

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

---

In the Matter of Alleged Violations  
of Articles 17 and 25 of the Environmental  
Conservation Law of the State of New York,  
Article 12 of the Navigation Law,  
and Titles 6 and 17 of the  
Official Compilation of Codes, Rules and  
Regulations of the State of New York,

Ruling on Motion for  
Order Without Hearing  
R2-20100628-177

-by-

WILLETS POINT ASPHALT CORP.,

Respondent.

---

**SUMMARY**

Staff of the Department of Environmental Conservation ("DEC Staff") commenced this administrative enforcement action by service of a notice of hearing and complaint on Willets Point Asphalt Corp. ("respondent"). The complaint alleged 25 separate violations that occurred on a site in Queens, New York (35-32 College Point Boulevard, Flushing, NY, tax block 4963, lots 212 and 249) where the respondent owned and operated an asphalt plant. The site contained a PBS facility (#2-032182) and tidal wetlands. The respondent timely served an answer generally denying the alleged violations. DEC Staff then served a motion for order without hearing with respect to one violation, namely that the respondent violated a consent order executed in 2007 which required the respondent to timely provide DEC Staff with the contract for sale of the site. DEC Staff seeks an order from the Commissioner finding the respondent liable and imposing a payable civil penalty of \$98,500. The respondent opposed the motion. This ruling grants, in part, DEC Staff's motion and finds the respondent liable for failing to timely provide the contract, as required by the 2007 consent order, but does not recommend the imposition of a penalty at this time. A hearing will be scheduled to address the remaining twenty four alleged violations and the appropriate civil penalty.

## PROCEEDINGS

This administrative enforcement matter was commenced by DEC Staff by the service on the respondent of a notice of hearing and complaint dated December 15, 2010. Service was completed by delivery of the papers by certified mail on December 20, 2010. The complaint alleged six causes of action (and involved twenty-five separate alleged violations). The first, second, and third causes of action (16 total violations) involve the oil spills that are alleged to have occurred at the site in 1987, 1991 and 2000. The fourth cause of action (2 violations) involves the respondent's alleged failure to notify DEC Staff prior to closing two underground tanks in 1988. The fifth cause of action (4 violations) involves alleged breaches of the 2007 consent order, and the sixth cause of action (3 violations) involves alleged violations in the tidal wetland at the site. In its complaint, DEC Staff seeks an order of the Commissioner: (1) finding the respondent liable for the violations alleged; (2) requiring payment of a civil penalty not to exceed the statutory maximum (which DEC Staff calculates to be in excess of \$2.1 billion); and (3) requiring investigation and remediation at the site.

A prehearing conference occurred on January 10, 2011. After this meeting, several letters were exchanged by the parties.

Respondent's attorney served an answer on DEC Staff by Federal Express on March 10, 2011. The answer generally denies DEC Staff's allegations and raises two affirmative defenses.

With papers dated May 5, 2011, DEC Staff moved for a motion for order without hearing. This motion seeks an order of the Commissioner finding the respondent liable for a single violation, specifically, failing to provide a copy of a contract of sale for the premises within five days of its execution or at least thirty days prior to any such sale, whichever was earlier, as required by the 2007 consent order, paragraph I (the first violation alleged in the fifth cause of action). DEC Staff also seeks a payable civil penalty of \$98,500. Attached to DEC Staff's motion were: (1) the affirmation of DEC Staff counsel John K. Urda, Esq.; (2) a copy of the notice of hearing and complaint; (3) a copy of the affidavit of service for the notice of hearing and complaint; (4) a copy of a January 11, 2011 letter from DEC Staff to respondent's counsel; (5) a copy of a January 31, 2011 letter from the respondent's counsel to DEC Staff; (6) a copy of the respondent's answer; (7) an affirmation

of DEC Staff counsel Udo Drescher, Esq.; (8) a copy of the 2007 consent order; (9) a copy of the deed for the site; and (10) a copy of a contract for sale of the site. Also included with DEC Staff's papers was a copy of the affidavit of service of the motion.

Respondent's counsel opposed DEC Staff's motion in papers received on May 31, 2011. Respondent's papers included: (1) the affirmation of Richard H. Wynn, Esq. with attachments; and (2) the affirmation of Dean E. Devoe, Esq. with attachments.

On May 31, 2010, this matter was assigned to me.

By letter dated June 1, 2011, DEC Staff requested permission to file a reply to respondent's papers, which was granted.

DEC Staff filed its reply in papers received on June 13, 2011. These papers included: (1) a reply affirmation by DEC Staff counsel John K. Urda; and (2) the reply affidavit of DEC Staff member Andrew C. Walker.

