 41 Gas Stations *(Crains)*

Currently: 31 Gas Stations in Manhattan

2014: 12 Gas Stations below 96th *(Crains)*

Currently: 7 Gas Stations below 96th Street – with 2 on 96th Street (East and West)

2006: 300,000 Gas Stations Nationwide

Currently: <130,000 Gas Stations Nationwide

(Gasoline and Automotive Service Dealers of America)

Environmental Due Diligence

Phase I ESA and Phase II ESA and Independent Research

- Phase I ESA - *Buy/Sell/Development/Financing*
- *("All Appropriate Inquiry" Standard)*
- Phase II *ESA (Soil, GW, Vapor)*
- Exploration of "E" Designations in NYC
- Title – Including Restrictions and Covenants
- Zoning & Buildings Department Issues
- Violations & Restrictions
- Potential DEC/OER Brownfields site

Environmental Due Diligence

Phase I ESA, Phase II ESA and Independent Research

Additional research/legal review:

- Proposed use
- Location, location, location
- PMPA (Petroleum Marketing Practices Act) – Dealer/tenant rights
- Prior contracts and agreements affecting property
- Ground leases, loan agreements, oil company agreements, access agreements of record
- Prior indemnities
- Cost recovery issues
- Existing UST and PLL Insurance, if any
- Petroleum vs. Non-Petroleum
- Asbestos/Lead paint

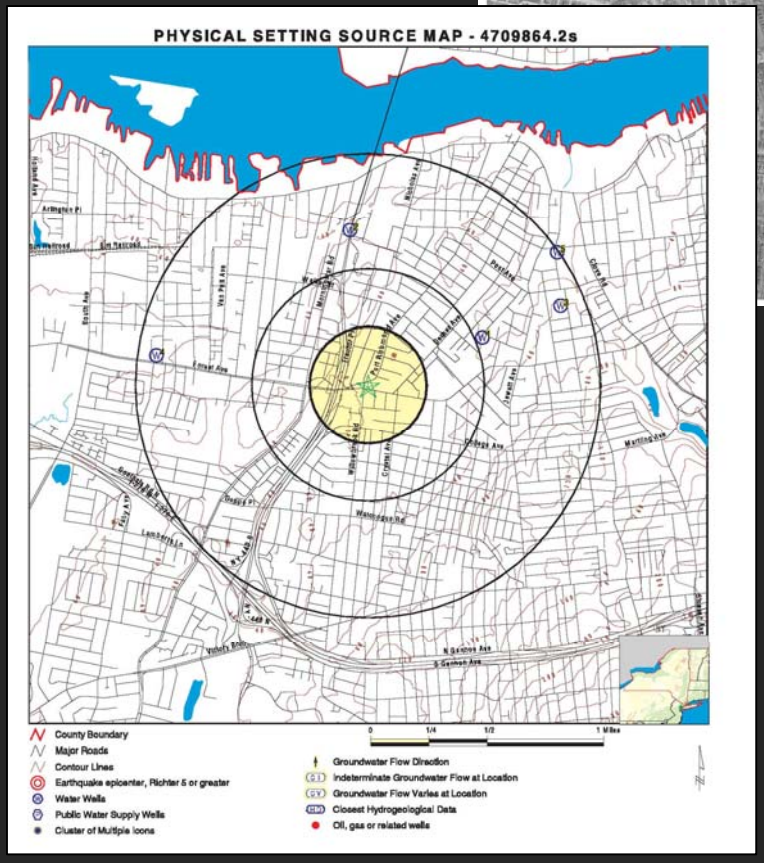
Phase I ESA

- Environmental Due Diligence
- Buy/Sell/Development/Refinancing
- “All Appropriate Inquiry” Standard
- Define purpose and client needs
- Non-Invasive
- Site Inspection
- Owner/property manager interview

Phase I EDR Report

(Environmental Data Resources)

- Site History/Prior Uses
- Sanborn Maps/Aerial Photos
- Surrounding Property Map
- Ground Water Flow Map
- Environmental Liens
- Send Foils (Freedom of Information Law)
- Identify issues
  - NYSDEC Spills/Enviro compliance issues/NFAs
  - PBS (Petroleum Bulk Storage)
  - Nassau/Suffolk DOH (USTs)
  - OER 'E' Designations
  - NYSDOH & FDNY
  - Other applicable agencies
- REC's/AOC's
- Recommendations



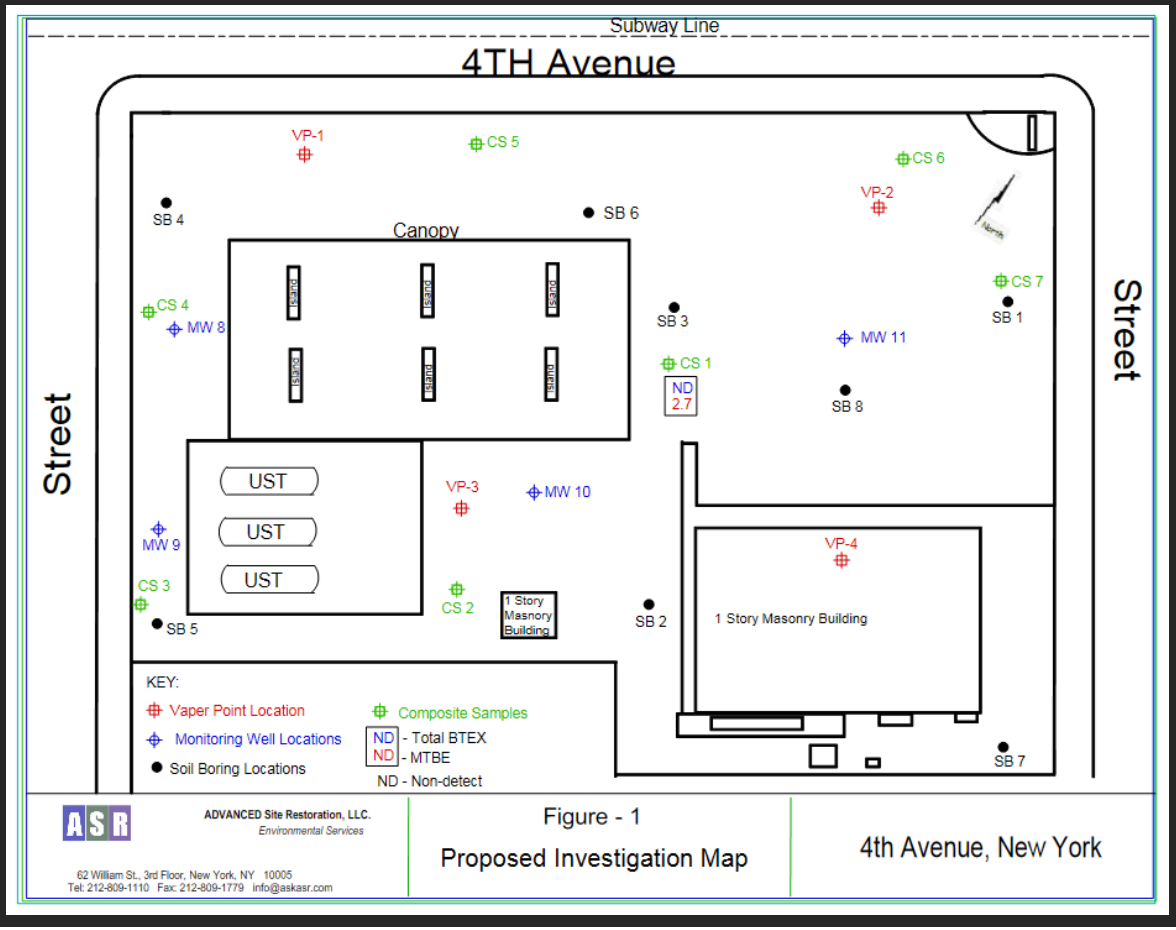
Phase II

Environmental Site Assessment

- Invasive
- SOW tailored to client's purpose/goal
- Testing of Soil, Soil Vapor and Groundwater
- Petroleum vs. Non-Petroleum sampling
- Obtain access agreement
- Obtain insurance certificates from consultants, subs and driller

Phase II - Investigation Work Plan – IWP

- Define SOW & Purpose
- Design Phase II IWP
- Identify AOC's & REC's from prior reports & Phase I
- Propose Sampling Locations
- Define Sampling Protocol
  - Ground Water
  - Soil
  - Soil Vapor



Phase II Approvals / Investigation

- NYSDEC/OER/DEP Approval (if applicable)
- Health and Safety Plan (HASP/CHASP) (if applicable)
- MTA Approval (if applicable)
- Utility Mark Outs
- Access Agreements
- Ground Penetrating Radar (locate inactive USTs/piping)
- Obtaining Samples - Drilling/GeoProbe, etc.
- Analytical Lab Results – GW, Soil, Vapor (Part 375, if applicable – proposed use is key – Residential vs. Non-Residential/ Commercial/ Mixed Use)
- Waste Classification (for disposal purposes)
- Conclusions
- Recommendations (Soil Disposal, Vapor Barrier, SSDS, etc.)

Due Diligence Results

- Brief client/stakeholders as to results of Phase I, Phase II, Foils and independent research and investigation
- Analyze results in context of client's goals, proposed use, risk tolerance and estimated budget constraints
- Research insurance and get quotes for Environmental (Pollution Legal Liability) Insurance as appropriate
- If applicable, propose potential remedial work plan (RIWP) to satisfy client/project goals, use, governmental agency, risk tolerance, lender, cost/benefit analysis and budget

Gas Station Development, Redevelopment and Due Diligence

Seth Friedland, Friedland Law, LLC

Rich Levato, President, Advanced Site Restoration, LLC

NYSBA Oil Spill Symposium, Albany, NY

May 8, 2019

Individual Liability & the Responsible Corporate Officer Doctrine

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Cloudy Waters: Individual Liability and the Responsible Corporate Officer Doctrine Related to Oil Spills Under Article 12 of the New York Navigation Law

May 8, 2019
NYSBA Environmental & Energy Law Section
Oil Spill Symposium

JEFFREY C. STRAVINO, ESQ. AND HENRY A. ZOMERFELD, HODGSON RUSS LLP

DOUGLAS H. ZAMELIS, ESQ., LAW OFFICE OF DOUGLAS H. ZAMELIS

Introduction

Overview

- Article 12 of the New York Navigation Law (a/k/a the Oil Spill Act)
  - History of the law
  - Conduct giving rise to liability
  - Who is liable and to what extent
  - Damages available
- Piercing the corporate veil and corporate officer liability
- Best practices

Article 12 of the Navigation Law

- Enacted in 1977 to "to ensure a clean environment and healthy economy for the state by preventing the unregulated discharge of petroleum which may result in damage to lands, waters or natural resources." Navigation Law § 171.
- Since the law is "necessary for the general health, safety, and welfare of the people of this state," its terms "shall be liberally construed to effect its purposes." Navigation Law § 195.
- The authority interpreting and applying the Navigation Law has been inconsistent and therefore the application of the law has been murky at best.

Liability Under Article 12

- Strict liability is imposed on any person "without regard to fault, for all cleanup and removal costs [. . .] no matter by whom sustained." Navigation Law § 181(1) (brackets and ellipsis added).

- Liability is imposed also for failing to report a discharge. *See* Navigation Law § 175 ("Any person responsible for causing a discharge shall immediately notify the [New York State Department of Environmental Conservation] pursuant to rules and regulations established by the [New York State Department of Environmental Conservation], but in no case later than two hours after the discharge.") (brackets added).

- Very simply, "strict liability under the Oil Spill Act does not depend on fault or knowledge. Instead, the liability of an otherwise faultless owner of contaminated property or a system from which petroleum has spilled 'turns on the owner's 'capacity to take action to prevent an oil spill *or to clean up contamination resulting from a spill.'" State v. C.J. Burth Services, Inc.*, 79 A.D.3d 1298, 1300 (3d Dep't 2010) (internal citations omitted) (emphasis in original).

Liability Under Article 12

- Because of how broad the intent and the liberal construction of the Navigation Law is, courts often hold that "system owners strictly liable for the cost of remediation under Navigation Law § 181(1) 'even in the absence of any evidence that the owner caused or contributed to the discharge.'" *State v. C.J. Burth Services, Inc.*, 79 A.D.3d 1298, 1300 (3d Dep't 2010) (internal citations omitted).

- Liability may also be imposed for a failure to report a discharge to the NYSDEC within two hours of the discharge. Navigation Law § 175.

- This provision has resulted in liability upon a broad array of individuals. *See In the Matter of Middleton, Kontokosta Associates, Ltd. D/B/A and/or A.K.A. Mka Ltd. and Donald J. Middleton, Jr., Individually and as Vice President, Respondents*, 1998 WL 939495, at *2 (NYSDEC 1998) (Holding that "[t]he reporting duty is on everyone with knowledge of the spill" and therefore applied to an environmental consulting firm that had observed a spill.).

Who can be Liable?

- Any "person" that engages in prohibited conduct - - *i.e.*, any "discharge" - - may be liable.

- A "person" is defined as "public or private corporations, companies, associations, societies, firms, partnerships, joint stock companies, individuals, the United States, the state of New York and any of its political subdivisions or agents." Navigation Law § 172(14).

- "Discharge" is defined as "any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of petroleum into the waters of the state or onto lands from which it might flow or drain into said waters, or into waters outside the jurisdiction of the state when damage may result to the lands, waters or natural resources within the jurisdiction of the state." Navigation Law § 172(8).

Who Else Can Be Liable?

- An "owner" or "operator," which "means with respect to a vessel, any person owning, operating or chartering by demise such vessel; with respect to any major facility, any person owning such facility, or operating it by lease, contract or other form of agreement; with respect to abandoned or derelict major facilities, the person who owned or operated such facility immediately prior to such abandonment, or the owner at the time of discharge." Navigation Law § 172(13).

- One's status as a corporate officer does not always insulate that individual from personal liability. For instance, a corporate officer that meets the statutory definition of "owner" under Navigation Law § 172(13), may be liable if there is a "discharge." *See In the Matter of Bradley K. Grant and Grant's Gas and Grocery, LLC*, 2018 WL 5482336 *at * 7* (NYSDEC 2018) (sole member/owner of LLC was individually liable as an "owner" under the Navigation Law).

Liability Analyses

New York court decisions on the Navigation Law are inconsistent in their analyses concerning the conduct that will create liability under the Navigation law. The cases can be broken into three analyses: status, control, and conduct.

- Status analysis focuses on an individual's status e.g., an owner. *See Leone v. Leewood Svc. Station, Inc.*, 212 A.D.2d 669 (2d Dep't 1995) (owner liable for petroleum spill from its underground tanks; also proper to criminally charge lessee of gas station as "operator" instead of actual owner.). Notably, the owner of the underground tanks found liable was not the entity that maintained the tanks.

- Control analysis focuses on the degree of control. *See Huntington Hosp. v. Anron Heating and Air Conditioning, Inc.*, 250 A.D.2d 814 (2d Dep't 1998) (holding general contractor responsible under Navigation Law where it supervised the overall work and is therefore liable as a "discharger."). In this Second Department case just three years after *Leone*, the Court focused on the general contractor's responsibility for supervising a number of subcontractors for work that included the installation of underground storage tanks.

- Conduct analysis focuses on whether one's acts or omissions contributed to the discharge. *See Barclays Bank of New York, N.A. v. Tank Specialists, Inc.*, 236 A.D.2d 570 (2d Dep't 1997) (failure to install a tank liner may have contributed to the discharge and liability could also be imposed on the defendant as a "discharger."). Here, another Second Department case where the Court has taken now a third approach under the Navigation Law, highlighting the ways in which liability can be imposed.

Cloudy Interpretations

- The Navigation Law has been subject to varying interpretations, some of those heavily factual. For instance, the liability of "owners" has not been consistently applied. *Compare White v. Regan*, 171 A.D.2d 197 (3d Dep't 1991), *app. denied* 79 N.Y.2d 754 (1992) (owners of property where petroleum tanks leaked automatically responsible regardless of whether they were aware) *with Drouin v. Ridge Lumber, Inc.*, 209 A.D.2d 957 (4th Dep't 1994) (landowner was not liable for acts of tenant concerning leaking tanks because "liability depends on conduct not status.").

- These two cases are just one example of the lack of consistency in interpreting and applying the Navigation Law. Further demonstration of that was the three separate analyses conducted by the Second Department concerning liability discussed earlier.

- One way that the Navigation Law will be interpreted more clearly moving forward is if the Court of Appeals addresses the inconsistencies in the decisions of the Appellate Divisions.

What Damages are Available?

- Damages are generally limited to economic loss. Navigation Law § 181(1) ("Any person who has discharged petroleum shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained, as defined in this section.").

- While this does not preclude a plaintiff from seeking additional damages, the provision has been interpreted to provide for only limited damages. *See e.g.*, *Wever Petroleum, Inc. v. Gord's Ltd.*, 225 A.D.2d 27 (3d Dep't 1996) (plaintiff entitled to only economic loss damages.). The Appellate Division reasoned that the language of Navigation Law § 181(5), providing that damages "shall be limited to the damages authorized by this section," prevented an award of anything other than economic loss. *Id.* at 30.

- Dischargers should expect to indemnify the Environmental Protection and Spill Compensation Fund or property owners for costs related to cleanup.

Other Damages

- Dischargers can be fined up to $25,000 for each offense for failing to act toward cleaning up a discharge along with other sanctions. Navigation Law § 192.

- A plaintiff may also seek other remedies, including common law claims and injunctive relief. Navigation Law § 193. "[N]o person who receives compensation for damages or cleanup and removal costs pursuant to any other state or federal law shall be permitted to receive compensation for the same damages or cleanup and removal costs under this article." *Id.*

- Despite the other remedies available, the Third Department in *Strand v. Neglia,* 232 A.D.2d 907, 909 (3d Dep't 1996) held that "Navigation Law § 181 creates no cause of action for personal injuries."

- In addition to the provisions and case law, NYSDEC has made a commitment to recover Natural Resource Damages against those responsible for environmental offenses, including oil spills. *See* NYSDEC CP-44 Natural Resource Damages Policy, January 21, 2010, *obtained from* https://www.dec.ny.gov/regulations/68567.html.

Other Damages

- The NYSDEC Natural Resource Damages policy is consistent with the various damages provided for by Navigation Law § 181(2), including:
  - "The cost of restoring, repairing, or replacing any real or personal property damages or destroyed by a discharge, any income lost from the time such property is damaged to the time such property is restored, repaired or replaced, any reduction in value of such property caused by such discharge by comparison with its value prior thereto." Navigation Law § 181(2)(a).
  - "Loss of income or impairment of earning capacity due to damage to real or personal property . . ." Navigation Law § 181(2)(c).
- Attorneys' fees may be recoverable as an "indirect damage." *See e.g.*, *Strand v. Neglia*, 232 A.D.2d 907, 909 (3d Dep't 1996) (attorneys' fees "may be recovered as an 'indirect damage' under Navigation Law § 181 (1) and (5).").

Corporate Officers

- "A director or officer of a corporation does not incur personal liability for its torts merely by reason of his [or her] official character" and thus, cannot be liable for torts "attributable to the corporation if he [or she] did not participate in and was not connected with the acts in any manner." *PDK Labs, Inc. v. G.M.G. Trans. W. Corp.*, 101 A.D.3d 970, 973 (2d Dep't 2012) (internal citations and quotation marks omitted).

- A corporate officer could be exposed to liability if the corporate veil was pierced.

