STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 40 of the Environmental Conservation Law (ECL) and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

- by -

RO ACQUISTION CORP. and INDUSTRIAL FINISHING PRODUCTS INC.,

Respondents.

RULING OF THE COMMISSIONER ON MOTION TO VACATE DEFAULT

DEC File No. R2-20101029-390

In this administrative enforcement proceeding, respondents RO Acquisition Corp. (RO Acquisition) and Industrial Finishing Products Inc. (Industrial) (collectively, respondents), move to vacate a December 6, 2011 order of the Commissioner. The order was issued after respondents failed to respond to a motion for an order without hearing filed by staff of the New York State Department of Environmental Conservation (Department).

The order held that RO Acquisition was liable for multiple violations of the regulations governing chemical bulk storage (CBS) facilities at its facility at 820-840 Remsen Avenue, Brooklyn, New York (Remsen Avenue facility). The order imposed a penalty of $37,500 against RO Acquisition, but suspended $17,500 contingent upon RO addressing two violations that had not been corrected.

The order also held that Industrial was liable for multiple violations of the CBS regulations at its facility located at 465 Logan Street, Brooklyn, New York (Logan Street facility). The order imposed a penalty of $42,500 for the violations.

By motion dated May 7, 2012, respondents move to vacate the December 2011 order. Department staff opposes the motion by affirmation of John K. Urda, Esq., dated May 15, 2012.

The matter was assigned to Chief Administrative Law Judge (ALJ) James T. McClymonds. The Chief ALJ prepared the attached

summary report (Summary Report), which I adopt as my decision on this motion subject to my comments below.

As set forth in the summary report, Industrial has made a sufficient showing of a reasonable excuse for failure to respond to staff's prior motion for summary judgment, and also demonstrates a meritorious defense on both liability and penalty (see Summary Report, at 5). In contrast, RO Acquisition has failed to demonstrate adequate grounds for vacating the December 6, 2011 Commissioner's order.

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

I. The motion to vacate the Commissioner's December 6, 2011 order is granted with respect to respondent Industrial Finishing Products Inc. The matter is hereby remanded for a hearing on liability and penalty as to Industrial Finishing Products Inc., for the Logan Street facility.

II. The motion to vacate the Commissioner's December 6, 2011 order is denied as to respondent RO Acquisition Corp.

For the New York State Department
of Environmental Conservation

/s/

By: _____
Joseph J. Martens
Commissioner

Dated: July 23, 2012
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 40 of the Environmental Conservation Law of the State of New York (ECL) and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

SUMMARY REPORT

DEC File No. R2-20101029-390

- by -

RO ACQUISITION CORP. and INDUSTRIAL FINISHING PRODUCTS, INC.,

Respondents.

Appearances of Counsel:

-- Steven C. Russo, Deputy Commissioner and General Counsel (John K. Urda of counsel), for staff of the Department of Environmental Conservation

-- The Law Office of Frederick Eisenbud (Robert R. Dooley of counsel), for respondents RO Acquisition Corp. and Industrial Finishing Products, Inc.

SUMMARY REPORT OF THE CHIEF ADMINISTRATIVE LAW JUDGE ON MOTION TO VACATE DEFAULT

In this administrative enforcement proceeding, respondents RO Acquisition Corp. (RO Acquisition) and Industrial Finishing Products, Inc. (Industrial) (collectively, respondents), move to vacate a December 6, 2011 order of the Commissioner. The order was issued after respondents defaulted in answering a motion for an order without hearing filed by staff of the Department of Environmental Conservation (Department). For the reasons that follow, I recommend that the Commissioner grant the motion in part, vacate the order as to Industrial, and remand the matter for a hearing on liability and penalty as to Industrial. I further recommend that the Commissioner deny the motion as to RO Acquisition.

I. Facts and Procedural Background

RO Acquisition owns a chemical bulk storage (CBS) facility located at 820-840 Remsen Avenue, Brooklyn, New York (Remsen Avenue facility). Industrial owns a CBS facility located at 465 Logan Street, Brooklyn, New York (Logan Street facility).[1]

Department staff commenced this administrative enforcement proceeding by service of an April 21, 2011, motion for order without hearing in lieu of complaint. In the motion, which serves as the complaint in the proceedings, staff alleged multiple violations of the regulations governing CBS facilities (see 6 NYCRR parts 596, 598, and 599). The charges were based on staff inspections of the facilities conducted in May 2010.

Respondents failed to respond to staff's motion and, therefore, failed to file answers in this proceeding. However, the plant manager for RO Acquisition's Remsen facility, Andrew Galgano, sent an undated letter to the Department that was received on May 13, 2011 (Galgano letter). The Galgano letter stated that corrective actions were undertaken at the Remsen facility following Department staff's inspection. In response, Department staff noted in a letter dated August 1, 2011, that although many of the violations were corrected, violations relating to transfer station secondary containment and fill port labeling at the Remsen facility had not been corrected and remained outstanding.