The respondent's attorney's sur-reply was received on July 11, 2011. These papers consisted of an affirmation of Richard H. Wynn, Esq., with attachments.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The respondent, Willets Point Asphalt Corp., is a domestic business corporation, having its principal executive office at 127-50 Northern Boulevard, Flushing, New York 11368-1520.
2. Willets Point Asphalt Corp. owned 35-32 College Point Boulevard, Flushing, New York (Queens Count Tax Block 4963 Lot 212 and 249) until January 8, 2008. At this address, the respondent operated an asphalt plant. The site abuts Flushing Creek.
3. Willets Point Asphalt Corp. entered into an order on consent with DEC Staff which became effective on August 8, 2007 (DEC file #R2-20070111-28 and #R2-20070130-47).
4. Willets Point Asphalt Corp. was required by paragraph I of the 2007 consent order to submit to DEC Staff a copy of any contract of sale of 35-32 College Point Boulevard, Flushing

within five days of the execution thereof or at least thirty days prior to any conveyance or sale, whichever was earlier.

5. Willets Point Asphalt Corp. entered into a contract for the sale of 35-32 College Point Boulevard, Flushing in May 2007 with Fulton/Max International (Holdings), Inc. This contract was later assigned to TDC Development and Construction Corp.
6. Willets Point Asphalt Corp. conveyed 35-32 College Point Boulevard, Flushing to TDC Development and Construction Corp. on January 8, 2008.
7. Willets Point Asphalt Corp. submitted a copy of the contract for sale to DEC Staff on January 22, 2008.
8. Willets Point Asphalt Corp. violated paragraph I of the 2007 consent order.

## **DISCUSSION**

DEC Staff argues that the respondent should be found liable for the first violation alleged in the fifth cause of action, failure to timely provide a copy of the contract of sale for the site, and the Commissioner should impose a total civil penalty of \$98,500. In addition, DEC Staff requests that a hearing be scheduled on the violations not addressed in this motion. The respondent's counsel acknowledges that the contract was submitted late, but argues that DEC Staff knew the property was being sold and that DEC Staff suffered no harm from the late submission.

### ***Liability***

There is no question of fact regarding the respondent's liability for the alleged violation. The last sentence of paragraph I of the 2007 consent order reads:

"Respondent shall submit to DEC a copy of any contract of sale of the premises or of a controlling interest therein within five days of the execution thereof or at least thirty days prior to any such conveyance or sale, whichever shall be earlier."

DEC Staff submits the affirmation of DEC Staff counsel Udo Drescher who states that the respondent transferred title to the site to TDC Development & Construction Corp. on January 8, 2008 (attached to the affirmation is a copy of the deed). Mr. Drescher states that he did receive an email from one of the respondent's attorneys on January 22, 2008 which purported to forward a copy of the contract for sale. However, according to Mr. Drescher, this document was not the contract required. Mr. Drescher concludes that DEC Staff had not received a copy of the contract for sale as of May 5, 2011.

The respondent does not dispute that the contract was not timely submitted. However, the respondent argues in its papers that its dealings with several DEC Staff members dealing with the termination of water, air and petroleum bulk storage permits for the site, as well as submissions relating to compliance with the 2007 consent order, clearly informed DEC Staff that the respondent was in the process of selling the site. In addition, the 2007 consent order acknowledges that the respondent was in the process of selling the site (paragraph 20).

Based on the evidence in the record and the respondent's admission that the contract was not timely submitted to DEC Staff, as required by the 2007 consent order, the respondent's liability for this violation is established.

### ***Civil Penalty***

DEC Staff seeks a total civil penalty of \$98,500, comprised of the payment of the \$61,000 suspended penalty from the 2007 consent order and an additional \$37,500 for the violation.

In his affirmation, DEC Staff counsel Urda states that the penalty is justified because: (1) it is important that the terms and conditions of consent orders be strictly complied with and failure to enforce would result in respondents disregarding and ignoring consent order requirements; and (2) the respondent in this case has been uncooperative and cavalier in its dealings with DEC Staff. In his reply affirmation, Mr. Urda elaborates and states that the timely submission of the contract was needed to ensure that any outstanding requirements of the 2007 consent order were properly completed prior to the sale.

In its papers, respondent disputes DEC Staff's characterization of its behavior and argues that the imposition of a large monetary penalty is not warranted without a hearing. Respondent argues that the late submission of the contract was

an excusable oversight and that DEC Staff knew that the property was to be sold from the numerous contacts between it and DEC Staff.

At this point in this proceeding it is not appropriate to recommend the imposition of a civil penalty for this single violation. In its complaint, DEC Staff is alleging an additional 24 causes of action, three of which involve other alleged violations of the 2007 consent order. In the interests of efficiency, the amount of civil penalty will be considered only after these other alleged violations have been addressed. Only after these other violations have been proven, disproven, or withdrawn would it be appropriate for me to make a recommendation regarding the appropriate civil penalty amount to the Commissioner.

### **CONCLUSION**

DEC Staff's motion for order without hearing is granted with respect to liability. However, given the procedural posture of this matter, a hearing will be scheduled on the other 24 alleged violations and the appropriate civil penalty. The parties will be contacted shortly for the purposes of scheduling the hearing in this matter.

/s/

---

P. Nicholas Garlick  
Administrative Law Judge

September 22, 2011  
Albany, NY

To: Willets Point Asphalt Corp.  
127-50 Northern Boulevard  
Flushing, New York 11368

Richard H. Wynn, Esq.  
Attorney for Respondent  
Willets Point Asphalt Corp.  
127-50 Northern Boulevard  
Flushing, New York 11368

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