- A corporate officer could also be found liable where the claim involves a tort. In fact, in terms of torts, "it is well-established that under New York law, piercing the corporate veil is not required to hold a corporate officer liable for his company's torts: "a corporate officer who controls corporate conduct and thus is an active individual participant in that conduct is liable for the torts of the corporation." *City of Newburgh v. Sarna*, 690 F. Supp. 2d 136, 163 (S.D.N.Y. 2010), *aff'd in part, appeal dismissed in part,* 406 Fed. Appx. 557 (2d Cir 2011) (citing *State v. Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1985) (holding individual defendant personally liable for public nuisance without piercing the corporate veil); *see also Rajeev Sindhwani, M.D., PLLC v. Coe Bus. Serv., Inc.*, 52 A.D.3d 674, 677 (2d Dep't 2008) ("However, '[a] corporate officer who participates in the commission of a tort may be held individually liable, regardless of whether the officer acted on behalf of the corporation in the course of official duties and regardless of whether the corporate veil is pierced.'") (internal citation omitted).

Responsible Corporate Officer Doctrine

- The Responsible Corporate Officer Doctrine essentially renders regulatory offenses strict liability offenses removing any *mens rea* or criminal intent. Those knowledge requirements have, in recent years, been imputed upon corporate officers. This history of the Responsible Corporate Officer Doctrine arose in the food and drug arena.

- The key policy behind the doctrine is that a corporate officer may be held liable for the violations of a corporation if the violations threaten public health, safety, or welfare, and the corporate officer had responsibility over the actions that caused the violations. *In the Matter of Bradley K. Grant and Grant's Gas and Grocery, LLC*, 2018 WL 5482336 *at * 7* (NYSDEC 2018) (internal citations omitted) *see also In the Matter of the Burch Logging, LLC and Gregory A. Burch Jr., Individually*, 2019 WL 1219174 at *13 (NYSDEC 2019).

- The seminal cases regarding the Responsible Corporate Officer Doctrine are *United States v. Dotterweich,* 320 U.S. 277 (1943) and *United States v. Park,* 421 U.S. 658 (1975). "The Court in *Park* clarified that corporate officer liability in that situation requires only a finding that the officer had 'authority with respect to the conditions that formed the basis of the alleged violations.'" *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 51 (1st Cir 1991) (internal citation omitted)).

- However, as the Court of Appeals for the First Circuit reasoned, "[i]n a crime having knowledge as an express element, a mere showing of official responsibility under *Dotterweich* and *Park* is not an adequate substitute for direct or circumstantial proof of knowledge." *Id.* at 55

Cloudy Interpretations

- The interpretations are even more inconsistent in the context of corporate officers. "[I]n order to hold a corporate stockholder, officer or employee personally liable under the Navigation Law for a discharge occurring at a site owned or operated by the corporation, that individual must, at a minimum, have been directly, actively and knowingly involved in the culpable activities or inaction which led to a spill or which allowed a spill to continue unabated." *State v. Markowitz*, 273 A.D.2d 637, 642 (3d Dep't 2000) (internal citations omitted).

- Interestingly, the Appellate Division in *Markowitz* outright rejected personal liability upon corporate officers for corporate violations because "the Navigation Law does not address personal liability of officers and managers," but rather statuses and culpable conduct. *Id.* at 642, fn 4.

Piercing the Corporate Veil

- "Generally . . . piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in [the] plaintiff's injury." *Supreme Energy, LLC v. Martens*, 145 A.D.3d 1147, 1150 (3d Dep't 2016) (citing *Matter of Morris v. New York State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 141 (1993)). "Whether to pierce the corporate veil involves a scrutiny of various considerations, including "the overlap in ownership, officers, director and personnel, the capitalization of the corporation, any commingling of assets and the presence, or absence, of the formalities that attend the corporate form." *Id.* at 1150-1151 (internal citations omitted).

- "While 'New York is reluctant to pierce corporate veils * * *' exceptions are made in two broad situations: to prevent fraud or other wrong, or where a parent dominates and controls a subsidiary." *Carte Blanche (Singapore) Pte., Ltd. v. Diners Club Intern., Inc.*, 2 F.3d 24, 26 (2d Cir. 1993]) (internal citation omitted).

- In *Supreme Energy, LLC v. Martens*, 145 A.D.3d 1147 (3d Dep't 2016), the Appellate Division affirmed the NYSDEC Commissioner's decision to pierce the corporate veil where the sole owner of two separate entities used a single checkbook for both of them and comingled personal and business finances.

Best Practices

- ❑ Ensure proper legal compliance and understand obligations e.g., reporting under Navigation Law § 175.

- ❑ Where third-parties are involved, enter into contracts with indemnification provisions and insurance requirements.
  - Courts can be reluctant to allow one to "contract out" of liability, particularly liability imposed by statute, but at least in the case of sophisticated entities, an indemnification clause in the context of the Navigation Law has been upheld. *See Niagara Frontier Transp. Auth. v. Tri-Delta Constr. Corp.*, 107 A.D.2d 450 (4th Dep't 1985), *aff'd* 65 N.Y.2d 1038 (1985). The terms, however, must be express and unequivocal. *See Umbra U.S.A., Inc. v. Niagara Frontier Transp. Auth.*, 262 A.D.2d 980 (4th Dep't 1999).

- ❑ Obtain and maintain appropriate and sufficient insurance coverage.
  - Watch for exclusions! Pollution is a frequent exclusion in coverage and often includes oil spills. These clauses, while based on their plain language, are often upheld. *See e.g., Cortland Pump & Equipment, Inc. v. Firemen's Ins. Co. of Newark N.J.*, 194 A.D.2d 117 (3d Dep't 1993) (insurer not obligated to defend where action arose from petroleum discharge, which was subject to an pollution exclusion clause.).

Questions?

Thank you!

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NEW YORK STATE OF OPPORTUNITY | Department of Environmental Conservation

Grant, Bradley K. and Grant's Gas and Grocery, LLC - Ruling on Motion for Order Without Hearing in Lieu of Complaint, October 19, 2018

Ruling on Motion for Order Without Hearing in Lieu of Complaint, October 19, 2018

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17
of the Environmental Conservation Law ("ECL") and
Part 613 of Title 6 of the Official Compilation of Codes,
Rules and Regulations of the State of New York
("6 NYCRR"),

- by -

BRADLEY K. GRANT and GRANT'S GAS AND GROCERY, LLC,
Respondents.

RULING ON MOTION FOR ORDER WITHOUT HEARING IN LIEU OF COMPLAINT

DEC Case No.R6-20150306-18

October 19, 2018

Appearances of Counsel :

-- Thomas S. Berkman, Deputy Commissioner and General Counsel (Randall C. Young, Regional Attorney, Region 6, of counsel), for staff of the Department of Environmental Conservation.

-- The Law Office of Douglas H. Zamelis (Douglas H. Zamelis of counsel), for respondents Bradley K. Grant and Grant's Gas and Grocery, LLC.

In this administrative enforcement proceeding, staff of the Department of Environmental Conservation (Department or DEC) alleges that respondents Bradley K. Grant and Grant's Gas and Grocery, LLC (respondents), violated the statutes and regulations governing petroleum bulk storage (PBS) facilities when they failed to re-register and permanently close an out-of-service gasoline station located in the Town of Potsdam, St. Lawrence County. Department staff moves for an order without hearing in lieu of complaint, and respondents oppose. For the reasons that follow, Department staff's motion is granted in part and otherwise denied.

I. PROCEEDINGS

Department staff commenced this administrative enforcement proceeding by service of a March 26, 2018 notice of motion and motion for order without hearing in lieu of complaint (see 6 NYCRR 622.12 [a]). The motion was personally served on respondents on June 28, 2018 (see Affidavit of Personal Service of Environmental Conservation Officer [ECO] Joel Schneller, dated June 29, 2018). Attached to the motion was a brief supporting motion for order without hearing, and the affidavits of Ronald Novak, Michael Cox, and Jessica Fauteux, each with exhibits attached.

In the motion, which serves as the complaint in this matter, staff charges that respondents violated ECL 17-1009 and 6 NYCRR 613-1.9(c) by failing to renew the registration for the PBS facility located at 6759 US Route 11, Potsdam, New York 13617 when it expired on March 16, 2016. Staff also charges that respondents violated 6 NYCRR 613-2.6(a)(3) by failing to permanently close six underground storage tanks at the facility that have been out of service for more than one year, and 6 NYCRR 613-4.5(a)(3) by failing to permanently close an aboveground storage tank at the facility that has also been out of service for more than one year. Staff seeks to hold respondent Grant's Gas and Grocery, LLC liable for the violations as the owner of the facility, and respondent Bradley K. Grant individually liable as the responsible corporate officer of the LLC. Staff seeks an order imposing a civil penalty jointly and severally on respondents in the amount of $75,000, with $15,000 immediately payable and $60,000 suspended, provided that respondents comply with the terms of any Commissioner order issued in this matter. Staff also seeks an order requiring respondents to submit a complete and accurate PBS registration application together with regulatory fees to register the facility, and directing respondents to permanently close the facility pursuant to the requirements of 6 NYCRR part 613 (Part 613).

Department staff granted respondents two extensions of time to respond to the motion. Accordingly, on June 19, 2018, respondents served and filed papers in opposition to staff's motion. Respondents' papers consist of an affidavit of Bradley K. Grant, an affidavit of Anthony Inserra, Esq., with attachments, an affirmation of Douglas H. Zamelis, Esq., with exhibits attached, and a memorandum of law in opposition to motion for order without hearing. Respondents' response to the motion, which constitutes the answer in this proceeding, raises the defense of inability to pay the civil penalty or for the remediation sought in staff's motion.

After the filing of respondents' response with the Department's Office of Hearings and Mediation Services (OHMS), the matter was assigned to the undersigned Chief Administrative Law Judge (ALJ).

II. FINDINGS OF FACT

The following facts are determinable as a matter of law on this motion for order without hearing, which is the administrative equivalent of a motion for summary judgment under CPLR 3212 (see 6 NYCRR 622.12[d]), and are deemed established for all purposes in this proceeding (see 6 NYCRR 622.12[e]).

1. Respondent Grant's Gas and Grocery, LLC (Grant's Gas), is a New York limited liability company that owns a petroleum bulk storage facility located at 6759 US Route 11, Potsdam, New York 13617 (the facility) (see Novak Aff ¶ 3; see also Deed, Fauteux Aff, Exh 14; Articles of Organization, id. , Exh 16). Respondent Bradley K. Grant is a duly authorized member and sole owner of Grant's Gas and Grocery, LLC (see Grant Aff ¶¶ 11-12; see also Limited Liability Company Biennial Statements, Fauteux Aff, Exhs 17-19; Bankruptcy Schedule B, Inserra Supplemental Aff, Attachment). Grant's Gas and Mr. Grant (respondents) formerly operated the facility as a retail gasoline station and convenience store (see Novak Aff ¶ 4).

2. The facility was a registered petroleum bulk storage facility containing six 4,000-gallon underground tanks (USTs) (see Novak Aff ¶ 7; see also PBS Facility Information Report, Novak Aff, Exh 1 [Tanks 7, 8, 9, 10, 11, and 12]). Four of the USTs were registered for the storage of gasoline, one for the storage of kerosene, and one for diesel fuel (see id.). The facility also contains a 275-gallon stationary aboveground storage tank (AST) associated with the heating system for the building (see id. [Tank 13]).
3. On April 19, 2011, respondents renewed the facility's PBS registration by filing an application with the Department (see PBS Application, Novak Aff, Exh 2). On the application, Mr. Grant listed his own name in the boxes designated "Owner Name," "Name of Daily On-Site Operator," and "Emergency Contact Name" (see id.). In the box titled "Federal Tax ID Number," Mr. Grant listed the employer identification number for Grant's Gas and Grocery, LLC, rather than his personal social security number (see id. ; Grant Aff ¶ 8). Mr. Grant also signed the check to pay the registration fee on behalf of Grant's Gas and Grocery, LLC (see Novak Aff, Exh 3).
4. On April 19, 2011, the Department issued PBS Registration Certificate No. 6-264075 to Grant's Gas and Grocery, LLC (see PBS Registration Certificate, Novak Aff, Exh 1). The registration's expiration date was March 16, 2016 (see id.).
5. On August 11, 2010, Department staff member Michael Cox, a sanitary construction inspector for the Department's Division of Environmental Remediation (DER) in the Region 6 Potsdam sub-office, inspected the facility (see Cox Aff ¶ 5). During the inspection, Mr. Grant was present and indicated to Mr. Cox that he was the facility owner (see id.). Mr. Grant acted as the facility representative during the inspection, accompanying Mr. Cox and providing access to the facility and its records (see id.). During his inspection, Mr. Cox identified several alleged violations of the PBS regulations (see PBS Inspection Form, Cox Aff, Exh 11).
6. On October 4, 2010, staff sent respondents a notice of violation advising respondents of several violations of the PBS regulations noted during the August 2010 inspection, including the failure to maintain certain monitoring records (see Cox Aff ¶ 6; see also Notice of Violation, Cox Aff, Exhibit 13). In response to the notice of violation, Mr. Grant provided staff with weekly monitoring records and monthly inspection reports, signed by him as inspector, covering the period beginning October 4, 2010 through October 31, 2010 (see Novak Aff ¶ 9; see also Inspection Reports, Novak Aff, Exh 5).
7. During the spring of 2013, a leak occurred in Tank 12, one of the 4,000-gallon USTs containing gasoline/ethanol. Staff assigned the incident spill number 1302797 and issued a spill report. (See Novak Aff ¶ 10; see also NYSDEC Spill Report Form, Novak Aff, Exh 6.) Mr. Novak spoke with Mr. Grant about the spill on more than one occasion, and Mr. Grant eventually informed Mr. Novak that he had hired Bach Environmental Inc. to address the problem (see Novak Aff ¶ 10).
8. In response to the report of problems with Tank 12, staff received copies of the leak detection monitoring reports and inventory monitoring records, which Mr. Grant signed to indicate that he performed the inspections and reconciliations himself (see Novak Aff ¶¶ 11 and 12; see also Leak Detection Reports, Reconciliation Worksheets, Novak Aff, Exhs 7 and 8).
9. On June 14, 2013, staff observed employees of Bach Environmental Inc. working on Tank 12 (see Novak Aff ¶ 13). Specifically, staff observed the employees excavate soil from around the tank, cut and cap its connections to the other tanks, and transfer the product to a different tank (see id.). As a result, Tank 12 has not received or dispensed product since June 14, 2013 (see id.).
10. On June 27, 2014, respondents Mr. Grant and Grant's Gas separately filed for bankruptcy under chapter 7 of the United States Bankruptcy Code (see Novak Aff ¶ 17; id. , Exh 10). Mr. Grant received a bankruptcy discharge on October 3, 2014 (see Inserra Supplemental Aff ¶ 3; Discharge

of Debtor, Novak Aff, Exh 10). Although respondent Grant's Gas did not receive a discharge, after the case was administered by the bankruptcy trustee, the case was deemed closed on April 5, 2016 (see Inserra Supplemental Aff ¶ 4).

11. On February 16, 2015, Department staff member Ronald Novak, an environmental engineer and the regional bulk storage supervisor for DEC Region 6, inspected the facility and observed that the store was closed and vacant, and the facility appeared to be out of business (see Novak Aff ¶ 16).
12. On February 18, 2015, staff sent respondents a second notice of violation advising respondents of several more violations of the PBS regulations, including the failure to properly and permanently close out of service USTs numbers 7, 8, 9, 10, 11, and 12 (see id. ; see also 2015 Notice of Violation, Novak Aff, Exh 9). In response to staff's February 16, 2015 notice of violation, staff received a facsimile from respondents' bankruptcy attorney, Anthony Inserra, notifying staff that respondents had filed for Chapter 7 bankruptcy (see id. ¶ 17; id. , Exh 10).
13. On March 16, 2016, the facility's PBS registration certificate expired (see PBS Registration Certificate, Novak Aff, Exh 1). The Department did not receive a re-registration application from respondent to renew the facility's registration on or before March 16, 2016 (see Novak Aff ¶ 5).
14. As of March 2018, the facility has been out of business for more than two years (see Cox Aff ¶ 8). No petroleum has been delivered to or dispensed from the tanks at the facility in more than 12 months, but the tanks at the facility have not been permanently closed (see id. ¶¶ 7-9; Novak Aff ¶¶ 15-16).
15. On March 26, 2018, staff served a notice of motion for order without hearing in lieu of a complaint on respondents seeking an order holding them in violation of ECL 17-1009(2), 6 NYCRR 613-1.9 (c), 6 NYCRR 613-2.6(a)(3), and 6 NYCRR 613-4.5(a)(3), and imposing a civil penalty jointly and severally in the amount of seventy-five thousand dollars ($75,000), with fifteen thousand dollars of that amount payable and the remaining sixty thousand dollars ($60,000) suspended (see id. at 6-7). Staff also seeks an order requiring respondents to take certain remedial action to permanently close all the PBS tanks at the facility (see id.).
16. On May 11, 2018, attorney Douglas H. Zamelis wrote to staff confirming that the Department granted respondents an extension to June 21, 2018 to respond to the motion (see Letter from Douglas H. Zamelis, Esq., to Randall C. Young, Esq., Regional Attorney, Region 6, dated May 11, 2018).
17. On June 19, 2018, respondents served their response to the motion for order without hearing upon staff (see Affirmation of Service, Respondent's Opposition to Motion for Order Without Hearing, Attachment 5).

III. DISCUSSION

A. Standards of Review

A contested motion for order without hearing will be granted if, upon all the papers and proof filed, the causes of action or defenses are established sufficiently to warrant granting summary judgment under the CPLR in favor of any party (see 6 NYCRR 622.12[d]). The motion will be denied with respect to particular causes of action if any party shows the existence of substantive disputes of fact sufficient to require a hearing (see 6 NYCRR 622.12[e]).

If a motion for order without hearing is denied, the ALJ may, if practicable, ascertain what facts are not in dispute or are incontrovertible by examining the evidence filed, interrogating counsel, or directing a conference (see 6 NYCRR 622.12[e]). The ALJ will issue a ruling denying the motion and specifying what facts, if any, will be deemed established for all purposes in the hearing (see id.). Upon the

issuance of such a ruling, the moving and responding papers will be deemed the complaint and answer, respectively, and the hearing will proceed (see id..).

The existence of a triable issue of fact regarding the amount of civil penalties that should be imposed will not bar the granting of a motion for an order without hearing (see 6 NYCRR 622.12[f]). If the civil penalty to be imposed is the only triable issue of fact presented, the ALJ must convene a hearing to assess the amount of penalties to be recommended to the Commissioner (see id.).

On a motion for summary judgment pursuant to the CPLR, the movant must establish its cause of action or defense sufficiently to warrant directing judgment in its favor as a matter of law. The party opposing the motion must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests. Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to meet the parties' burdens. (See Matter of Wilder , Ruling/Hearing Report on Motion for Order Without Hearing at 10, adopted by Order of the Commissioner, Nov. 4, 2004 [citing Gilbert Frank Corp. v Federal Ins. Co. , 70 NY2d 966, 967 (1988), and quoting Zuckerman v City of New York , 49 NY2d 557, 562 (1980)].)

Thus, Department staff bears the initial burden of making a prima facie showing of entitlement to summary judgment as a matter of law with respect to each element of the violations alleged (see id. [citing Cheeseman v Inserra Supermarkets, Inc. , 174 AD2d 956, 957-958 [3d Dept 1991]). To carry its burden of making a prima facie showing of its entitlement to summary judgment, Department staff must proffer "sufficient" evidence to support the factual assertions in its complaint (see Matter of Tractor Supply Co. , Decision and Order of the Commissioner, Aug. 8, 2008, at 3 [and cases cited therein]). "Sufficient" evidence is such relevant proof as a reasonable person may accept as adequate to support a conclusion or ultimate fact (see id.). Once Department staff has made a prima facie showing, "it is imperative that a [party] opposing . . . a motion for summary judgment assemble, lay bare, and reveal his proofs" in admissible form (Cheeseman , 174 AD2d at 957-958). The failure of the opposing party to deny a fact alleged in the moving papers constitutes an admission of the fact (see Matter of Locaparra , Decision and Order of the Commissioner, June 16, 2003, at 4).