The matter was assigned to Administrative Law Judge (ALJ) Molly T. McBride, who prepared a summary report on staff's motion, which is the Departmental equivalent of a CPLR 3212 motion for summary judgment. In her report, the ALJ noted that Industrial failed to appear in this proceeding, and recommended that staff's unopposed motion for summary judgment be granted on the issues of liability and penalty as against Industrial for the violations at the Logan Street facility (see Summary Report, at 5, 7-8).

[1] In their motion papers, respondents assert that Industrial is the operator of both facilities (see Dooley Affirmation in Support, at 5).

With respect to RO Acquisition, the ALJ took the Galgano letter into account, but concluded that the letter did not dispute liability for violations at the Remsen Avenue facility (see id. at 5). Accordingly, the ALJ recommended that staff be granted summary judgment on the issues of liability and penalty as against RO Acquisition as well (see id. at 7-8).

In the December 6, 2011, order, the Commissioner adopted the ALJ's recommendations, granted Department staff's summary judgment motion, and imposed a $42,500 penalty against Industrial and a $37,500 penalty against RO Acquisition (see Order, at 3-4). However, based upon the corrective measures detailed in the Galgano letter, the Commissioner suspended $17,500 of the $37,500 penalty imposed against RO Acquisition, provided that RO Acquisition submit documentation that the outstanding violations noted in Department staff's August 1, 2011, letter, were corrected, and pay the unsuspended portion of the penalty, both within 30 days of service of the order upon it (see id. at 2-3).

Based upon respondents' alleged failure to comply with the Commissioner's order, the Department's General Counsel requested in April 2012 that the New York State Attorney General bring an action to enforce the order. Thereafter, respondents filed the present motion requesting that the Commissioner's order be vacated, and that a hearing be scheduled. Department staff filed an affirmation in opposition to respondents' motion. The matter was assigned to the undersigned for preparation of a report and recommendation on the motion.

II. Discussion

A. Motion to Vacate Default

Respondents move to vacate the Commissioner's order citing 6 NYCRR 622.15(d) and CPLR 5015. Department staff argues that the Commissioner's order was issued in response to an unopposed motion for order without hearing pursuant to 6 NYCRR 622.12, and not in response to a staff motion for a default judgment pursuant to 6 NYCRR 622.15. Accordingly, staff asserts, respondents' motion to vacate a default judgment pursuant to 6 NYCRR 622.15(d) does not lie.

Technically, Department staff is correct. The December 2011 Commissioner order did not decide a motion for a default judgment pursuant to 6 NYCRR 622.15. Nevertheless, Commissioners have applied the CPLR 5015 standards when considering motions to vacate prior Commissioner orders, whether those prior orders were based upon a respondent's default or on the merits (see, e.g., Matter of RGLL, Inc., Ruling of the Commissioner, Nov. 21, 2006, at 2 [motion to reopen Commissioner order issued on motion for order without hearing in lieu of complaint]; Matter of Risi, Ruling of the Assistant Commissioner on Motion for Reconsideration, April 5, 2005, at 4-5; Matter of Mohawk Valley Organics, LLC, Commissioner's Ruling on Motion To Suspend Order and Reopen Hearing Record, Sept. 8, 2003, at 5).

Thus, the Commissioner has the inherent authority to consider respondents' motion to vacate the December 2011 order based upon respondents' claimed "excusable default" in answering the prior motion (see CPLR 5015[a][1]). A respondent seeking to vacate a prior order pursuant to CPLR 5015(a)(1) must demonstrate both a reasonable excuse for the default in appearing or answering, and the existence of a meritorious defense (see, e.g., Dominguez v Carioscia, 1 AD3d 396, 397 [2d Dept 2003]).

B. Industrial's Logan Street Facility

With respect to Industrial's Logan Street facility, respondents have demonstrated a reasonable excuse for the default in answering staff's prior summary judgment motion. Respondents assert that during staff's inspection of the facility, the plant manager, Ms. Sandra Jagarnauth, provided the inspector with information showing that at least two of the alleged violations did not occur. Specifically, Ms. Jagarnauth allegedly provided the inspector with the facility's spill prevention report, which showed that it was updated, reviewed, and approved annually, and which included a site map for the facility (see Jagarnauth Affidavit, ¶¶ 7, 24; see also Spill Prevention Report, Dooley Affirmation, Exh F, at Dooley Ex pgs 77, 96). This was in response to staff charges that Industrial failed to update the facility's spill prevention report, and failed to provide a facility site map.