B. Respondent Grant's Gas and Grocery, LLC's Liability

In its motion papers, which serves at the complaint in this matter, Department staff charges that respondent Grant's Gas, as owner of the subject PBS facility, violated ECL 17-1009 and 6 NYCRR 613-1.9(c) by failing to renew the registration of the facility when it expired on March 16, 2016. ECL 17-1009 provides that:

"All owners shall register the facility with the department. . . . Registration shall be renewed every five years or whenever ownership of a facility is transferred, whichever occurs first"

(ECL 17-1009[2]). ECL 17-1003(1) defines facility as "a single property or adjacent properties used for a common purpose which are owned or operated by the same person on or in which are located . . . one or more stationary tanks which are used singularly or in combination for the storage or containment of more than one thousand one hundred gallons of petroleum." ECL 17-1003(4) defines owner as "any person who has legal or equitable title to a facility."

Similarly, 6 NYCRR 613-1.9(c) states:

"(c) *Renewal.* Registration must be renewed every five years from the date of the last valid registration certificate until the department receives written notice and documentation from the facility owner that the facility has been permanently closed in accordance with section 613-2.6(b), 613-3.5(b), or 613-4.5

(b) of the Part, or that ownership of the facility had been transferred in accordance with subdivision (d) of this section."

Here, Department staff has made a prima facie showing, and respondents do not dispute, that respondent Grant's Gas is the owner of a PBS facility, as defined by the statute, that as of the date of staff's motion, Grant's Gas has not renewed the registration for the facility when it expired on March 16, 2016, and that Grant's Gas has not permanently closed the tanks at the facility. Accordingly, staff has established its entitlement to summary judgment on the issue of respondent Grant's Gas's liability for the violation of ECL 17-1009 and 6 NYCRR 613-1.9(c), and respondents fail to raise a triable issue of fact requiring hearing.

Department staff further charges respondent Grant's Gas with violating 6 NYCRR 613-2.6(a)(3) by failing to permanently close the underground storage tank (UST) system at the facility that have been out-of-service for more than one year. Section 613-2.6(a)(3) provides: "[w]hen a UST system is out-of-service for more than 12 months, the facility must permanently close the UST system in accordance with subdivision (b) through (e) of this section." Section 613-1.3(ap) provides that: "[o]ut-of-service with respect to a tank system means no longer receiving or dispensing petroleum."

Here, Department staff has made a prima facie showing that for over a year, respondent Grant's Gas is no longer receiving or dispensing petroleum from the six USTs at the facility, and that the UST system has not been permanently closed consistent with regulatory requirements. Respondents do not raise any triable issues of fact in opposition. Accordingly, Department staff has established its entitlement to summary judgment of the issue of respondent Grant's Gas's liability for the violation of 6 NYCRR 613-2.6(a)(3).

Finally, Department staff charges respondent Grant's Gas with violating 6 NYCRR 613-4.5(a)(3) by failing to close the aboveground petroleum storage tank (AST) at the facility that has been out-of-service for more than one year. Section 613-4.5(a)(3) provides: "[w]hen an AST system is out-of-service for more than 12 months, the facility must permanently close the AST system in accordance with subdivision (b) of this section, unless that AST system is located at a facility where one or more other tank systems are not out-of-service."

Here, Department staff has made a prima facie showing that the AST at the facility has not received petroleum for more than one year, that no other tanks at the facility are in-service, and that the AST has not been permanently closed consistent with regulatory requirements. Respondents do not raise any triable issues of fact in opposition. Accordingly, staff is entitled to summary judgment on the issue of respondent Grant's Gas's liability for violating section 613-4.5(a)(3).

C. Respondent Bradley K. Grant's Liability

In its papers, Department staff charges that respondent Bradley Grant is individually liable for all violations alleged as a corporate officer directly and actively involved in the activities of the facility with the authority to make all business and operating decisions related to the facility. Accordingly, staff seeks to hold respondent Mr. Grant, as the responsible corporate officer, individually liability for the violations at the facility.

In opposition, respondents argue that respondent Bradley Grant, while the owner of the LLC, is not the owner of the facility. Moreover, respondents contend that no basis exists for piercing the corporate form to hold Mr. Grant individually liable for the LLC's violations. Respondents' arguments are not persuasive.

It is not necessary to apply "the piercing of the corporate veil" doctrine to hold a responsible corporate officer individually liable for the environmental violations of an LLC. Rather, a corporate officer may be held liable for the environmental violations of an LLC under the separate and distinct "responsible corporate officer" doctrine (see Matter of Supreme Energy Corp. , Decision and Order of the Commissioner, April 11, 2014, at 25-27, confirmed on other grounds sub nom Matter of Supreme Energy, LLC v Martens , 145 AD3d 1147 [3d Dept 2016]). A corporate officer can be held personally liable for violations of the corporate entity that threaten the public health, safety, or welfare (see id. at 25-26 [citing Matter of Galfunt , Order of the Commissioner, May 5, 1993, at 2; United States v Park , 421 US 658 (1975); United States v Dotterweich , 320 US 277 (1943); United States v Hodges X-Ray, Inc. , 759 F2d 557 (6th Cir 1985)]). A corporate officer need only have responsibility over the activities of the business that caused the violations (see id.). It is not necessary to determine if the corporate officer made any specific decisions concerning the conduct alleged in the violations, only that the officer had direct responsibility for operations and was in a position to prevent the violations (see id.). The responsible corporate officer doctrine has also been applied to limited liability companies and their members (see Matter of 125 Broadway, LLC , Decision and Order of the Commissioner, Dec. 15, 2006, at 5, and Default Summary Report at 7-11).

Here, Department staff established that respondent Bradley Grant is a member and sole owner of respondent Grant's Gas and Grocery, LLC. Staff also established that Mr. Grant submitted the last PBS facility registration renewal for the facility, and signed the application as the on-site operator, emergency contact, and "owner." Mr. Grant also signed the check to pay the registration fee on behalf of respondent Grant's Gas. He also accompanied staff on inspections, and filled out monthly inspection reports and leak detection monitoring reports required for the facility. Further. Mr. Grant was responsible for hiring an environmental services company to address a petroleum release at the facility. Thus, although respondent Bradley Grant is not the owner of the subject facility, Department staff made a prima facie showing that Mr. Grant is the member and sole owner of the LLC, which does own the facility, that had direct responsibility for facility operations and was in a position to prevent the violations. Respondents failed to raise any triable issues of fact in response. Accordingly, Department staff is entitled to summary judgment on the issue of respondent Bradley K. Grant's individual liability as a responsible corporate officer for the violations of the environmental laws of the State of New York by respondent Grant's Gas and Grocery, LLC.

D. Penalty and Remedial Relief

In its motion, Department staff seeks an order imposing a civil penalty jointly and severally on respondents in the amount of $75,000, with $15,000 of that amount payable within 20 days of service of the order, and the remaining $60,000 suspended, conditioned upon respondents' compliance with the terms of any order the Commissioner may issue. In addition, staff seeks an order requiring respondents to submit a complete and accurate petroleum bulk storage facility registration application to register the facility with payment of the regulatory fee of $500 within 10 days of the service of any order, and to take certain steps to permanently close the storage tanks at the facility in compliance with the requirements of Part 613.

In response, respondents allege that they lack the ability to pay any penalty or for the remedial relief sought by Department staff. In support of their allegations, respondent Bradley Grant notes his discharge in bankruptcy, and attests to the financial and medical difficulties he and his family have faced since the bankruptcy (see Grant Aff ¶¶ 16-18, 22-29). Respondents' also submit documents from the Chapter 7 bankruptcy proceeding.

On this motion, Department staff does not offer any justification or support for the civil penalty or remedial relief sought. Moreover, although respondents do not proffer sufficient proof to warrant granting summary judgment to respondents on their ability to pay defense, they nevertheless raise triable issues of fact that are relevant to the amount of civil penalty and remedial obligations to be assessed (see Civil Penalty Policy, Commissioner's Policy DEE-1, ¶ IV.E.4 [1990]). Accordingly, Department staff's motion for order without hearing is denied on the issue of civil penalty and remedial relief.

IV. CONCLUSIONS AND RULING

Department staff's motion for order without hearing is granted in part on the issue of the joint and several liability of respondent Bradley K. Grant, individually, and respondent Grant's Gas and Grocery, LLC for the following violations:

1. Respondents violated ECL 17-1009 and 6 NYCRR 613-1.9(c) by failing to renew the registration of the facility when it expired on March 16, 2016;
2. Respondents violated 6 NYCRR 613-2.6(a)(3) by failing to permanently close the underground storage tank (UST) system at the facility that have been out-of-service for more than one year; and
3. Respondents violated 6 NYCRR 613-4.5(a)(3) by failing to close the aboveground petroleum storage tank (AST) at the facility that has been out-of-service for more than one year.

The motion for order without hearing is denied on the issues of penalty and remedial relief.

The matter will be set down for a hearing on the issues of penalty and remedial relief to be recommended to the Commissioner for imposition in this case. In the meantime, Department staff is requested to forward to respondents the forms used by the Department to evaluate inability to pay claims.

/s/
James T. McClymonds
Chief Administrative Law Judge

Dated: Albany, New York
October 19, 2018

STATE OF NEW YORK
DEPT. OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of Article 17 of the Environmental Conservation Law and 6 NYCRR Part 613 (2015) by:

Bradley K. Grant and
Grant's Gas & Grocery, LLC

Case Number: R6-20150306-18

MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR ORDER WITHOUT HEARING

Respectfully submitted,

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PRELIMINARY STATEMENT

Respondent Bradley K. Grant ("Mr. Grant") respectfully submits this memorandum of law, along with the affidavit of Mr. Grant, the affidavit of Mr. Grant's bankruptcy attorney Anthony Inserra, Esq., and the affirmation of Douglas H. Zamelis, Esq., all in opposition to the motion for order without hearing ("Motion") of New York State Department of Environmental Conservation Region 6 Staff ("Staff").

STATEMENT OF FACTS

Grant's Gas & Grocery, LLC was formed in or about December 15, 2005 by filing articles of organization with the New York Secretary of State ("NYSDOS") (Affidavit of Fauteux, Exhibit "20"). Grant's Gas & Grocery, LLC thereafter filed biennial statement with NYSDOS (Affidavit of Fauteux, Exhibit "17", "18" and "19"). Grant's Gas & Grocery, LLC acquired title to the real property at 6759 U.S. Route 11 in the Town of Potsdam (the "Facility") by deed dated January 17, 2006 from Manufacturers and Traders Trust Company which deed was filed in the office of the St. Lawrence County Clerk on January 20, 2006 (Affidavit of Fauteux, Exhibit "14"). When completing the Petroleum Bulk Storage ("PBS") Registration Application, Mr. Grant mistakenly indicated himself as "owner" when the owner was actually Grant's Gas & Grocery, LLC (Affidavit of Grant, ¶¶ 5-7). The "Commercial/corporate" box was checked and Grant's Gas & Grocery, LLC's federal tax ID number was provided on the PBS Registration Application (Affidavit of Grant, ¶¶ 8-9).

In or about June of 2013, product was detected in the interstitial space of tank #12 at the Facility (Affidavit of Grant, ¶¶ 13-14; Affidavit of Novak, Exhibit "6"). Grant's Gas & Grocery, LLC took prompt action to remove product from tank #12 such that less than one inch remained,

and to isolate tank #12 (Affidavit of Novak, Exhibit "6"). The Department's spill report for Spill Number 1302797 pertaining to the detection of product in the interstitial space of tank #12 indicates there was no release to the environment (Affidavit of Novak, Exhibit "6").

Grant's Gas and Grocery, LLC faced financial difficulty and on or about June 27, 2014, Mr. Grant and Grant's Gas and Grocery, LLC filed voluntary petitions for protection under Chapter 7 of the United States Bankruptcy Code (Affidavit of Grant, ¶¶ 5-7; Affidavit of Inserra, ¶¶ 1-2; Affidavit of Novak, Exhibits "6" and "10"). In the bankruptcy petitions, Mr. Grant did not indicate or represent that he had any personal or individual ownership of the Facility (Affidavit of Inserra, ¶¶ 5-7). Mr. Grant received a discharge from the United States Bankruptcy Court on or about October 3, 2014 (Affidavit of Inserra, ¶ 3).

By correspondence dated March 11, 2015, Staff notified the County of St. Lawrence and the Town of Potsdam pursuant to ECL Section 3-0311 of sufficient evidence to commence an enforcement action against Grant's Gas and Grocery, LLC, however staff did not indicate in said notices sufficient evidence to commence an enforcement action against Mr. Grant (Affirmation of Zamelis, ¶ 17 and Exhibit "A").

ARGUMENT

STAFF'S MOTION MUST BE DENIED AS AGAINST MR. GRANT

In reviewing a summary judgment motion, the court must consider the facts "in a light most favorable to the nonmoving party," (*Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgmt., L.P.*, 7 NY3d 96 (2006)), and examine whether the proponent has made "a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York University Med. Ctr.*,

64 NY2d 851 (1985)). Once the moving party has done so, the nonmoving party must "show facts sufficient to require a trial on any issue of fact" (CPLR §3212).

Staff has failed to tender sufficient evidence to establish that Mr. Grant was or is the "owner" of the Facility for purposes of Title 10 of Article 17, which imposes registration and closure obligations on "owners" of regulated PBS facilities. The overwhelming weight of evidence in Staff's Motion establishes that Mr. Grant was not and is not the owner of the Facility.

Staff's Motion establishes that Grant's Gas and Grocery, LLC acquired title to the Facility from Manufacturers and Traders Trust Company by deed dated October 17, 2006, and Staff fails to present evidence that there was ever any subsequent conveyance to Mr. Grant or any other third party. Had there been any record(s) of such conveyance on file at the St. Lawrence County Clerk's office, such record(s) would have been provided in response to Staff's request for certified records.

Staff argues that Mr. Grant indicated himself as "owner" on the PBS Registration Application, accompanied staff on inspections of the Facility, and signed a check disbursed from the account of Grant's Gas and Grocery, LLC. Mr. Grant counters in his sworn affidavit that he mistakenly entered his personal name as owner, checked the "Corporate/Commercial" box on the application and provided the federal tax ID number instead of his own social security number. Mr. Grant's bankruptcy attorney further avers that in Mr. Grant's and Grant's Gas and Grocery, LLC bankruptcy proceedings, Mr. Grant never represented that he had any personal interest in the Facility, only a membership interest in Grant's Gas and Grocery, LLC.

The evidence presented by Staff in its Motion raises questions of fact concerning the Facility's ownership sufficient to defeat Staff's Motion. When Staff's evidence is viewed together with evidence provided by Mr. Grant and his bankruptcy attorney in their sworn affidavits, there remains no plausible question of fact that Mr. Grant was not, and is not, the owner of the Facility for purposes of facility registration and closure as set forth in Title 10 of Article 17.

And to the extent 6 NYCRR Subdivision 613-1.2(d) purports to enlarge the class of persons responsible for facility registration and closure pursuant to Title 10 of Article 17, such goes well beyond the statutory authority and delegation granted by the legislature. Title 10 imposes such obligations only on the "owner" of a facility, which in this case was Grant's Gas and Grocery, LLC.

AN ORDER SHOULD BE ENTERED FINDING THAT MR. GRANT IS NOT PERSONALLY OR INDIVIDUALLY RESPONSIBLE FOR REGISTRATION OR CLOSURE OF THE FACILITY

CPLR Section 3212(d) provides in pertinent that "If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the need for a cross-motion."

Inasmuch as Staff's Motion is akin to a CPLR Section 3212 motion for summary judgment, an order should be entered in this proceeding finding that Mr. Grant is not the owner of the Facility, is not a proper respondent, and is not personally or individually responsible for registration of closure of the Facility, as such obligations rest entirely with Grant's Gas and Grocery, LLC.

MR. GRANT IS NOT PERSONALLY OR INDIVUDALLY LIABLE

In its brief, Staff cites *United States v. Dotterweich*, 320 US 277 (1943), *United States v. Wise*, 370 US 405 (1962), *US v. Hamling*, 418 US 87 (1974), and *US v. Park*, 421 US 658 (1975) for the proposition that corporate officers have been held personally liable for the criminal violations of corporate entities if they had a responsible share in the furtherance of the transaction from which the statute outlaws, however those decisions are easily distinguishable as each involved criminal violations and prosecutions which are not raised by or at issue with this Motion. Staff also cites *U.S. v. Hodges X-Ray, Inc.*, 759 F2d 557 (6th Cir. 1985) which is a decision of the 6th Circuit Court of Appeals and is not binding on courts and tribunals here in the 2nd Circuit where the leading case on personal and individual environmental liability remains *State of New York v. Shore Realty Corp. and Donald Leogrande*, 759 F2d 1032 (2nd Cir. 1985) which was decided at about the same time as *Hodges X-Ray, Inc. Shore Realty Corp.* involved statutory claims by the State of New York under CERCLA and tort claims sounding in nuisance. In discussing the state's claims against Donald Leogrande, the 2nd Circuit found:

> it is debatable whether a New York court would hold LeoGrande personally liable by piercing the corporate veil. New York courts disregard the corporate form "reluctantly," see Gartner v. Snyder, 607 F.2d 582, 586 (2d Cir. 1979), and while the State claims that LeoGrande dominated Shore and that Shore was undercapitalized, these allegations are probably insufficiently particularized. See Walkovszky v. Carlton, 18 N.Y.2d 414, 420, 223 N.E.2d 6, 10, 276 N.Y.S.2d 585, 590 (1966). Both the New York Court of Appeals and this court have been quite insistent that the corporate form will not be disregarded unless the opposing party shows that the corporate form is being used fraudulently or as a means of carrying on business for personal rather than corporate ends. See Marine Midland Bank, N.A. v. Miller, 664 F.2d 899, 903 (2d Cir. 1981); Walkovszky, 18 N.Y.2d at 418, 420, 223 N.E.2d at 8, 10, 276 N.Y.S.2d at 588-90. The State's claim has not at this stage risen to that level.

The 2nd Circuit held Leogrande personally liable for the abatement of the nuisance without piercing the corporate veil, finding that New York courts have held that "a corporate

officer who controls corporate conduct and thus is an active individual participant in that conduct is liable for the torts of the corporation."

Here, Staff has not alleged sufficient facts to pierce Grant's Gas and Grocery, LLC's corporate veil, and the Motion does not assert or raise claims of nuisance or any other tort claim. Mr. Grant's status as member of Grant's Gas and Grocery, LLC is not a proper basis to hold Mr. Grant liable for the registration or closure of tanks owned by Grant's Gas and Grocery, LLC. Upon information and belief, only the New York Attorney General is authorized to prosecute claims of public nuisance in New York.

Staff also cites *Carney's Restaurant, Inc. v. State of New York*, 89 AD3d 1250 (3rd Dept. 2011) where the record reflected that Robert Carney was a) the sole officer and shareholder of the corporation, and b) was the sole individual personally and directly responsible for making decisions regarding illegal modifications the restaurant's sewage disposal system which resulted in actual illegal discharges to a tributary to Ballston Lake and presumably harm to the environment. Mr. Carney was further personally named as the permittee on the restaurant's SPDES permit instead of the corporation, and he was also a signatory in his individual capacity to prior Consent Orders which he failed to comply with.

In contrast here, there is no allegation of any harm to the environment, Grant's Gas and Grocery, LLC took prompt and reasonable steps to avoid any release of petroleum to the environment, Mr. Grant is not personally a permittee or registrant though he erroneously indicated himself as owner on the PBS Registration Application, Mr. Grant is not the individual signatory to any prior Consent Order and is therefore not in violation of any such order, and Staff's motion does not actually establish that Mr. Grant was or is the sole member of Grant's Gas and Grocery, LLC.

When staff notified the County of St. Lawrence and the Town of Potsdam concerning violations at the Facility as required by ECL 3-0311, notably omitted was any notice of any violations by Mr. Grant in his personal and individual capacity. Had Staff believed it had evidence of violations by Mr. Grant, Staff was required by law to report same to the county and the town, and Staff's failure to do so allows an inference that Staff doesn't have and never had any evidence of violations by Mr. Grant in his personal or individual capacity, and that Staff's pursuit of Mr. Grant now is a questionable attempt to leverage a compromise.

In *Matter of Waterbury Square, Inc.*, NYSDEC Case Number R6-20150428-29 decided just last year, Region 6 Staff prosecuted an enforcement proceeding involving similar asserted violations as here, where in that case there was actual evidence that tank number 1 was taking on water after product was removed, indicating an obvious pathway for release of petroleum to the environment. Waterbury Square, Inc. was assessed a civil penalty of $10,000.00 with $5,000.00 suspended pending compliance with the Commissioner's Order. Notably, no principal of Waterbury Square, Inc. was a respondent in that proceeding.

CONCLUSION

For the foregoing reasons, it is respectfully requested that Staff's motion for order without hearing be denied, and that an order be entered finding that Mr. Grant is not a proper respondent and is not personally or individually responsible under these circumstances for registration and closure of the PBS tanks at the Facility under Title 10 of Article 17 of the ECL.

Dated: June 19, 2018
Springfield Center, New York

Respectfully submitted,

By: _____

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STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
In the Matter of Alleged Violations of Article 17 of the Environmental Conservation Law and 6 NYCRR Part 613 (2015) by:

Bradley K. Grant and
Grant's Gas and Grocery, LLC

Respondents.

BRIEF SUPPORTING MOTION FOR ORDER WITHOUT HEARING

Case Number:
R6-20150306-18

PBS Facility Number:
6-264075

I. STATEMENT OF FACTS

Grant's Gas and Grocery, LLC owns property that included a gas station and store located at 6759 US Route 11, Potsdam, St. Lawrence County, New York 13617 (the facility). [Fauteux ¶3; Exhibit 14.] The facility includes six 4,000-gallon underground petroleum storage tanks used to store petroleum for retail sale. [Novak ¶7; Exhibits 1, 2, and 4.] The facility also includes a stationary 275-gallon aboveground storage tank used to store fuel for the store's heating system. [Id.] Bradley K. Grant and Grant's Gas and Grocery, LLC both applied for Chapter 7 bankruptcy on June 27, 2014. [Exhibit 10.] No petroleum has been delivered to or dispensed from the tanks at the facility in more than 12 months, but the tanks at the facility have not been permanently closed. [Cox ¶8, 9, 10; Novak ¶15,16.]

The facility's petroleum bulk storage registration expired on March 16, 2016. [Novak ¶5; Exhibit 1 and 4.] Bradley K. Grant submitted the last petroleum bulk storage registration renewal for the facility on or about April 18, 2011. [Novak ¶5; Exhibit 1, 2, and 4.] Mr. Grant signed the application on which he denominated himself as the on-site operator, emergency contact, and owner of the facility. [Exhibit 2.] He also signed the check to pay the registration fee on behalf of Grant's Gas and Grocery, LLC. [Exhibit 3.] He accompanied Department staff on inspections [Cox ¶5; Novak ¶9,14.], filled out

monthly inspection reports and leak detection monitoring reports required for the facility. [Exhibits 5 and 7.]

II. ARGUMENT

A. BRADLEY GRANT IS PERSONALLY LIABLE FOR FAILING TO RENEW THE FACILITY'S REGISTRATION AND FAILING TO PERMANENTLY CLOSE TANKS THAT HAD BEEN OUT-OF-SERVICE FOR MORE THAN A YEAR.

The principle is well settled that a corporate agent, through whose act or omission caused the corporation to violate the law is individually liable for those violations. *United States v. Dotterweich,* 320 U.S. 277 (1943); *United States v. Wise*, 370 US 405 (1962); *US. v. Hamling*, 418 US 87 (1974); *US v. Park* 421 US 658, 669 (1975). Corporate officers and employees are personally liable for violations of corporate entities if they ". . . have . . . a responsible share in the furtherance of the transaction which the statute outlaws." *US v. Park,* 421 US 658, 669 (1975). This doctrine applies to civil or administrative enforcement of law as well as crimes. *US v. Hodges X-ray, Inc.*, 759 F. 2d. 557, 561 (6th Cir. 1985).

> ...[T]he Government establishes a prima facie case when it introduces evidence sufficient to warrant a finding by the trier of the facts that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so.

In this case, Bradley K. Grant personally controlled the administration of the company and operated the facility. He signed the PBS registration application and designated himself as the "owner" and "operator" of the facility. [Exhibit 2.] He signed the check to pay the registration fee on behalf of Grant's Gas and Grocery, LLC. [Exhibit 3.] He signed monthly inspection reports and leak detection reports. [Exhibits 5 and 7.] He performed the reconciliation of petroleum inventory stored at the facility. [Exhibit 8.] He was the person who interacted with the Department on behalf of the facility. [Cox ¶5, Novak ¶14.] This provides more than sufficient grounds to hold Bradley K. Grant

personally liable for violations at the facility. *See, Carney's Restaurant, Inc. v. State of New York*, 89 AD 3d 1250, 1253-1254 (3rd Dept. 2011).

B. GRANT'S GAS AND GROCERY, LLC VIOLATED ECL §17-1009(2) AND 6 NYCRR PART 613-1.9(C) BY ALLOWING THE FACILITY'S REGISTRATION TO EXPIRE.

On March 16, 2016, Respondents allowed the facility's registration to expire. ECL §17-1009(2) and 6 NYCRR Part 613-1.9(c)(2015) require the owners of petroleum bulk storage facilities to renew their registrations every five years.

ECL §17-1003(1) defines a facility as:

> 1... a single property or contiguous or adjacent properties used for a common purpose which are owned or operated by the same person on or in which are located:
>
> a. one or more stationary tanks which are used singularly or in combination for the storage or containment of one thousand one hundred gallons of petroleum; or
>
> b. any tank whose capacity is greater than one hundred ten gallons that is used for the storage or containment of petroleum, the volume of which is ten percent or more beneath the surface of the ground.
>
> This term shall not include:
>
> (1) facilities licensed under article twelve of the navigation law;
>
> (2) facilities regulated under the federal natural gas act;
>
> (3) a heating oil tank used for on premises consumption at the same site which is not interconnected to any other heating oil tank and is used to store or contain less than one thousand one hundred gallons of petroleum unless such tank is located on a site that otherwise meets the definition of facility given in this subdivision;
>
> (4) tanks eleven hundred gallons or less used to store motor fuel (gasoline or diesel products) for non-commercial purposes (not for resale) at a farm or residence, unless such tank or tanks are located on a site that otherwise meets the definition of facility given in this subdivision;
>
> (5) tanks used to store or contain asphalt, however, tanks used to store or contain asphaltic emulsions are included; or
>
> (6) tanks which have been permanently closed in accordance with regulations promulgated pursuant to section 17-1005 of this title.

In this case, the facility includes 6 USTs with an aggregate capacity of 16,000 gallons used to store motor fuels for resale and off-site consumption. The facility also includes a 275-gallon aboveground tank. [Exhibits 1, 2, and 4.] All the tanks are stationary. USTs are inherently fixed in place. The AST is stationary in design and practice by virtue of its connection to the heating system in the building. [Exhibits 1, 2, 4, and 12, Novak ¶7.] Therefore, 6759 US Route 11, Potsdam, St. Lawrence County, New York, is a "facility."

ECL §17-1009 states:

> 2. All owners shall register the facility with the department. ... The department is authorized to assess a fee according to a schedule based on the size and type of facility, not to exceed five hundred dollars per facility. Such fee shall be paid at the time of registration or registration renewal. Registration shall be renewed every five years or whenever ownership of a facility is transferred, whichever occurs first. The owner shall notify the department when the authorized representative or operator of the facility changes... .

6 NYCRR Part 613-1.9(c) also requires facility owners to submit applications to renew the registrations of their facilities every 5 years.

ECL §17-1003(4) defines "owner" as "any person with legal or equitable title to a facility." The most recent deed on file with the St. Lawrence County Clerk's office shows "Grant's Gas and Grocery, LLC" as the owner of the property where the facility is located. [Fauteux ¶3, Exhibit 14.] The Department received the last application to renew the facility's registration on April 18, 2011. The facility's registration expired on March 16, 2016. Therefore, Grant's Gas and Grocery, LLC violated ECL §17-1009(2) and 6 NYCRR Part 613-1.9(c).

C. RESPONDENTS VIOLATED 6 NYCRR SUBPARTS 613-2.6 AND 613-4.5 BY FAILING TO PERMANENTLY CLOSE TANKS THAT HAD BEEN OUT-OF-SERVICE MORE THAN 12 MONTHS.

Respondents violated 6 NYCRR Part 613-2.6(b) by failing to permanently close tanks 7 through 12 at the facility before they were out-of-service for more than 12 months. Respondents also violated 6 NYCRR Part 613-4.5(b) by failing to permanently close tank 13 before it had been out of service for more than 12 months.

6 NYCRR Part 613-2.6(a)(2015) states:

> (3) When a UST system is out-of-service for more than 12 months, the facility must permanently close the UST system in accordance with subdivisions (b) through (e) of this section.

6 NYCRR part 613-4.5(a) states:

> (3) When an AST system is out-of-service for more than 12 months, the facility must permanently close the AST system in accordance with subdivision (b) of this section, unless the AST system is located at a facility where one or more other tank systems are not out-of-service.

6 NYCRR Part 613-1.3 states:

> (ap) Out-of-service with respect to a tank system means no longer receiving or dispensing petroleum.

Tanks 7 through 12 are USTs that have not received or dispensed petroleum for far more than 12 months. The facility has been out-of-business and vacant for years. [Novak ¶16; Cox ¶8, 9, 10; Exhibit 10.] Department staff who sees the facility almost daily have not seen any sign that the tanks have been permanently closed. [Cox ¶8, 9, 10.] The Department has not received any notice of permanent closure as required by 6 NYCRR Part 613-2.6(b) and 6 NYCRR Part 613-4.5(b). [Novak ¶15.]

Therefore, Respondents violated 6 NYCRR Part 612-2.6(a)(3) and 6 NYCRR Part 613-4.5(a)(3).

The bankruptcy of Grant's Gas and Grocery, LLC does not absolve Respondents of the requirement to register the facility. Bankruptcy is a process to allocate the financial resources of a person or entity that does not have the resources to repay debts. Bankruptcy does not affect the requirement to comply with laws enacted for the health and safety of the public.

Although the property of those seeking bankruptcy protection can be disposed of by the court for the benefit of the creditors, in this case, there is no record that ownership of the facility was transferred. The record owner remains with Grant's Gas and Grocery, LLC. [Fauteux ¶3; Exhibit 14.] Respondents have not provided information stating that ownership has been transferred, nor has any

other person notified the Department of a transfer of ownership as required by 6 NYCRR Part 613-1.9(d). [Novak ¶16.]

CONCLUSION

Grant's Gas and Grocery, LLC failed to renew the PBS registration for its facility in violation of ECL §17-1009(2) and 6 NYCRR Part 613-1.9(c). It failed to permanently close stationary petroleum storage tanks that have been out-of-service for more than 12 months in violation of 6 NYCRR Parts 613-2.6(a)(3) and 6 NYCRR Part 613-4.5(a)(3). Respondent Bradley K. Grant is personally responsible for these violations because he had the authority and ability to take the actions required by law and failed to do so.

Dated: March 26, 2018
Watertown, New York

Respectfully submitted,

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Petroleum Spill Case Study

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Batman: A Hero or Villain?

2019 Oil Spill Symposium

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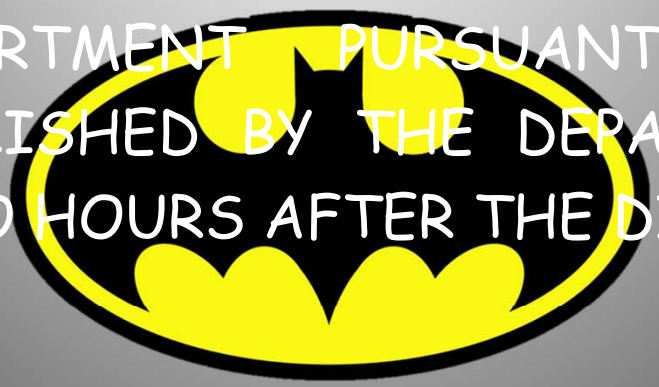
New York State Reporting Requirements

Navigation Law §175 provides that "[a]ny person responsible for causing a discharge shall immediately notify the department pursuant to rules and regulations established by the department, but in no case later than two hours after the discharge."



New York State Reporting Requirements

Environmental Conservation Law §17-1743 sets forth the following reporting requirement:

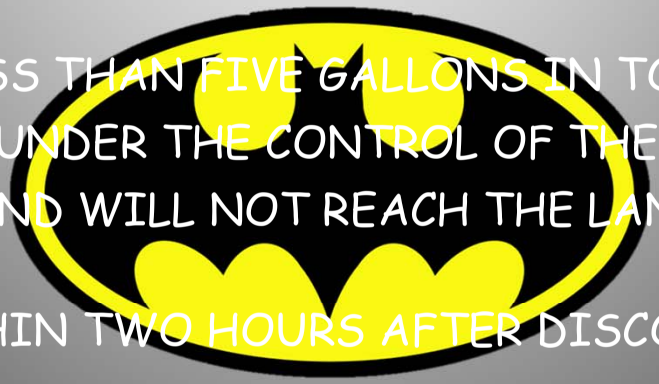
Any person who is the owner of ***or in actual or constructive possession or control of more than 1,100 gallons***, in bulk, of any liquid, including petroleum, which if released, discharged or spilled would or would be likely to pollute the lands or waters of the state, including the groundwaters thereof shall, as soon as he has knowledge of the release, discharge or spill of any part of such liquid in his possession or control onto the lands or into the waters of the state including the groundwaters thereof immediately notify the department.

New York State Reporting Requirements

- **6 N.Y.C.R.R. §613-2.4(D)(1)** states:

A ***FACILITY*** must report every spill to the Department's spill hotline (518-457-7362) within two hours after discovery, contain the spill, and begin corrective action except if it meets the following conditions:

  - it is known to be less than five gallons in total volume;
  - it is contained and under the control of the spiller;
  - it has not reached and will not reach the land or waters of the state; and
  - it is cleaned up within two hours after discovery.



- **6 N.Y.C.R.R. §613-1.3(V),** defines ***FACILITY*** to include property with "one or more tank systems having a combined storage capacity of more than 1,100 gallons (including a major facility), or an underground tank system having a storage capacity that is greater than 110 gallons."
- **6 N.Y.C.R.R. 613-1.2(D)** applies to "every operator and every tank system owner at the facility"

Who Should Have Reported?

WAYNE ENTERPRISES

Oil Spill Act Liability

- **Navigation Law §181(1)-** "[A]ny person who has discharged petroleum shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained."
- **Navigation Law §181(5)-** Any claim by any injured person for the costs of cleanup and removal and direct and indirect damages based on the strict liability imposed by this section may be brought directly against the person who has discharged the petroleum, provided, however, that damages recoverable by any injured person in such a direct claim based on the strict liability imposed by this section shall be limited to the damages authorized by this section.
- **Navigation Law §176 (1)-**Any person discharging petroleum in the manner prohibited by section one hundred seventy-three of this article shall immediately undertake to contain such discharge.
- **Navigation Law §176 (8)-**Notwithstanding any other provision of law to the contrary, including but not limited to section 15-108 of the general obligations law, every person providing cleanup, removal of discharge of petroleum or relocation of persons pursuant to this section shall be entitled to contribution from any other responsible party.

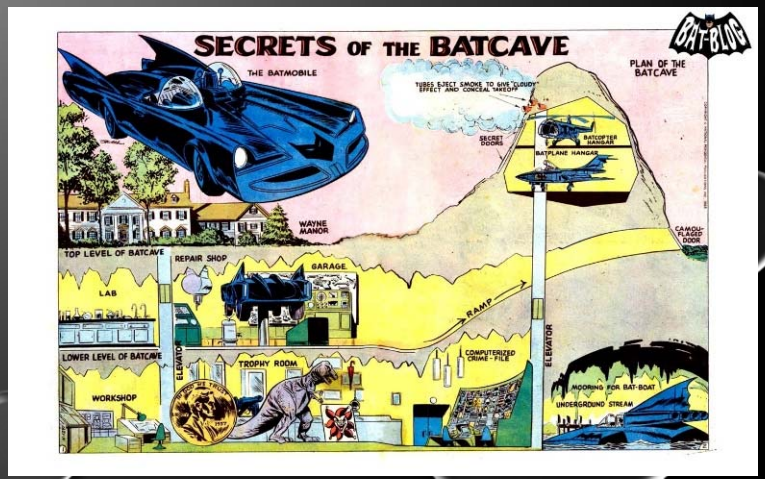
Who is Liable?

Joker Construction Inc.

Penguin Environmental Services

CONSULTANTS

- **PHASE I/ PHASE II PROCEDURES**
  - PHASE I- ASTM STANDARD E1527-13
  - PHASE II- ASTM STANDARD E1903
  - OTHER CONSIDERATIONS
- **CLEANUP REQUIREMENTS**
  - BEDROCK CONTAMINATION TECHNIQUES
  - OVERBURDEN CONTAMINATION
  - SOIL VAPOR INTRUSION IN BATCAVE



NYSDEC Penalties and Liens

- **PENALTY CONSIDERATIONS**
  - DEE-1 CIVIL PENALTY POLICY
- **ENVIRONMENTAL LIENS**
  - PURSUANT TO NAVIGATION LAW § 181-A
- **STIPULATIONS**
  - PURSUANT TO ECL § 17-0303

Thank you

Batman: A Hero or Villain?

In some abandoned land outside the City of Gotham (State of New York), Bruce Wayne was aimlessly walking, pondering justice against criminals, when he fell into a well. He realized that this was the perfect place to build his Batcave and pursue his passion for fighting crime.

Wayne Enterprises, the multinational conglomerate company, owned and chaired by Bruce, purchased the 10 acre parcel of land. After purchasing the land, Bruce hired Penguin Environmental Services ("PES") to perform a Phase I and Phase II, which discovered that roughly 20 USTs existed in two locations on the Property – 10 USTs near the eastern boundary and and 10 USTs near the western boundary of the parcel. The Phase II noted that none of the USTs had leaked. PES failed to uncover that the east end tanks had, in fact, leaked many years before and petroleum contamination had traveled all the way down to the bedrock. PES hired Joker Construction Inc. ("JCI") to excavate the tanks. During this work, JCI accidently punctured a few of them located in the west end. JCI removed all of the tanks but did not tell anyone about the historic and newly created discharges and decided to leave all of the contaminated soil behind.

During one of Batman's and Robin's nightly trips from the Batcave to fight crime, they discovered the petroleum seeping out of one of the side walls of the Bat Cave. Robin exclaims "Holy Petroleum Batman!" Not wanting to disclose the location of the future Batcave or their identities, Batman and Robin do not report the spill, rather Batman instructs trusty Alfred to do so. "Yes Sir, I'll take care of it." But elderly Alfred forgot to do so after being distracted when he saw the Bat Signal from the Gotham City Police and rushed off to tell Batman.