Ms. Jagarnauth further asserts that when she received the May 19, 2010, notice of violation for alleged violations at

the Logan Street facility revealed by staff's inspection, she again provided the staff inspector with the facility's spill prevention report, and provided information that corrective measures were being undertaken to address any additional violations (see id. ¶ 15; Letter from Sandy Jagarnauth to Leszek Zielinski [6-14-10], Dooley Affirmation, Exh F). When respondents received Department staff's motion for order without hearing, Ms. Jagarnauth claims that, acting without an attorney, she sent a letter to Department staff's attorney again claiming that the facility's spill prevention report was in compliance, and that the remaining violations had been corrected (see Jagarnauth Affidavit, ¶¶ 22-26; Letter from Sandy Jagarnauth to John K. Urda, Esq. [6-2-11], Dooley Affirmation, Exh G).

Ms. Jagarnauth's actions in contacting the Department demonstrate a reasonable attempt to appear in this proceeding and answer the charges. Department staff's conclusory denial that it received Ms. Jagarnauth's letters is insufficient to rebut mailings that appear proper on their face. Thus, respondent Industrial has made a sufficient showing of a reasonable excuse for defaulting in answering staff's prior motion.

Industrial also demonstrates a meritorious defense. Industrial alleges that its spill prevention report is updated annually, and that the report contains a site plan and status reports. These facts, if proven, would establish that Industrial is not guilty of three of the causes of action charged against it. Moreover, Industrial's allegation that it corrected the remaining violations, while not a complete defense to liability, would nonetheless be considered in mitigation of any penalty to be imposed in this case. Accordingly, Industrial has established sufficient grounds for reopening its default in appearing in this proceeding, and vacating the order as against it.

C. RO Acquisition's Remsen Avenue Facility

RO Acquisition, on the other hand, has failed to demonstrate adequate grounds for vacating the Commissioner's order. First, although RO Acquisition did not file a formal response to Department staff's prior motion, RO Acquisition appeared in the matter through the Galgano letter, and was heard on the issue of penalty. Moreover, the Commissioner suspended a

portion of the penalty based upon the corrective measures Mr. Galgano claimed in his letter. Because RO Acquisition appeared through the Galgano letter and was heard on the issue of penalty, there is no default to be reopened in this proceeding.

In addition, RO Acquisition fails to raise a meritorious defense. RO Acquisition did not deny that the violations occurred, either in the Galgano letter or in its present papers. To the extent RO Acquisition seeks mitigation of the penalty for the violations based upon the corrective measures it took after the inspection of its facility, those corrective measures were considered by the Commissioner and formed the basis of the penalty suspension provided for in the order. Thus, the defense it seeks to have considered on this motion was already considered and taken into account on the prior motion.

RO Acquisition also claims that it did not receive Department staff's August 2011 response to the Galgano letter until after the order was issued in this proceeding. In the August 2011 letter, Department staff indicated that two violations had not been corrected. RO Acquisition asserts that if it had received the August 2011 letter, it would have taken further steps to correct the remaining violations, and that those steps would have been considered in further mitigation of the penalty in this case.

RO Acquisition's argument is unpersuasive. RO Acquisition's assertion that if it had known not all violations were corrected, it would have taken further corrective measures is not a valid defense. RO Acquisition admits that it received both the May 2010 notice of violation and the April 2011 motion for order without hearing, both of which detailed the violations charged against it. RO Acquisition provides no valid excuse for failing to address all outstanding violations when it made the corrections noted in the Galgano letter. Moreover, the Commissioner's order itself gave RO Acquisition 30 days to correct the two outstanding violations as a condition for the suspension of a portion of the penalty imposed in the order. Thus, RO Acquisition was on notice of the remaining violations, and given ample opportunity to correct those violations as a condition for a reduced penalty. Accordingly, RO Acquisition has failed to proffer a meritorious defense and its motion to vacate the Commissioner order should be denied.

III. Conclusion and Recommendation

In sum, Industrial has demonstrated a reasonable excuse in failing to respond to Department staff's prior motion in this matter, and a meritorious defense on both liability and penalty. Accordingly, I recommend that the Commissioner grant respondents' motion to vacate the Commissioner's order as to Industrial, sever the proceeding as against Industrial from the present proceeding, and remand the matter for a hearing on liability and penalty as to Industrial for the Logan Street facility.

With respect to the Remsen Avenue facility, RO Acquistion has failed to demonstrate a reasonable excuse or a meritorious defense. Accordingly, I recommend that the Commissioner deny the motion to vacate the Commissioner's order as to RO Acquisition, and continue the December 6, 2011, order as against RO Acquisition.

/s/

James T. McClymonds
Chief Administrative Law Judge

Dated: June 22, 2012
Albany, New York