A few months later, Batman and Robin began an investigation into numerous complaints of the pollution of the Gotham City River. Believing it to be the work of Batman's nemesis, Scarecrow, Batman and Robin notified the NYSDEC. The NYSDEC began to investigate the source of and to remediate the contamination in the River. Eventually, NYSDEC tracked the spill back to the Property and then issued both Bruce and Wayne Enterprises a Notice of Violation seeking a $1,000,000 fine, and a Stipulation requiring full site remediation. The Oil Spill Fund filed a lien on the Property for $22,000 which was the about of money spent on the River remediation.

New York State Reporting Requirements

In a now 20-year old decision of the NYSDEC Commissioner, *In the Matter of Middleton, Kontokosta Associates, Ltd. (Dec. 31, 1998)*, a consultant who merely observed an oil spill at a site was found to be in violation of the then reporting requirement in 6 N.Y.C.R.R. §613.8 applicable "to all above-ground and underground petroleum storage facilities with a combined storage capacity of over 1,100 gallons, including all facilities registered under Part 612 of this title":

> Any person with knowledge of a spill, leak or discharge of petroleum must report the incident to the department within two hours of discovery. The results of any inventory record, test or inspection which shows a facility is leaking must be reported to the department within two hours of the discovery. Notification must be made by calling the telephone hotline (518) 457-7362.

NYSDEC Commissioner Cahill ruled that:

> The term "any person" in §613.8 should be given a broad, not limited or restrictive, interpretation. The term "any person" is intended to apply, not only to persons who are "owners" and "operators", but also to all other persons with knowledge of a spill, leak or discharge in order to implement the remedial and preventive purposes of the Petroleum Bulk Storage Code, of which §613.8 is a part. The rationale for requiring "any person" to report a spill or discharge to the Department within two hours is obviously to enable stoppage of ongoing contamination as quickly as possible after detection of a spill. For example, in the case of an ongoing gush of oil from an overturned tanker truck on the highway, an immediate report will enable a quick response in order to minimize environmental damage. The reporting duty is on everyone with knowledge of the spill.

However, in 2015, this regulation was repealed and now 6 N.Y.C.R.R. §613-2.4(d)(1) states:

A ***facility*** must report every spill to the Department's Spill Hotline (518-457-7362) within two hours after discovery, contain the spill, and begin corrective action except if it meets the following conditions:

(i) It is known to be less than five gallons in total volume;

(ii) It is contained and under the control of the spiller;

(iii) It has not reached and will not reach the land or waters of the State; and

(iv) It is cleaned up within two hours after discovery.

See also 6 N.Y.C.R.R. §613-1.2(d), which limit the requirements under the regulations, including the spill reporting requirement, to the facility operator or tank system owner. However, a "facility" now also includes an underground storage system having a storage capacity that is greater than 110 gallons. 6 N.Y.C.R.R. §613-1.3(v) Therefore, any owner or operator of "one or more tank

systems having a combined storage capacity of more than 1,100 gallons (including a major facility), or "an underground tank system having a storage capacity that is greater than 110 gallons pursuant to the recent facility definition in 6 N.Y.C.R.R. §613-1.3(v) must still report a spill to the hotline.

Further, Navigation Law §175 provides that "[a]ny person responsible for causing a discharge shall immediately notify the department pursuant to rules and regulations established by the department, but in no case later than two hours after the discharge."

Finally, New York Environmental Conservation Law §17-1743 sets forth the following reporting requirement:

> Any person who is the owner of ***or in actual or constructive possession or control of more than 1,100 gallons***, in bulk, of any liquid, including petroleum, which if released, discharged or spilled would or would be likely to pollute the lands or waters of the state, including the groundwaters thereof shall, as soon as he has knowledge of the release, discharge or spill of any part of such liquid in his possession or control onto the lands or into the waters of the state including the groundwaters thereof immediately notify the department.

Thus, this provision requires an immediate call to the NYSDEC spill hotline for a spill from a facility that stored more than 1,100 gallons of petroleum or any other liquid that might pollute ground or surface waters.

McKinney's Consolidated Laws of New York Annotated
Navigation Law (Refs & Annos)
Chapter 37. Of the Consolidated Laws (Refs & Annos)
Article 12. Oil Spill Prevention, Control, and Compensation (Refs & Annos)
Part One. General Provisions

McKinney's Navigation Law § 170

§ 170. Legislative intent

Currentness

The legislature finds and declares that New York's lands and waters constitute a unique and delicately balanced resource; that the protection and preservation of these lands and waters promotes the health, safety and welfare of the people of this state; that the tourists and recreation industry dependent on clean waters and beaches is vital to the economy of this state; that the state is the trustee, for the benefit of its citizens, of all natural resources within its jurisdiction; and that the storage and transfer of petroleum between vessels, between facilities and vessels, and between facilities, whether onshore or offshore, is a hazardous undertaking and imposes risks of damage to persons and property within this state.

The legislature finds and declares that the discharge of petroleum within or outside the jurisdiction of this state constitutes a threat to the economy and environment of this state. The legislature intends by the passage of this article to exercise the powers of this state to control the transfer and storage of petroleum and to provide liability for damage sustained within this state as a result of the discharge of said petroleum by requiring prompt cleanup and removal of such pollution and petroleum, and to provide a fund for swift and adequate compensation to resort businesses and other persons damaged by such discharge.

Credits
(Added L.1977, c. 845, § 2.)

McKinney's Navigation Law § 170, NY NAVIG § 170
Current through L.2019, chapters 1 to 23.

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McKinney's Consolidated Laws of New York Annotated
Navigation Law (Refs & Annos)
Chapter 37. Of the Consolidated Laws (Refs & Annos)
Article 12. Oil Spill Prevention, Control, and Compensation (Refs & Annos)
Part One. General Provisions

McKinney's Navigation Law § 171

§ 171. Purposes

Currentness

It is the purpose of this article to ensure a clean environment and healthy economy for the state by preventing the unregulated discharge of petroleum which may result in damage to lands, waters or natural resources of the state by authorizing the department of environmental conservation to respond quickly to such discharges and effect prompt cleanup and removal of such discharges, giving first priority to minimizing environmental damage, and by providing for liability for damage sustained within the state as a result of such discharges.

Credits
(Added L.1977, c. 845, § 2. Amended L.1985, c. 35, § 1.)

McKinney's Navigation Law § 171, NY NAVIG § 171
Current through L.2019, chapters 1 to 23.

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Part One. General Provisions

McKinney's Navigation Law § 172

§ 172. Definitions

Currentness

Unless the context clearly indicates otherwise, the following terms shall have the following meanings:

1. “Administrator” means the chief executive, within the department of audit and control, of the New York environmental protection and spill compensation fund;

2. “Barrel” means forty-two United States gallons, or 159.9 liters, at sixty degrees fahrenheit;

2-a. “Biological additives” means microbiological cultures, enzymes, or nutrient additives that are deliberately introduced into a petroleum discharge for the specific purpose of encouraging biodegradation to mitigate the effects of the discharge.

3. “Claim” means, for purposes of part three of this article, any claim of the fund or any claim by an injured person, who is not responsible for the discharge, seeking compensation for cleanup and removal costs incurred or damages sustained as a result of a petroleum discharge;

3-a. “Burning agents” means additives that, through physical or chemical means, improve the combustibility of the materials to which they are applied.

3-b. “Chemical agents” means generally those elements, compounds or mixtures that coagulate, disperse, dissolve, emulsify, foam, neutralize, precipitate, reduce, solubilize, oxidize, concentrate, congeal, entrap, fix, make the pollutant mass more rigid or viscous, or otherwise facilitate the mitigation of deleterious effects or removal of the pollutant or petroleum from the water.

4. “Cleanup and removal” means the (a) containment or attempted containment of a discharge, (b) removal or attempted removal of a discharge or, (c) taking of reasonable measures to prevent or mitigate damages to the public health, safety, or welfare, including but not limited to, public and private property, shorelines, beaches, surface waters, water columns and bottom sediments, soils and other affected property, including wildlife and other natural resources;

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5. “Cleanup and removal costs” means all costs associated with the cleanup and removal of a discharge including relocation costs pursuant to section one hundred seventy-seven-a of this article incurred by the state or its political subdivisions or their agents or any person with approval of the department;

6. “Commissioner” means the commissioner of the department of environmental conservation, unless otherwise indicated;

6-a. “Containment boom” means a floating or stationary device composed of plastic, natural or synthetic materials which can be mechanically extended over water or permanently stationed over water for the purposes of containing floating petroleum, solid objects or other pollutants within or outside a particular area;

7. “Department” means the department of environmental conservation, unless otherwise indicated;

8. “Discharge” means any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of petroleum into the waters of the state or onto lands from which it might flow or drain into said waters, or into waters outside the jurisdiction of the state when damage may result to the lands, waters or natural resources within the jurisdiction of the state;

8-a. “Dispersant” means chemical agents that emulsify, disperse, or solubilize petroleum into the water column or promote the surface spreading of petroleum slicks to facilitate dispersal of the petroleum into the water column.

9. “Fund” means the New York environmental protection and spill compensation fund;

10. “License fee period” means every calendar month on the basis of which the licensee is required to report under this article;

11. “Major facility” includes but is not limited to any refinery, storage or transfer terminal, pipeline, deep water port, drilling platform or any appurtenance related to any of the preceding that is used or is capable of being used to refine, produce, store, handle, transfer, process or transport petroleum. A vessel shall be considered a major facility only when petroleum is transferred between vessels. A vessel that would not otherwise be considered a major facility shall not be considered a major facility based solely upon its rendering of care, assistance or advice consistent with the national contingency plan or as otherwise directed by the federal on-scene coordinator or by the commissioner or his designee, in response to a discharge of petroleum into or upon the navigable waters. Facilities with total combined above-ground or buried storage capacity of less than four hundred thousand gallons are not major facilities for the purposes of this article;

12. “Natural resources” means all land, fish, shellfish, wildlife, biota, air, waters and other such resources;

13. “Owner” or “operator” means with respect to a vessel, any person owning, operating or chartering by demise such vessel; with respect to any major facility, any person owning such facility, or operating it by lease, contract or other form of agreement; with respect to abandoned or derelict major facilities, the person who owned or operated such facility immediately prior to such abandonment, or the owner at the time of discharge;

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14. “Person” means public or private corporations, companies, associations, societies, firms, partnerships, joint stock companies, individuals, the United States, the state of New York and any of its political subdivisions or agents;

15. “Petroleum” means oil or petroleum of any kind and in any form including, but not limited to, oil, petroleum, fuel oil, oil sludge, oil refuse, oil mixed with other wastes and crude oils, gasoline and kerosene;

15-a. “Petroleum-bearing vessel” means any vessel transporting petroleum in commercial quantities as cargo or any vessel constructed or adapted for the carriage of petroleum in bulk;

15-b. “Sinking agents” means additives applied to petroleum discharges to sink floating pollutants below the water surface.

15-c. “Surface collecting agents” means chemical agents that form a surface film to control the layer thickness of petroleum.

15-d. “Tank vessel” means a vessel that is constructed or adapted to carry, or that carries, petroleum in bulk as cargo or cargo residue, and that:

(a) is a vessel of the United States;

(b) operates on the waters of the state of New York; or

(c) transfers petroleum in a place subject to the jurisdiction of the of the [1] state of New York.

16. “Transfer” means onloading or offloading between major facilities and vessels or vessels and major facilities, and from vessel to vessel or major facility to major facility;

17. “Vessel” means every description, of watercraft or other contrivance that is practically capable of being used as a means of commercial transportation of petroleum upon the water, whether or not self-propelled; and

18. “Waters” means the ocean and its estuaries to the seaward limit of the state's jurisdiction, and all lakes, springs, streams and bodies of surface or groundwater, whether natural or artificial, within the boundaries of this state. Provided, however, that for purposes of this definition, waters of the state adjacent to Long Island Sound are to be strictly construed to effectuate only the provisions of this article.

Credits

(Added L.1977, c. 845, § 2. Amended L.1980, c. 649, § 1; L.1985, c. 35, § 2; L.1989, c. 712, § 1; L.1990, c. 898, § 3; L.1991, c. 672, § 4; L.1992, c. 162, § 1; L.1992, c. 584, § 1.)

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Footnotes

1 So in original.

McKinney's Navigation Law § 172, NY NAVIG § 172

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Part Two. Oil Spill Cleanup and Removal; Licenses

McKinney's Navigation Law Ch. 37, Art. 12, Pt. TWO, Refs & Annos
Currentness

McKinney's Navigation Law Ch. 37, Art. 12, Pt. TWO, Refs & Annos, NY NAVIG Ch. 37, Art. 12, Pt. TWO, Refs & Annos
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McKinney's Navigation Law § 173

§ 173. Discharge of petroleum; prohibition

Currentness

1. The discharge of petroleum is prohibited.

2. On or after January first, nineteen hundred ninety-four, all new vessels sold in New York that are equipped with fuel tank air vents shall have such fuel tank air vents designed to prevent fuel overflow during refueling. The provisions of this subdivision shall not apply to those fuel systems in vessels which are required to meet the standards provided for in the Federal Boat Safety Act of 1971 [1].

3. This section shall not apply to discharges of petroleum pursuant to and in compliance with the conditions of a federal or state permit.

Credits
(Added L.1977, c. 845, § 2. Amended L.1990, c. 329, § 1.)

Footnotes
1 Repealed. Formerly 46 USCA App. § 1451 et seq.
McKinney's Navigation Law § 173, NY NAVIG § 173
Current through L.2019, chapters 1 to 23.

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Navigation Law (Refs & Annos)
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McKinney's Navigation Law § 174

§ 174. Licenses

Effective: April 13, 2015
Currentness

1. No person shall operate or cause to be operated a major facility as defined in this article without (a) a license issued by the commissioner, (b) without paying a license fee if such fee is required by the administrator, pursuant to the provisions of paragraph (a) of subdivision four of this section, and (c) without paying the surcharge established by paragraph (b) of subdivision four of this section.

2. Licenses shall be issued for a period not to exceed five years, subject to such terms and conditions as the department may determine are necessary to carry out the purposes of this article.

3. As a condition precedent to the issuance or renewel [1] of a license the department shall require satisfactory evidence that the applicant has implemented or is in the process of implementing state and federal plans and regulations for control of discharges of petroleum, and the containment and removal thereof when a discharge occurs.

4. (a) The license fee shall be nine and one-half cents per barrel transferred, provided, however, that the fee on any barrel, including any products derived therefrom, subject to multiple transfer, shall be imposed only once at the point of first transfer. Provided further, the license fee for major facilities that (i) transfer barrels for their own use, and (ii) do not sell or transfer the product subject to such license fee, shall be eight cents. In each fiscal year following any year in which the balance of the account established by paragraph (a) of subdivision two of section one hundred seventy-nine of this article equals or exceeds forty million dollars, no license fee shall be imposed unless (a) the current balance in such account is less than thirty-five million dollars or (b) pending claims against such account exceed fifty percent of the existing balance of such account. In the event of either such occurrence and upon certification thereof by the state comptroller, the administrator shall within ten days of the date of such certification reimpose the license fee, which shall take effect on the first day of the month following such relevy. The rate may be set at less than nine and one-half cents per barrel transferred if the administrator determines that the revenue produced by such lower rate shall be sufficient to pay outstanding claims against such account within one year of such imposition of the license fee. Should such account exceed forty million dollars, as a result of interest, the administrator and the commissioner of environmental conservation shall report to the legislature and the governor concerning the options for the use of such interest. The fee established by this paragraph shall not be imposed upon any barrel which is transferred to a land based facility but thereafter exported from this state for use outside the state and is shipped to facilities outside the state regardless of whether the delivery or sale of such petroleum occurs in this state.

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(b) The surcharge on the license fee shall be four and one-quarter cents per barrel for each barrel transferred on or after February first, nineteen hundred ninety.

(c) The surcharge established by paragraph (b) of this subdivision shall continue to be paid despite the fact that the license fee imposed pursuant to paragraph (a) of this subdivision may, pursuant to said paragraph, no longer be imposed.

(d) The surcharge established by paragraph (b) of this subdivision shall be thirteen and three quarters cents per barrel for any barrel that is transferred but thereafter exported from this state for use outside the state as described by paragraph (a) of this subdivision. Twelve and one-quarter cents of such surcharge shall be credited to the account established by paragraph (a) of subdivision two of section one hundred seventy-nine of this article.

5. Every licensee required to pay a major petroleum license fee or surcharge pursuant to paragraph (a) or (b) of subdivision four of this section shall on or before the twentieth day of the month following the close of each license fee period certify to the commissioner on such forms as may be prescribed by the commissioner the number of barrels of petroleum transferred to the licensee's major facility during the license fee period and at the same time shall pay the full amount of the license fee and surcharge due except that no licensee shall be required to make such payment until the cumulative amount due equals or exceeds one hundred dollars. Any licensee whose cumulative license fee or surcharge does not equal or exceed one hundred dollars annually shall pay the total amount due on or before the twentieth day following the expiration date of the license issued pursuant to this section. Licensees who did not have to pay the license fee or surcharge shall certify annually to the commissioner on a form as may be prescribed by the commissioner on or before the twentieth day of April that the barrels of petroleum transferred to the licensee's major facility were not subject to the license fee or surcharge.

6. If a certificate required by this section is not filed, or if a certificate when filed is incorrect or insufficient in the opinion of the commissioner, the amount of license fee or surcharge due shall be determined by the commissioner from such information as may be available. Notice of such determination, and notice of licensee's right to appeal such determination, shall be given to the licensee liable for the payment of the license fee or surcharge. Such determination shall finally and irrevocably fix the fee or surcharge unless the person against whom it is assessed, within thirty days after receiving notice of such determination, shall apply to the commissioner for a hearing, or unless the commissioner on his own motion shall redetermine the same. After such hearing the commissioner shall give notice of his determination to the person to whom the license fee or surcharge is assessed.

7. Any licensee failing to file a certificate, failing to pay a license fee or surcharge, or filing or causing to be filed, a certificate which is willfully false, or failing to keep any records required by this article or rules and regulations adopted hereunder, shall, in addition to any other penalties herein or otherwise provided, be subject to a fine not to exceed two times the annual license fee or surcharge, as determined by the commissioner.

8. Within three months of the effective date of this article every owner or operator of a major facility shall obtain a license. The department shall issue a license upon the showing that such registrant can provide necessary equipment to prevent, contain and remove discharges of petroleum.

9. On or after June twenty-ninth, nineteen hundred seventy-eight, no person shall operate or cause to be operated any major facility without a major facility license issued by the commissioner. No license shall be valid for more than five

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years. Each applicant for a major facility license shall submit information, in a form satisfactory to the commissioner, describing the following:

(a) The number of barrels or another measurement of the storage capacity of the facility;

(b) Average daily throughput of the facility;

(c) A primary and contingency cleanup and removal plan which includes, but is not limited to, an inventory of:

(i) The storage and transfer capacity of the facility;

(ii) The containment and removal equipment, including, but not limited to, vehicles, vessels, pumps, skimmers, booms, chemicals, and communication devices, to which the facility has access through direct ownership or by contract or membership in a discharge cleanup organization recognized by the departments of environmental conservation and transportation as well as the time lapse following a discharge which precedes such access;

(iii) The trained personnel which are required and available to operate such containment and removal equipment and the time lapse following a discharge which precedes such availability;

(iv) All equipment and trained personnel used or employed in a capacity at the facility to prevent discharges of petroleum;

(v) The terms of agreement and operation plan of any discharge cleanup organization to which the owner or operator of the facility belongs;

(vi) The type and amount of petroleum transferred, refined, processed or stored at the facility;

(d) The steps taken to insure prevention of a discharge;

10. No portion of fees or surcharges assessed and collected pursuant to this section shall be used for any purpose if such use, under federal law, would preclude the collection of such fee or surcharge.

11. Each owner or operator of a major facility or vessel subject to the provisions of this article shall designate a person in the state as his legal agent for service of process under this section and such designation shall be filed with the secretary of state. In the absence of such designation the secretary of state shall be the designated agent for purposes of service of process under this section.

Credits

(Added L.1977, c. 845, § 2. Amended L.1978, c. 458, §§ 1, 2; L.1984, c. 176, § 1; L.1985, c. 35, § 3; L.1985, c. 38, § 14; L.1986, c. 512, §§ 5, 6; L.1992, c. 584, § 2; L.1997, c. 373, § 1, eff. Aug. 5, 1997; L.1998, c. 58, pt. A, § 20, eff. Sept. 1,

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1998; L.1998, c. 58, pt. A, § 21, eff. Sept. 1, 1999; L.1999, c. 413, pt. E, § 1, eff. Aug. 9, 1999; L.2015, c. 58, pt. X, § 1, eff. April 13, 2015.)

Footnotes

1 So in original. Probably should read “renewal”.

McKinney's Navigation Law § 174, NY NAVIG § 174

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McKinney's Navigation Law § 174-a

§ 174-a. Use of containment booms

Currentness

1. The commissioner, after consultation with appropriate federal, state and local governments and agencies, may promulgate regulations requiring the use of containment booms or prestaging of response equipment around or at major facilities and vessels involved in the transfer of petroleum. The commissioner may consult with interested groups and trade associations in developing such regulations. In adopting such regulations, the commissioner shall consider factors, including but not limited to applicable federal laws and regulations, weather conditions, tides, health and safety of workers and product being transferred.

2. Whenever petroleum is transferred after sunset and before sunrise, lighting adequate to detect any petroleum discharge shall be in operation.

3. The deployment of containment booms pursuant to this part shall be the responsibility of the owner, lessee or operator of the vessels involved in a vessel-to-vessel petroleum transfer. The deployment of containment booms pursuant to this part shall be the responsibility of the owner, lessee or operator of the major facility involved in a petroleum transfer between a vessel and a major facility.

4. (a) Any local law or ordinance which is inconsistent with any provision of this part or any rule or regulation promulgated hereunder shall be preempted, except that any local law or ordinance of any county, or of any city of a population of one million or more, which is inconsistent with the provisions of this part or any rules or regulations promulgated hereunder shall not be preempted if such local law or ordinance provides environmental protection equal to or greater than the provisions of this part of any rules or regulations promulgated hereunder, and such county or city files with the department a written declaration of its intent to administer and enforce such local law or ordinance which is approved by the commissioner in written findings which set forth the terms of such approval.

(b) Any owner, lessee or operator violating any provisions of this section or any rule promulgated thereunder shall: (i) if the transfer involves and/or the vessel contains less than one million gallons, be liable for a penalty of not more than twenty-five thousand dollars for each offense in a court of competent jurisdiction; or (ii) if the transfer involves and/or the vessel contains one million gallons or more, be liable for a penalty of not more than fifty thousand dollars for each offense in a court of competent jurisdiction. Every violation of this section shall be a separate and distinct offense, and, in case of a continuing violation, every day's continuance thereof shall be deemed to be a separate and distinct offense.

(c) All penalties and fines imposed under this section shall be credited to the New York environmental protection and spill compensation fund pursuant to paragraph (a) of subdivision two of section one hundred seventy-nine of this chapter.

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Credits
(Added L.1990, c. 898, § 4.)

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McKinney's Navigation Law § 174-b

§ 174-b. Use of agents

Currentness

1. The commissioner may promulgate regulations governing the use of dispersants, burning agents, biological additives, surface collecting agents or other chemical additives in the cleanup and removal of a petroleum discharge.

2. The commissioner shall pursue an official memorandum of understanding with the United States Coast Guard regarding the planned uses of dispersants, burning agents, sinking agents, biological additives, surface collecting agents or other chemical additives in the event of a petroleum discharge. Such memorandum of understanding should be reflective of any rules or regulations promulgated pursuant to this section.

3. No person shall supervise, aid or participate in any use of dispersants, burning agents, sinking agents, biological additives, surface collecting agents or other chemical additives which is inconsistent with any rule or regulation promulgated pursuant to this section.

Credits
(Added L.1990, c. 898, § 5.)

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McKinney's Navigation Law § 175

§ 175. Notification by persons responsible for discharge

Currentness

Any person responsible for causing a discharge shall immediately notify the department pursuant to rules and regulations established by the department, but in no case later than two hours after the discharge. Failure to so notify shall make persons liable to the penalty provisions of section 192 of this article. Notwithstanding the provisions of any other law, such notification to the department shall be deemed to fulfill the notification requirements of any other state or local law.

Credits
(Added L.1977, c. 845, § 2. Amended L.1985, c. 35, § 4.)

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McKinney's Navigation Law § 176

§ 176. Removal of prohibited discharges

Effective: April 1, 2017
Currentness

1. Any person discharging petroleum in the manner prohibited by section one hundred seventy-three of this article shall immediately undertake to contain such discharge. Notwithstanding the above requirement, the department may undertake the removal of such discharge and may retain agents and contractors who shall operate under the direction of such department for such purposes. The commissioner shall develop a system of immediate response type contracts with appropriate agents and contractors. Such contracts shall be subject to the approval of the state comptroller in accordance with section one hundred twelve of the state finance law, however, such approval shall not obligate to any particular contract any specific amount of monies from the fund but shall obligate from the fund on an individual basis as such contracts are utilized the actual amount required to effectuate any contract or any portion thereof. Any necessary approvals of availability of funds for a particular project in accordance with any provision of the state finance law shall be undertaken as soon as practical after clean up and removal procedures are undertaken, or such procedures are ordered by the commissioner.

2. (a) Upon the occurrence of a discharge of petroleum, the department shall respond promptly and proceed to cleanup and remove the discharge in accordance with environmental priorities or may, at its discretion, direct the discharger to promptly cleanup and remove the discharge. The department shall be responsible for cleanup and removal or as the case may be, for retaining agents and contractors who shall operate under the direction of that department for such purposes. Implementation of cleanup and removal procedures after each discharge shall be conducted in accordance with environmental priorities and procedures established by the department.

(b) Section eight of the court of claims act or any other provision of law to the contrary notwithstanding, the state shall be immune from liability and action with respect to any act or omission done in the discharge of the department's responsibility pursuant to this article; provided, however, that this subdivision shall not limit any liability which may otherwise exist for unlawful, willful or malicious acts or omissions on the part of the state, state agencies, or their officers, employees or agents or for a discharge in violation of section one hundred seventy-three of this article.

3. Any unexplained discharge of petroleum within state jurisdiction or discharge of petroleum occurring in waters beyond state jurisdiction that for any reason penetrates within state jurisdiction shall be removed by or under the direction of the department. Except for those expenses incurred by the party causing such discharge, any expenses incurred in the removal of discharges shall be paid promptly from the New York environmental protection and spill compensation fund

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pursuant to sections one hundred and eighty-six and one hundred seventy-nine-a of this article and any reimbursements due such fund shall be collected in accordance with the provisions of section one hundred and eighty-seven of this article.

4. Cleanup and removal of petroleum and actions to minimize damage from discharges shall be, to the greatest extent possible, in accordance with the National Contingency Plan for removal of oil and hazardous substances established pursuant to section 311 (d) of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), as amended by the Federal Oil Pollution Act of 1990 (33 U.S.C. 2701 et seq.), or revised under section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9605).

5. The department in consultation with the attorney general shall develop a standard contract form to be used when contracting services for the cleanup and removal of a discharge.

6. Whenever the department acts to remove a discharge or contracts to secure prospective removal services, it is authorized to draw upon the money available in the fund. Such moneys shall be used to pay promptly for all cleanup and removal costs incurred by the department.

7. (a) Nothing in this section is intended to preclude cleanup and removal by any person threatened by such discharges, who, as soon as is reasonably possible, coordinates and obtains approval for such actions with ongoing state or federal operations and appropriate state and federal authorities. Notwithstanding any other provision of law to the contrary, the liability of any contractor for such person, where such person obtains approval from appropriate state and federal authorities for such cleanup and removal, and the liability of any person providing services related to the cleanup or removal of a discharge, under contract with the department, for any injury to a person or property caused by or related to such services shall be limited to acts or omissions of the person during the course of performing such services which are shown to have been the result of negligence, gross negligence or reckless, wanton or intentional misconduct. Notwithstanding any other provisions of law, when (i) a verdict or decision in an action or claim for injury to a person or property caused by or related to such services is determined in favor of a claimant in an action involving a person performing such services and any other person or persons jointly liable, and (ii) the liability of the person performing such services is found to be fifty percent or less of the total liability assigned to all persons liable, and (iii) the liability of the person performing such services is not based on a finding of reckless disregard for the safety of others, or intentional misconduct, then the liability of the person performing such services to the claimant for loss relating to injury to property and for non-economic loss relating to injury to a person shall not exceed the equitable share of the person performing such services determined in accordance with the relative culpability of each person causing or contributing to the total liability for such losses; provided, however, that the culpable conduct of any person not a party to the action shall not be considered in determining any equitable share herein if the claimant proves that with due diligence the claimant was unable to obtain jurisdiction over such person in said action. As used in this section, the term “non-economic loss” includes, but is not limited to, pain and suffering, mental anguish, loss of consortium or other damages for non-economic loss. However, nothing in this subdivision shall be deemed to alter, modify or abrogate the liability of any person performing such services for breach of any express warranty, limited or otherwise, or an express or implied warranty under the uniform commercial code, or to an employee of such person pursuant to the workers' compensation law, or to relieve from any liability any person who is responsible for a discharge in violation of section one hundred seventy-four of this article.

(b) No action taken by any person to contain or remove a discharge shall be construed as an admission of liability for said discharge. No person who gratuitously renders assistance in containing or removing a discharge shall be liable for any civil damages to third parties resulting solely from acts or omissions of such person in rendering such assistance except for acts or omissions of gross negligence or willful misconduct. In the course of cleanup and removal, no person shall

discharge any detergent into the waters of this state without prior authorization of the commissioner of environmental conservation.

(c) A person may, without admission of responsibility for the discharge of petroleum and with the consent of the commissioner, commence clean up and removal of the discharge and upon the recommendation of the commissioner of health and with the consent of the fund undertake the relocation of persons affected by the discharge of petroleum. Upon determination by the fund that the person is not responsible for the discharge, the person shall be reimbursed by the fund for the actual and necessary expenses incurred.

8. Notwithstanding any other provision of law to the contrary, including but not limited to section 15-108 of the general obligations law, every person providing cleanup, removal of discharge of petroleum or relocation of persons pursuant to this section shall be entitled to contribution from any other responsible party.

Credits

(Added L.1977, c. 845, § 2. Amended L.1985, c. 35, § 5; L.1987, c. 536, §§ 6, 7; L.1989, c. 712, §§ 2, 3; L.1992, c. 584, § 3; L.2017, c. 58, pt. HH, § 3, eff. April 20, 2017, deemed eff. April 1, 2017.)

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McKinney's Navigation Law § 177

§ 177. Emergency oil spill control network

Currentness

1. The commissioner shall establish an emergency oil spill control network which shall be comprised of available equipment from appropriate town, county and state highway departments. Such network shall be employed to provide an immediate response to a discharge on any of the waters of the state. Furthermore, such network shall be employed in conjunction with the cleanup operations of the owner or operator, the department and any federal agency.

2. The commissioner shall make an inventory of all equipment in town, county, and state highway departments that would be capable of participating in discharge cleanup operations.

3. The commissioner shall have the power to deploy such equipment to participate in a discharge cleanup operation at his discretion and to reimburse such town, county, and state highway departments for use of such equipment from the fund.

4. The commissioner may request and shall receive from any other state agency such assistance and data as will enable him to carry out his responsibilities pursuant to this section.

5. (a) The commissioner shall issue a catalogue designed to expedite responses to discharges of petroleum.

(b) The catalogue shall contain the following information, broken down by geographical area:

(i) a listing of state stand-by contractors, their equipment and spill response capabilities;

(ii) a listing of state-owned equipment which could be used in the event of a major discharge of petroleum;

(iii) a listing of companies and organizations that have spill response equipment available for sale, lease or loan; and

(iv) a listing of organizations which are involved in the cleanup and rehabilitation of birds and wildlife.

(c) The catalogue shall be updated as deemed appropriate by the commissioner.

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(d) The commissioner shall notify the chief executive officer of all counties which border on any navigable waters of the state or on the marine and coastal district, as defined in section 13-0303 of the environmental conservation law, of the availability of the catalogue. This catalogue shall be distributed upon request at a maximum fee of twenty-five cents per page. Any such fee shall be deposited into the New York environmental protection and spill compensation fund established pursuant to section one hundred seventy-nine of this article.

6. The commissioner may institute a program to educate local officials on procedures to follow in reporting and responding to spill emergencies.

Credits

(Added L.1977, c. 845, § 2. Amended L.1985, c. 35, § 6; L.1990, c. 898, § 6.)

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McKinney's Navigation Law § 177-a

§ 177-a. Emergency oil spill relocation network

Currentness

1. The commissioner shall establish an emergency oil spill relocation network which shall be headed by the commissioner of health and comprised of the appropriate services from county and state health departments.

2. Such network shall be employed to provide an immediate response to a discharge in any area of the state where the public health may be at risk. Further, such network shall be employed in conjunction with the cleanup operations of the owner or operator, the department or any federal agency.

3. The commissioner of health shall be first notified whenever an application is made for emergency oil spill relocation.

4. The commissioner of health shall have the power to deploy such resources at his discretion to the state and local health departments to make an assessment of the possible health risks to persons residing in the area of the spill site.

5. The commissioner of health shall determine the actual and necessary costs of the relocation of individuals who, in his opinion, are exposed to health risks as a result of the discharge and certify the amount of such costs to the administrator. The certification by the commissioner of health shall be for a period of relocation not exceeding thirty days, provided that the commissioner upon a further assessment of the possible health risks in the area of the spill site may extend such relocation for successive thirty day periods. The certification by the commissioner of health shall not be admissible in any civil action in a court of law in regard to the issue of damages to the individuals certified for relocation pursuant to this section.

6. Notwithstanding any provision of law to the contrary the certification of individuals for relocation and its associated costs shall be an issue restricted to consideration as cleanup cost and shall not be a determination of liability, nor shall it be admissible in any civil action in a court of law in regard to the issue of damages to the individuals certified for relocation pursuant to this section.

7. The commissioner of health may request and shall receive from the department and any other state agency such assistance and data as will enable him to carry out his responsibilities pursuant to this section.

Credits
(Added L.1989, c. 712, § 4.)

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McKinney's Navigation Law § 177-b

§ 177-b. Habitat protection plan

Currentness

The commissioner may require every major facility which engages in the transfer of petroleum to file with the department a habitat protection plan as a condition of issuance of a license pursuant to section one hundred seventy-four of this article. Such plan shall provide protection from the potential adverse impact of any discharge on the habitat of threatened or endangered species and the mitigation of potential damage to wetlands in reasonable proximity to the facility. Such plan shall contain provisions for the rehabilitation of animals damaged by the discharge of petroleum.

Credits
(Added L.1990, c. 898, § 7.)

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McKinney's Navigation Law § 178

§ 178. Right to enter and inspect

Currentness

The department is hereby authorized to enter and inspect any property or premises for the purpose of inspecting facilities and investigating either actual or suspected sources of discharges or violation of this article or any rule or regulation promulgated pursuant to this article. The department is further authorized to enter on property or premises in order to assist in the cleanup or removal of the discharge. Any information relating to secret processes or methods of manufacture shall be kept confidential.

Credits
(Added L.1977, c. 845, § 2. Amended L.1980, c. 649, § 2; L.1985, c. 35, § 7.)

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McKinney's Navigation Law § 178-a

§ 178-a. Responder immunity

Currentness

1. Definitions. For the purposes of this section only, the following terms shall have the following meanings:

(a) “response efforts” means rendering care, assistance, or advice in accordance with the national contingency plan, the state oil spill contingency plan, or at the direction of the federal on-scene coordinator or the commissioner or his designee, in response to a discharge or threatened discharge of petroleum into or upon the navigable waters.

(b) “responsible party” and “navigable waters” shall have the meanings set forth in section 1001 of the Federal Oil Pollution Act of 1990 (33 U.S.C. 2701 et seq.).

2. Notwithstanding any other provision of law, (a) a person is not liable for cleanup and removal costs or damages which result from actions taken or omitted to be taken in good faith in the course of rendering care, assistance or advice consistent with the national contingency plan or as otherwise directed by the federal on-scene coordinator or by the commissioner or his designee, in response to a discharge or threatened discharge of petroleum into or upon the navigable waters.

(b) A person holding a master's or a towing vessel operator's license, the owner, and operator of a vessel operated by such person are not liable for cleanup and removal costs or damages which result from actions taken in good faith in the course of rendering assistance, in an emergency situation, at the request of the owner or operator of a vessel attempting to prevent the substantial threat of a discharge of petroleum into or upon the navigable waters; provided, however, that reasonable efforts are made to notify the federal on-scene coordinator or the commissioner or his designee prior to such assistance being rendered or, if that is not practicable, as soon as possible thereafter.

3. However, the provisions of subdivision two of this section shall not apply to: (i) a responsible party, (ii) liability for personal injury or wrongful death, (iii) cleanup and removal costs and damages resulting from such person's gross negligence or willful misconduct, (iv) negligence in the operation of a motor vehicle as defined in section one hundred twenty-five of the vehicle and traffic law, and (v) any physical actions taken that are not in or near the area of cleanup and removal of a discharge or threatened discharge.

4. The provisions of subdivision two of this section shall not apply to any response efforts undertaken by a person later than one hundred twenty days after a discharge has been stopped. Thereafter, such person shall not be strictly liable without regard to fault, but the liability of such person for personal injury or property damage shall be limited to acts

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or omissions of the person during the course of such response efforts which are shown to be the result of negligence, gross negligence, or reckless, wanton or intentional misconduct. Notwithstanding any other provision of law, when (i) a verdict or decision on a claim for injury to persons or property caused by response efforts, occurring after such one hundred twenty day period has ended, is determined in favor of the claimant in an action involving such person's response efforts and any other person or persons jointly liable, and (ii) the liability of the person related to such response efforts is found to be fifty percent or less of the total liability assigned to all persons liable, and (iii) the liability of the person related to such response efforts is not based on a finding of reckless disregard for the safety of others or of intentional misconduct, then the liability of such person to the claimant for injury to property and for non-economic loss relating to injury to a person shall not exceed the equitable share of such person as determined in accordance with the relative culpability of each person causing or contributing to the total liability. Provided, however, the culpable conduct of any person not a party to such action shall not be considered in determining any equitable share if the claimant was unable, with due diligence, to obtain jurisdiction over such person in said action. As used in this section, "non-economic loss" includes but is not limited to pain and suffering, mental anguish, loss of consortium or other damages for non-economic loss. However, nothing herein shall alter, modify, or abrogate the liability of any person for breach of warranty or to an employee of such person pursuant to the workers' compensation law, or to relieve from liability any person who is responsible for a discharge in violation of section one hundred seventy-four of this article.

5. In addition to any other liability, a responsible party shall be liable for any cleanup and removal costs and damages that another person is relieved of under subdivision two or four or both of this section.

6. Nothing in this section affects (i) the obligation of a discharger to respond immediately and to cleanup and remove a discharge; or (ii) the liability of a discharger under other provisions of this article or the environmental conservation law.

Credits
(Added L.1992, c. 584, § 4. Amended L.1994, c. 669, § 1.)

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Part Three. New York Environmental Protection and Spill Compensation Fund; Liability; Third Party Compensation

McKinney's Navigation Law § 179

§ 179. New York environmental protection and spill compensation fund

Effective: April 1, 2017
Currentness

1. The New York environmental protection and spill compensation fund is hereby established as a nonlapsing, revolving fund in the department of audit and control to carry out the purposes of this article.

2. Two separate accounts are hereby established within the fund established by subdivision one of this section:

(a) An account which shall be credited with all license fees and penalties collected pursuant to paragraph (b) of subdivision one and paragraph (a) of subdivision four of section one hundred seventy-four of this article except as provided in section one hundred seventy-nine-a of this article, the portion of the surcharge collected pursuant to paragraph (d) of subdivision four of section one hundred seventy-four of this article, penalties collected pursuant to paragraph (b) of subdivision four of section one hundred seventy-four-a of this article, money collected pursuant to section one hundred eighty-seven of this article, all penalties collected pursuant to section one hundred ninety-two of this article, and registration fees collected pursuant to subdivision two of section 17-1009 of the environmental conservation law.

(b) An account which shall be credited with all surcharges collected pursuant to paragraph (c) of subdivision one and paragraph (b) of subdivision four of section one hundred seventy-four of this article. In addition, such account shall be credited with funds from the account established by paragraph (a) of this subdivision in an amount equal to two and three-quarters cents multiplied by the number of barrels of petroleum subject to the provisions of paragraph (d) of subdivision four of section one hundred seventy-four of this article. The amount so credited shall not exceed the amount equal to two and three-quarters cents multiplied by the number of barrels which would have been subject to the provisions of such paragraph (d) during the state fiscal year ending March thirty-first, nineteen hundred ninety-nine.

Interest received on moneys in each account in the fund shall be credited to that account, respectively.

Credits
(Added L.1977, c. 845, § 2. Amended L.1985, c. 38, § 15; L.1990, c. 898, § 8; L.1991, c. 65, § 1; L.1995, c. 83, § 16; L.1998, c. 58, pt. A, § 22, eff. Sept. 1, 1999; L.2004, c. 577, pt. I, § 2, eff. October 5, 2004, deemed eff. April 1, 2004; L.2015, c. 58, pt. X, § 2, eff. April 13, 2015; L.2017, c. 58, pt. HH, § 1, eff. April 20, 2017, deemed eff. April 1, 2017.)

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McKinney's Navigation Law § 179-a

§ 179-a. New York environmental protection and spill remediation account

Effective: April 1, 2017
Currentness

1. There is hereby created an account within the miscellaneous capital projects fund, the New York environmental protection and spill remediation account. The New York environmental protection and spill remediation account shall consist of license fees received by the state pursuant to section one hundred seventy-four of this article, in an amount equal to expenditures made from this account.

2. These moneys, after appropriation by the legislature, and within the amounts set forth and for the several purposes specified, shall be available to reimburse the department of environmental conservation for expenditures associated with the purposes of costs incurred under this article, including cleanup and removal of petroleum spills, and other capital, investigation, maintenance and remediation costs.

3. All payments made from the New York environmental protection and spill remediation account shall be made by the administrator upon certification by the commissioner.

4. Spending pursuant to this section shall be included in the annual report required by section one hundred ninety-six of this article.

Credits
(Added L.2017, c. 58, pt. HH, § 2, eff. April 20, 2017, deemed eff. April 1, 2017.)

McKinney's Navigation Law § 179-a, NY NAVIG § 179-a
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McKinney's Navigation Law § 180

§ 180. Administrator of the fund

Currentness

The state comptroller shall appoint and supervise an administrator of the fund. The administrator shall be the chief executive of the fund and shall have the following powers and duties:

1. To represent the state in meetings with the alleged discharger and claimants concerning liability for the discharge and amount of the claims;

2. To determine if hearings are needed to settle particular claims filed by injured persons;

3. To convene hearings;

4. To certify the amount of claims and names of claimants to the state comptroller;

5. To disburse moneys from the fund for cleanup and removal costs pursuant to a certification of claims by the commissioner.

Credits
(Added L.1977, c. 845, § 2. Amended L.1985, c. 35, § 8; L.1991, c. 672, § 5.)

McKinney's Navigation Law § 180, NY NAVIG § 180
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McKinney's Navigation Law § 181

§ 181. Liability

Effective: October 3, 2011
Currentness

1. Any person who has discharged petroleum shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained, as defined in this section. In addition to cleanup and removal costs and damages, any such person who is notified of such release and who did not undertake relocation of persons residing in the area of the discharge in accordance with paragraph (c) of subdivision seven of section one hundred seventy-six of this article, shall be liable to the fund for an amount equal to two times the actual and necessary expense incurred by the fund for such relocation pursuant to section one hundred seventy-seven-a of this article.

2. The fund shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained, including, but not limited to:

(a) The cost of restoring, repairing, or replacing any real or personal property damaged or destroyed by a discharge, any income lost from the time such property is damaged to the time such property is restored, repaired or replaced, any reduction in value of such property caused by such discharge by comparison with its value prior thereto;

(b) The cost of restoration and replacement, where possible, of any natural resource damaged or destroyed by a discharge;

(c) Loss of income or impairment of earning capacity due to damage to real or personal property, including natural resources destroyed or damaged by a discharge; provided that such loss or impairment exceeds ten percent of the amount which claimant derives, based upon income or business records, exclusive of other sources of income, from activities related to the particular real or personal property or natural resources damaged or destroyed by such discharge during the week, month or year for which the claim is filed;

(d) Loss of tax revenue by the state or local governments for a period of one year due to damage to real or personal property proximately resulting from a discharge;

(e) Interest on loans obtained or other obligations incurred by a claimant for the purpose of ameliorating the adverse effects of a discharge pending the payment of a claim in full as provided by this article.

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3. (a) The owner or operator of a major facility or vessel which has discharged petroleum shall be strictly liable, without regard to fault, subject to the defenses enumerated in subdivision four of this section, for all cleanup and removal costs and all direct and indirect damages paid by the fund. However, the cleanup and removal costs and direct and indirect damages which may be recovered by the fund with respect to each incident shall not exceed:

(i) for a tank vessel, the greater of:

(1) one thousand two hundred dollars per gross ton; or

(2)(A) in the case of a vessel greater than three thousand gross tons, ten million dollars; or

(B) in the case of a vessel or [1] three thousand gross tons or less, two million dollars;

(ii) for any other vessel subject to the liability limits set forth in the Federal Oil Pollution Act of 1990 (33 U.S.C. 2701 et seq.), six hundred dollars per gross ton or five hundred thousand dollars, whichever is greater;

(iii) for any other vessel not subject to the liability limits set forth in the Federal Oil Pollution Act of 1990 (33 U.S.C. 2701 et seq.), three hundred dollars per gross ton for each vessel;

(iv) for a major facility that is defined as an "onshore facility" and covered by the liability limits established under the Federal Oil Pollution Act of 1990 (33 U.S.C. 2701 et seq.), three hundred fifty million dollars. This liability limit shall not be considered to increase the liability above the federal limit of three hundred fifty million dollars per incident. [2]

(v) for a major facility not covered in subparagraph (iv) of this paragraph, fifty million dollars.

(b) The liability limits established in subparagraphs (i) and (ii) of paragraph (a) of this subdivision shall not be considered to increase liability above the federal limits for tank vessels or vessels as defined in the Federal Oil Pollution Act of 1990 (33 U.S.C. 2701 et seq.).

(c)(i) The department shall establish, by regulation, a limit of liability under this subdivision of less than three hundred fifty million dollars but not less than eight million dollars, for major facilities defined as "onshore facilities" under the Federal Oil Pollution Act of 1990 (33 U.S.C. 2701 et seq.), taking into account facility size, storage capacity, throughput, proximity to environmentally sensitive areas, type of petroleum handled, and other factors relevant to risks posed by the class or category of facility.

(ii) The department shall establish, by regulation, a limit of liability under this subdivision of fifty million dollars or less for major facilities other than vessels that are not defined as "onshore facilities" under the Federal Oil Pollution Act of 1990 (33 U.S.C. 2701 et seq.), taking into account facility size, storage capacity, throughput, proximity to

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environmentally sensitive areas, type of petroleum handled, and other factors relevant to risks posed by the class or category of facility.

(d) The provisions of paragraph (a) of this subdivision shall not apply and the owner or operator shall be liable for the full amount of cleanup and removal costs and damages if it can be shown that the discharge was the result of (i) gross negligence or willful misconduct, within the knowledge and privity of the owner, operator or person in charge, or (ii) a gross or willful violation of applicable safety, construction or operating standards or regulations. In addition, the provisions of paragraph (a) of this subdivision shall not apply if the owner or operator fails or refuses:

(1) to report the discharge as required by section one hundred seventy-five of this article and the owner or operator knows or had reason to know of the discharge; or

(2) to provide all reasonable cooperation and assistance requested by the federal on-scene coordinator or the commissioner or his designee in connection with cleanup and removal activities.

(e)(i) The owner or operator of a vessel shall establish and maintain with the department evidence of financial responsibility sufficient to meet the amount of liability established pursuant to paragraph (a) of this subdivision. The owner or operator of any vessel which demonstrates financial responsibility pursuant to the requirements of the Federal Oil Pollution Act of 1990 (33 U.S.C. 2701 et seq.), shall be deemed to have demonstrated financial responsibility in accordance with this paragraph.

(ii) The commissioner in consultation with the superintendent of financial services may promulgate regulations requiring the owner or operator of a major facility other than a vessel to establish and maintain evidence of financial responsibility in an amount not to exceed twenty-five dollars, per incident, for each barrel of total petroleum storage capacity at the facility, subject to a maximum of one million dollars per incident per facility in an aggregate not to exceed two million dollars per facility per year; provided, however, that if the owner or operator establishes to the satisfaction of the commissioner that a lesser amount will be sufficient to protect the environment and public health, safety and welfare, the commissioner shall accept evidence of financial responsibility in such lesser amount. In determining the sufficiency of the amount of financial responsibility required under this section, the commissioner and the superintendent of financial services shall take into consideration facility size, storage capacity, throughput, proximity to environmentally sensitive areas, type of petroleum handled, and other factors relevant to the risks posed by the class or category of facility, as well as the availability and affordability of pollution liability insurance. Any regulations promulgated pursuant to this subparagraph shall not take effect until forty-eight months after the effective date of this section.

(iii) Financial responsibility under this paragraph may be established by any one or a combination of the following methods acceptable to the commissioner in consultation with the superintendent of financial services: evidence of insurance, surety bonds, guarantee, letter of credit, qualification as a self-insurer, or other evidence of financial responsibility, including certifications which qualify under the Federal Oil Pollution Act of 1990 (33 U.S.C. 2701 et seq.).

(iv) The liability of a third-party insurer providing proof of financial responsibility on behalf of a person required to establish and maintain evidence of financial responsibility under this section is limited to the type of risk assumed and the amount of coverage specified in the proof of financial responsibility furnished to and approved by the department. For the purposes of this section, the term “third-party insurer” means a third-party insurer, surety, guarantor, person

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furnishing a letter of credit, or other group or person providing proof of financial responsibility on behalf of another person; it does not include the person required to establish and maintain evidence of such financial responsibility.

4. (a) The only defenses that may be raised by a person responsible for a discharge of petroleum are: an act or omission caused solely by (i) war, sabotage, or governmental negligence or (ii) an act or omission of a third party other than an employee or agent of the person responsible, or a third party whose act or omission occurs in connection with a contractual relationship with the person responsible, if the person responsible establishes by a preponderance of the evidence that the person responsible (a) exercised due care with respect to the petroleum concerned, taking into consideration the characteristics of petroleum and in light of all relevant facts and circumstances; and (b) took precautions against the acts or omissions of any such third party and the consequences of those acts or omissions. These defenses shall not apply to a person responsible who refuses or fails to (a) report the discharge, or (b) provide all reasonable cooperation and assistance in cleanup and removal activities undertaken on behalf of the fund by the department. In any case where a person responsible for a discharge establishes by a preponderance of the evidence that a discharge and the resulting cleanup and removal costs were caused solely by an act or omission of one or more third parties as described above, the third party or parties shall be treated as the person or persons responsible for the purposes of determining liability under this article.

(b) Nothing set forth in this subdivision shall be construed to hold a lender liable to the state as a person responsible for the discharge of petroleum at a site in the event: (i) such lender, without participating in the management of such site, holds indicia of ownership primarily to protect the lender's security interest in the site, or (ii) such lender did not participate in the management of such site prior to a foreclosure, and such lender:

(1) forecloses on such site; and

(2) after foreclosure, sells, re-leases (in the case of a lease finance transaction), or liquidates such site, maintains business activities, winds up operations, or takes any other measure to preserve, protect or prepare such site for sale or disposition; provided however, that such lender shall take actions to sell, re-lease (in the case of a lease finance transaction), or otherwise divest itself of such site at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements.

(c) This exemption shall not apply to any lender that has (i) caused or contributed to the discharge of petroleum from or at the site, (ii) purchased, sold, refined, transported, or discharged petroleum from or at such site, or (iii) caused the purchase, sale, refinement, transportation, or discharge of petroleum from or at such site.

The terms “participating in management,” “foreclosure,” “lender” and “security interest” shall have the same meaning as those terms are defined in paragraph (c) of subdivision one of section 27-1323 of the environmental conservation law.

5. Any claim by any injured person for the costs of cleanup and removal and direct and indirect damages based on the strict liability imposed by this section may be brought directly against the person who has discharged the petroleum, provided, however, that damages recoverable by any injured person in such a direct claim based on the strict liability imposed by this section shall be limited to the damages authorized by this section.

6. Notwithstanding any other provision of this section, a volunteer firefighter, volunteer fire company, volunteer fire district, volunteer fire protection district, or volunteer fire department shall not be strictly liable for discharged petroleum

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when such discharge results from such volunteer firefighter, volunteer fire company, volunteer fire district, volunteer fire protection district, or volunteer fire department performing his, her, or their firefighting duties and there is not a showing of willful or gross negligence. This subdivision shall not be construed to provide an exemption from liability for a discharge of petroleum on or from real or personal property owned, leased, or operated by any such volunteer fire company, volunteer fire district, volunteer fire protection district, or volunteer fire department.

Credits

(Added L.1977, c. 845, § 2. Amended L.1978, c. 458, § 3; L.1989, c. 712, § 5; L.1991, c. 672, §§ 1, 2; L.1992, c. 584, § 5; L.1992, c. 585, § 1; L.1996, c. 358, § 1; L.1999, c. 157, § 1, eff. July 6, 1999, deemed eff. Aug. 29, 1996; L.2003, c. 1, pt. G, § 1, eff. Oct. 7, 2003; L.2004, c. 577, pt. G, § 1, eff. Oct. 5, 2004; L.2011, c. 62, pt. A, § 104, eff. Oct. 3, 2011.)

Footnotes

1 So in original. Probably should read “of”.

2 So in original. Probably should be a semicolon.

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McKinney's Navigation Law § 181-a

§ 181-a. Environmental lien

Currentness

1. The fund shall have a lien for the costs incurred by the fund for the cleanup and removal of a discharge and for the payment of claims for direct and indirect damages as a result of a discharge upon such real property located within the state:

(a) owned by a person liable to the fund for such costs under section one hundred eighty-one of this part at the time a notice of environmental lien is filed; and

(b) upon which the discharge occurred.

2. An environmental lien shall attach when:

(a) cleanup and removal costs and damage costs are incurred by the fund;

(b) the person referred to in subdivision one of this section fails to pay such costs within ninety days after a written demand therefor by the administrator is mailed by certified or registered mail, return receipt requested; and

(c) a notice of environmental lien is filed as provided in section one hundred eighty-one-c of this part; provided, however, that a copy of the notice of environmental lien is served upon the owner of the real property subject to the environmental lien within thirty days of such filing in accordance with the provisions of section eleven of the lien law.

3. An environmental lien shall continue against the real property until:

(a) the claim or judgment against the person referred to in subdivision one of this section for cleanup and removal costs and damage costs is satisfied or becomes unenforceable;

(b) the lien is released by the administrator pursuant to this subdivision;

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(c) the lien is discharged by payment of moneys into court; or

(d) the lien is otherwise vacated by court order.

Upon the occurrence of any of the foregoing, except where the lien is vacated by court order, the administrator shall execute the release of an environmental lien and file the release as provided in section one hundred eighty-one-c of this part. The administrator may release an environmental lien where:

(i) a legally enforceable agreement satisfactory to the administrator has been executed relating to cleanup and removal costs and damage costs or reimbursing the fund for cleanup and removal costs and damage costs; or

(ii) the attachment or enforcement of the environmental lien is determined by the administrator not to be in the public interest.

4. An environmental lien is subject to the rights of any other person, including an owner, purchaser, holder of a mortgage or security interest, or judgment lien creditor, whose interest is perfected before a lien notice has been filed as provided in section one hundred eighty-one-c of this part.

Credits
(Added L.1991, c. 488, § 1.)

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McKinney's Navigation Law § 181-b

§ 181-b. Environmental lien notice; contents

Currentness

A notice of environmental lien must state:

1. That the lienor is the New York environmental protection and spill compensation fund;

2. The name of the record owner of the real property on which the environmental lien has attached;

3. The real property subject to the lien, with a description thereof sufficient for identification;

4. That the real property described in the notice is the property upon which a discharge occurred and that cleanup and removal costs and damage costs have been incurred by the lienor as a result of such discharge;

5. That the owner is potentially liable for cleanup and removal costs and damage costs pursuant to section one hundred eighty-one of this part; and

6. That an environmental lien has attached to the described real property.

Credits
(Added L.1991, c. 488, § 1.)

McKinney's Navigation Law § 181-b, NY NAVIG § 181-b
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McKinney's Navigation Law § 181-c

§ 181-c. Filing of notice of environmental lien; filing of release

Currentness

1. A notice of environmental lien shall be filed within six years from the time a disbursement is made by the fund for cleanup and removal costs and damage costs incurred by the fund in the clerk's office of the county where the property is situated. If such property is situated in two or more counties, the notice of environmental lien shall be filed in the office of the clerk of each of such counties. The notice of lien shall be indexed by the county clerk in accordance with the provisions of section ten of the lien law.

2. A release of an environmental lien shall be filed in the clerk's office of each county where the notice of environmental lien was filed and shall be indexed in the manner prescribed for indexing environmental liens.

Credits
(Added L.1991, c. 488, § 1.)

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McKinney's Navigation Law § 181-d

§ 181-d. Enforcement of environmental lien

Currentness

An environmental lien may be enforced against the property specified in the notice of environmental lien, and an environmental lien may be vacated or discharged, as prescribed in article three of the lien law; provided, however, that nothing in this article or in article three of the lien law shall affect the right of the fund to bring an action to recover cleanup and removal costs and damage costs under section one hundred eighty-one, one hundred eighty-seven, one hundred eighty-eight or one hundred ninety of this part.

Credits
(Added L.1991, c. 488, § 1.)

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McKinney's Navigation Law § 181-e

§ 181-e. Amounts received to satisfy lien

Currentness

Amounts received by the administrator to satisfy all or part of an environmental lien shall be deposited in the state treasury and credited to the environmental protection and spill compensation fund.

Credits
(Added L.1991, c. 488, § 1.)

McKinney's Navigation Law § 181-e, NY NAVIG § 181-e
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McKinney's Navigation Law § 182

§ 182. Claims against the fund

Currentness

Claims shall be filed with the administrator not later than three years after the date of discovery of damage nor later than ten years after the date of the incident which caused the damage. The administrator shall prescribe appropriate forms and procedures for such claims, which shall include a provision requiring the claimant to make a sworn verification of the claim to the best of his knowledge. Any person who knowingly gives or causes to be given any false information as a part of any such claim shall, in addition to any other penalties herein or elsewhere prescribed, be guilty of a misdemeanor punishable by a fine of up to one thousand dollars or up to one year imprisonment. Upon receipt of any claim, the administrator shall as soon as practicable inform all affected parties of the claim.

Credits
(Added L.1977, c. 845, § 2. Amended L.1980, c. 649, § 3.)

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McKinney's Navigation Law § 183

§ 183. Settlements

Currentness

The administrator shall attempt to promote and arrange a settlement between the claimant and the person responsible for the discharge. If the source of the discharge can be determined and liability is conceded, the claimant and the alleged discharger may agree to a settlement which shall be final and binding upon the parties and which will waive all recourse against the fund.

Credits
(Added L.1977, c. 845, § 2.)

McKinney's Navigation Law § 183, NY NAVIG § 183
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McKinney's Navigation Law § 184

§ 184. Settlements when source of discharge is unknown

Currentness

If the source of the discharge is unknown or cannot be determined, the claimant and the administrator shall attempt to arrange a settlement of any claim against the fund. The administrator is authorized to enter and certify payment of such settlement subject to such proof and procedures contained in regulations promulgated by the administrator.

Credits
(Added L.1977, c. 845, § 2.)

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McKinney's Navigation Law § 185

§ 185. Hearings for persons on claims filed with the administrator

Effective: April 13, 2015
Currentness

1. The administrator shall grant a hearing when persons alleged to be responsible for the discharge contest the validity or amount of damage claims or claims for cleanup and removal costs presented by injured persons to the fund for payment or when injured persons who have filed a claim against the fund contest the validity or amount of the settlement proposed by the administrator.

2. One hearing may be granted to hear and determine all claims arising from or related to a common discharge.

3. The burden of proof with respect to the validity or amount of damage claims or claims for cleanup and removal costs shall be upon the persons contesting such claims or the claimants contesting the settlement proposed by the administrator.

4. At least twenty days notice of such hearing shall be given by the administrator to the claimants and, if known, the alleged dischargers.

5. Upon the return day of such notice the person so notified shall file with the administrator a statement setting forth the position of the person so notified. Pertinent and relevant testimony of witnesses shall be received in support of or opposition to said statement. The claimants or alleged dischargers may appear in person or by attorney, present witnesses, submit evidence and be given full opportunity to be heard.

6. The administrator shall have the power to order testimony under oath and may subpoena attendance and testimony of witnesses and the production of such documentary materials pertinent to the issues presented at the hearing. Each person appearing at the hearing may be represented by counsel.

7. Within sixty calendar days from the close of such hearing and after due consideration of the written and oral statements and testimony and arguments filed pursuant to this section, or on default in appearance on said return day, the administrator shall make a final determination on the validity or amount of the damage claims or claims for cleanup and removal costs filed by the injured persons. The administrator shall notify the claimant and, if known, the alleged discharger thereof in writing by registered mail.

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8. Determinations made by the administrator after such hearing shall be final and conclusive. Any action for judicial review shall be filed pursuant to the provisions of article seventy-eight of the civil practice law and rules.

9. Upon a determination by the administrator that provides for an award to the claimants, the administrator shall certify the amount of the award and the name of the claimant to the state comptroller, who shall pay the award from the fund. In any case in which a person responsible for the discharge seeks judicial review, reasonable attorney's fees and costs shall be awarded to the claimant if the determination of the administrator is affirmed.

Credits

(Added L.1991, c. 672, § 3. Amended L.2015, c. 58, pt. X, § 3, eff. April 13, 2015.)

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Article 12. Oil Spill Prevention, Control, and Compensation (Refs & Annos)
Part Three. New York Environmental Protection and Spill Compensation Fund; Liability; Third Party Compensation

McKinney's Navigation Law § 186

§ 186. Disbursement of moneys from the fund

Effective: April 13, 2015
Currentness

1. (a) Moneys in the account established by paragraph (a) of subdivision two of section one hundred seventy-nine of this part shall be disbursed by the administrator, upon certification by the commissioner, for the purpose of costs incurred under section one hundred seventy-six of this article. (i) Beginning in state fiscal year two thousand fifteen--two thousand sixteen, up to two million one hundred thousand dollars per year shall be appropriated to the department for use only for the oil spill prevention and training purposes authorized in subdivision three of this section.

(b) Moneys in the account established by paragraph (b) of subdivision two of section one hundred seventy-nine of this part shall, within forty-five days of the close of each license fee period, be deposited by the administrator, in the hazardous waste remedial fund created pursuant to section ninety-seven-b of the state finance law for expenditure pursuant to such section; provided, however, that the state comptroller shall cause the administrator to reimburse the commissioner for the reasonable costs of collecting the surcharge during those times when the license fee is not imposed.

2. Moneys in the account established by paragraph (a) of subdivision two of section one hundred seventy-nine of this part shall be disbursed by the administrator, upon certification by him, for the following purposes:

(a) Damages as defined in section one hundred eighty-one of this article;

(b) Such sums as may be necessary for research on the prevention and the effects of spills of petroleum on the environment and on the development of improved cleanup and removal operations as may be appropriated by the legislature; provided, however, that such sums shall not exceed the amount of interest which is credited to the account established by paragraph (a) of subdivision two of section one hundred seventy-nine of this part;

(c) Such sums as may be necessary for the general administration of the fund, equipment and personnel costs of the department of environmental conservation and any other state agency related to the enforcement of this article as may be appropriated by the legislature;

(d) Such sums as may be appropriated by the legislature for research and demonstration programs concerning the causes and abatement of ocean pollution; provided, however, that such sums shall not exceed the amount of interest which is credited to the account established by paragraph (a) of subdivision two of section one hundred seventy-nine of this part.

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(e) Such sums as may be necessary for the general administration, equipment and personnel costs of the department of environmental conservation related to the administration and enforcement of the petroleum bulk storage program established pursuant to title ten of article seventeen of the environmental conservation law.

3. Moneys appropriated to the department pursuant to subparagraph (i) of paragraph (a) of subdivision one of this section, up to two million one hundred thousand dollars, shall be disbursed only for the following purposes:

(a) Such sums as may be necessary for the acquisition and maintenance of petroleum spill prevention, response or personal safety equipment and supplies and training for state and local government entities, including emergency services agencies and personnel.

(b) Such sums as may be necessary for petroleum spill response drills and exercises.

(c) Such sums as may be necessary for identification, mapping, and analysis of populations, environmentally sensitive areas, and resources at risk from spills of petroleum and related impacts; and the development, implementation, and updating of contingency plans, including geographic response plans, to protect those populations, sensitive environments, and resources in the event of a spill of petroleum or related impacts.

(d) Spending pursuant to this subdivision shall be included in the annual report required by section one hundred ninety-six of this article.

4. Moneys shall be disbursed from the fund only for the purposes set forth in subdivisions one, two and three of this section.

5. The state comptroller may invest and reinvest any moneys in said fund in obligations in which the comptroller is authorized to invest pursuant to the provisions of section ninety-eight-a of the state finance law. Any income or interest derived from such investment shall be included in the fund.

Credits

(Added L.1977, c. 845, § 2. Amended L.1979, c. 557, § 1; L.1985, c. 35, §§ 9, 10; L.1985, c. 38, § 16; L.1991, c. 672, § 6; L.1995, c. 83, § 17; L.2015, c. 58, pt. X, § 4, eff. April 13, 2015.)

McKinney's Navigation Law § 186, NY NAVIG § 186
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McKinney's Navigation Law § 187

§ 187. Reimbursements of moneys to fund

Currentness

The administrator shall recover to the fund moneys disbursed for the following purposes:

1. Costs incurred by the fund in the cleanup and removal of a discharge when the person responsible for causing a discharge has failed to promptly clean up and remove the discharge to the satisfaction of the department;

2. Costs incurred by the fund in the payment of claims for direct and indirect damages, as defined in section one hundred eighty-one of this article; and

3. All penalties assessed pursuant to this article.

Credits
(Added L.1977, c. 845, § 2.)

McKinney's Navigation Law § 187, NY NAVIG § 187
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McKinney's Navigation Law § 188

§ 188. Subrogation of rights

Currentness

Payment of any cleanup costs or damages by the fund arising from a single incident shall be conditioned upon the administrator acquiring by subrogation all rights of the claimant to recovery of such costs or damages from the discharger or other responsible party. The administrator shall then seek satisfaction from the discharger or other responsible party in the supreme court if the discharger or other responsible party does not reimburse the fund. In any such suit, except as provided by section one hundred eighty-one of this article, the administrator need prove only that an unlawful discharge occurred which was the responsibility of the discharger or other responsible party. The administrator is hereby authorized and empowered to compromise and settle the amount sought for cost and damages from the discharger or other responsible party and any penalty arising under this article.

Credits
(Added L.1977, c. 845, § 2.)

McKinney's Navigation Law § 188, NY NAVIG § 188
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McKinney's Navigation Law § 189

§ 189. Awards exceeding current balance

Currentness

In the event that the total awards for a specific occurrence exceed the current balance of the fund, the immediate award shall be paid on a prorated basis, and all claimants paid on a prorated basis shall be paid as determined by the administrator, a pro rata share of all moneys received by the fund until the total amount of the proven damages is paid to the claimant or claimants. The administrator may also provide through regulation to fix the priority for the payment of claims based on extreme hardship.

Credits
(Added L.1977, c. 845, § 2.)

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McKinney's Navigation Law § 190

§ 190. Claims against insurers

Currentness

Any claims for costs of cleanup and removal, civil penalties or damages by the state and any claim for damages by any injured person, may be brought directly against the bond, the insurer, or any other person providing evidence of financial responsibility.

Credits
(Added L.1977, c. 845, § 2.)

McKinney's Navigation Law § 190, NY NAVIG § 190
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McKinney's Navigation Law § 190-a

§ 190-a. Application of article

Currentness

For purposes of cleanup and removal of any public or private ground water supply system contaminated by a discharge occurring either before or after the effective date of article twelve of this chapter, all relevant provisions of article twelve of this chapter shall apply.

Credits
(Added L.1980, c. 649, § 4.)

McKinney's Navigation Law § 190-a, NY NAVIG § 190-a
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McKinney's Navigation Law § 191

§ 191. Joint rules and regulations

Currentness

The commissioner and the state comptroller are authorized to adopt, amend, repeal, and enforce such rules and regulations pursuant to the state administrative procedure act, as they may deem necessary to accomplish the purposes of this article.

Credits
(Added L.1977, c. 845, § 2. Amended L.1985, c. 35, § 11.)

McKinney's Navigation Law § 191, NY NAVIG § 191
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McKinney's Navigation Law § 192

§ 192. Enforcement of article; penalties

Currentness

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

Credits
(Added L.1977, c. 845, § 2.)

McKinney's Navigation Law § 192, NY NAVIG § 192
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McKinney's Navigation Law § 193

§ 193. Availability of additional remedies

Currentness

Nothing in this article shall be deemed to preclude the pursuit of any other civil or injunctive remedy by any person. The remedies provided in this article are in addition to those provided by existing statutory or common law, but no person who receives compensation for damages or cleanup and removal costs pursuant to any other state or federal law shall be permitted to receive compensation for the same damages or cleanup and removal costs under this article.

Credits
(Added L.1977, c. 845, § 2.)

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McKinney's Navigation Law § 194

§ 194. Severability

Currentness

If any section, subdivision, provision, clause or portion of this article is adjudged unconstitutional or invalid by a court of competent jurisdiction, the remainder of this article shall not be affected thereby.

Credits
(Added L.1977, c. 845, § 2.)

McKinney's Navigation Law § 194, NY NAVIG § 194
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McKinney's Navigation Law § 195

§ 195. Construction

Currentness

This article, being necessary for the general health, safety, and welfare of the people of this state, shall be liberally construed to effect its purposes.

Credits
(Added L.1977, c. 845, § 2.)

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McKinney's Navigation Law § 196

§ 196. Reports

Effective: April 13, 2015
Currentness

The commissioner and the administrator shall make an annual report to the legislature and the governor which shall describe the quality and quantity of spills of petroleum, the costs and damages paid by and recovered for the fund, and moneys spent pursuant to subdivision three of section one hundred eighty-six of this article including amounts spent for oil spill prevention and training activities conducted, and equipment purchased, and the economic and environmental impact on the state as a result of the administration of this article.

Credits
(Added L.1977, c. 845, § 2. Amended L.1985, c. 35, § 11; L.2015, c. 58, pt. X, § 6, eff. April 13, 2015.)

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McKinney's Navigation Law § 197

§ 197. Effect of federal legislation

Currentness

If the United States congress enacts legislation providing compensation in the event of a discharge of petroleum, the commissioner shall determine to what degree that legislation provides the needed protection for our citizens, businesses and environment and shall make the appropriate recommendations to the legislature for amendments to this article.

Credits
(Added L.1977, c. 845, § 2. Amended L.1985, c. 35, § 11.)

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Speaker Biographies

SETH D. FRIEDLAND

Mr. Friedland is a real estate transactions attorney, litigator and environmental lawyer, representing developers, owners, lenders, tenants, and petroleum industry businesses in a wide array of commercial real estate transactions and environmental matters, including acquisitions, divestments, dispositions, financing transactions, joint ventures, structuring, leases, ground leases, regulatory, compliance and related litigation matters. Mr. Friedland's practice encompasses all asset classes, with a particular concentration on the acquisition, divestment, development, operation, leasing and regulatory compliance of environmentally impacted and distressed properties.

Mr. Friedland represents petroleum marketers, jobbers, gas station owners, terminal operators, property owners and developers, in petroleum and environmental matters throughout the New York, New Jersey, and Connecticut areas, and in other parts of the country. He is a recognized expert on gas stations and petroleum marketing issues, and serves as a consultant to real estate lawyers, lenders and companies on litigation strategy, petroleum marketing, environmental matters, regulatory compliance, real estate and business transactions, risk avoidance, asset protection, and redevelopment of environmentally impacted and distressed properties.

Mr. Friedland has been the attorney of record in a variety of complex commercial litigation disputes, in state and federal courts and in administrative tribunals in New York, New Jersey, Florida, and other jurisdictions, and has handled numerous business transactions and commercial real estate transactions, and financing transactions in the petroleum marketing area, and involving high profile state and federal "Superfund" sites and other environmentally sensitive sites, and recently consummated several bulk purchases from major oil companies of multi-site service station portfolios in the greater New York metropolitan area and Connecticut. He has served as counsel and legal advisor to successful purchasers of abandoned properties with severe and complex environmental impacts, and works closely with multiple stakeholders and governmental regulatory agencies and departments, including USEPA, NYSDEC, NYC Mayor's Office of Environmental Remediation (OER), NJDEP, CTDEEP, on brownfield sites, and redeveloping abandoned sites.

Mr. Friedland is the founder and senior partner of the law firm Friedland Law, LLC (successor to Friedland Laifer & Robbins, LLP), with offices located in Manhattan. He also serves as counsel to Herrick, Feinstein LLP, a Manhattan law firm, concentrating on environmental and real estate matters. He was admitted to practice in 1978 in the State of New Jersey and in the United States District Court for New Jersey, and he was admitted in 1979 in the State of New York, and in the United States District Courts for Southern and Eastern Districts of New York. In 1981, he was admitted in the United States Court of Appeals for the Second Circuit and in the United States District Court for the District of Vermont. He was admitted to the Florida bar in 1997 and to the U.S. Supreme Court in 2013. He served as Assistant Regional Counsel for the United States Department of Energy in New York handling primarily gasoline price and allocation violation cases brought under the Economic Stabilization Act of 1973 during the energy crisis in the late 1970's. He is a member of the American Bar Association, the ABA Section on Natural Resources, Energy and Environmental Law, and the ABA Committee of State and Regional Environmental Cooperation. He is also a member of Petroleum Marketing Attorneys Group of the Rocky Mountain Mineral Law Foundation, the New York State Bar Association and the Navigation Law Task Force of the New York State Bar Association, the New Jersey Bar Association, and the Environmental Law Section of the New Jersey Bar Association. He is rated AV Preeminent by Martindale Hubbell and his peers. The highest level of professional excellence.

He is a graduate of Miami University, Oxford, Ohio, with a B.A. in Sociology. He received his J.D. from New York Law School.

Patrick Holloway

Patrick J. Holloway is the manager and attorney for the New York Environmental Protection and Spill Compensation Fund a/k/a the Oil Spill Fund in the Office of the State Comptroller.

Prior to coming to the Fund in 2005, Patrick was in private practice for 10 years in Cohoes and New Scotland, New York. His practice emphasized Real Property, Collections, Family and Wills & Estate law.

Patrick received a Bachelor of Arts degree with a double major in English and Political Science from Middlebury College and his Juris Doctor from Albany Law School.

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2. OSHA 1910.146 Confined Space Entry Certified
3. Rutgers University: Remediation Program
4. Office of Environmental Remediation (The Mayor's Office): Turbo Training Program

Professional Experience

1. Phase I Reports, Phase II Reports(RIR), UST Closure Reports

2. Remedial Action Work Plans (RWAP)

1. Development Due Diligence
2. Compliance Representation
3. OER “E” Designations
4. NYC Brownfield
5. Pre-development Consulting
6. Recovery Programs
7. Soil Management Plans
8. Design Groundwater Remediation Programs
9. Vapor Barriers and SSDS
10. Disposal Facilities Coordination

Richard Levato

Mr. Richard Levato is currently the CEO of Advanced Site Restoration, LLC. He has over twenty seven years' of experience in directing a creative and successful environmental company. He has extensive experience in soil management with city and governmental agencies, including but not limited to MTA, NYSDEC and OER compliance. As a resourceful leader, he uses creative solutions to solve complex remedial problems. Richard takes great pride in his ability to listen and understand the clients wants and is able to create and design remedial methodologies involving projects like bio-remediation, hazardous waste, sub-slab depressurization system and vapor barriers, ultimately making your environmental development concerns manageable and affordable. With a wide range of cost –effective strategies and remedies, and the knowledge of how to incorporate a best management practice plan involving petroleum consuming companies such as: oil companies, auto-repair shops, and gas stations, Richard has the outstanding ability to focus on the bottom line as if it was his own. He feels this is the formula for long term relationships with his clients.

Bonnie Riggi

Bonnie Riggi is the Section Head of the Oil Spill Unit in the Civil Recoveries Bureau of the New York Attorney General's Office in Albany. She received her J.D. from Albany Law School in 1993. After five years in private practice litigating a variety of cases involving personal injury defense, commercial litigation and debt collection, she began working in the Office of the Attorney General in 1999 as a staff attorney in the Oil Spill Unit. She has served as Section Chief for the Unit since 2002. Ms. Riggi has lectured before members of the Albany County bar on issues relating to Article 12 of the Navigation Law. She has also served as a panelist for Continuing Legal Education programs for the Office of the Attorney General.

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Douglas H. Zamelis, Attorney & Counselor at Law, Cooperstown, NY

For almost thirty years, Douglas H. Zamelis has been counseling and representing private and public sector clients in legal matters involving safety and health, the use of land, and our shared environment. Presently a solo practitioner, Zamelis was formerly employed by the New York State Department of Environmental Conservation, and was a partner at the law firms of Hancock & Estabrook, LLP and Green & Seifter Attorneys, PLLC and was Visiting Assistant Professor of Law at Syracuse University College of Law for the 2007-2008 academic year. Zamelis graduated from Cornell University, holds a Master of Science from the SUNY College of Environmental Science and Forestry, and received his law degree from Syracuse University College of Law. He is admitted to practice in all courts of the State of New York and the United States District Courts for the Northern, Western, and Southern Districts of New York. Zamelis is a member of the New York State Bar Association and is the Co-Chair of the Environmental Law Section's Task Force on Petroleum Spills. He is also a past chair of the Onondaga County Bar Association Environmental Law Section. Zamelis can be contacted at dzamelis@windstream.net .