

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Alleged Violations of Article 71 of  
the New York State Environmental Conservation Law,

- by -

**ORDER**  
DEC Case Nos.  
R2-20130215-54  
R2-20140512-261

**2918 BOSTON POST ROAD REALTY CORP. and  
ALERTON AVE INC.,**

Respondents.

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This administrative enforcement proceeding addresses the alleged violation by respondents 2918 Boston Post Road Realty Corp. and Alerton Ave Inc. (respondents) of Order on Consent Nos. R2-20130215-54 and R2-20140512-261, effective March 20, 2015 (2015 Order on Consent). The 2015 Order on Consent addressed several violations relating to respondents' petroleum bulk storage (PBS) facility No. 2-337587, located at 2918 Boston Post Road, Bronx, New York (facility). Respondent 2918 Boston Post Road Realty Corp. owned the facility and Alerton Ave Inc. operated the facility.

Staff of the New York State Department of Environmental Conservation (Department) served respondents, by service upon the Secretary of State pursuant to Business Corporation Law § 306 on January 30, 2017, with a notice of motion for order without hearing in lieu of complaint, together with (a) a supporting affirmation of counsel for staff, and (b) an affidavit of a staff record custodian. Respondents have not responded to staff's motion papers.

Department staff, in its motion for order without hearing in lieu of complaint, alleges that respondents failed to comply with provisions of the 2015 Order on Consent. Specifically, staff alleges that respondents failed to pay ten of twelve scheduled civil penalty payments totaling twelve thousand nine hundred sixteen and 66/100 dollars (\$12,916.66). See 2015 Order on Consent (attached as Exhibit A to the Affirmation of Karen L. Mintzer, Esq., dated January 24, 2017), Paragraph I A, at 3 (setting forth respondents' obligation to pay a civil penalty in the amount of fifteen thousand five hundred dollars [\$15,500] in twelve installments starting in April 2015 and ending in February 2016).

Staff seeks a Commissioner's order:

- (a) finding that respondents committed the alleged violation of the 2015 Order on Consent;
- (b) imposing on respondents a civil penalty in the amount of twenty-two thousand nine hundred sixteen and 66/100 dollars (\$22,916.66); and

(c) granting such other and further relief as may be deemed just, proper and equitable.

The matter was assigned to Administrative Law Judge (ALJ) Michael S. Caruso, who prepared the attached summary report, which I adopt as my decision in this matter, subject to my comments below. I concur with the ALJ's conclusion that Department staff has submitted evidence sufficient to establish its entitlement to judgment on the violation alleged in the motion. The evidence submitted by staff demonstrates as a matter of law that respondents have failed to comply with the 2015 Order on Consent.

Department staff has requested that I impose a civil penalty in the amount of twenty-two thousand nine hundred sixteen and 66/100 dollars (\$22,916.66), consisting of the remaining twelve thousand nine hundred sixteen and 66/100 dollars (\$12,916.66) due under the 2015 Order on Consent and an additional ten thousand dollars (\$10,000) for violating the 2015 Order on Consent.

To support the requested penalty, Department staff considered (a) ECL 71-1929(1), which provides for a penalty of up to \$37,500 per day against 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 of the ECL, or the rules, regulations, orders or determinations of the commissioner promulgated thereto;<sup>1</sup> (b) the Department's Civil Penalty Policy (DEE-1); (c) the Department's Order on Consent Enforcement Policy (DEE-2); and (d) evidence of staff's efforts to obtain respondents' compliance (see Summary Report, Findings of Fact Nos. 8-9).

Re-imposing a civil penalty for the amount that is due under the 2015 Order on Consent (that is, the twelve thousand nine hundred sixteen and 66/100 dollars [\$12,916.66]) is unnecessary here. Respondents remain obligated to comply with all terms and conditions of the 2015 Order on Consent, including but not limited to the payment of the remaining civil penalty that is due and owing. These obligations are continuing (see e.g. Matter of Rraci Real Estate Corp., Order of the Commissioner, November 4, 2014, at 2; Matter of West 63 Empire Associates LLC, Order of the Commissioner, August 9, 2012, at 2). This amount is long overdue, and I am directing that payment of the full amount due and owing, made payable to the Environmental Protection and Spill Compensation Fund, be made within thirty (30) days of the service of this order upon respondents.

Respondents' failure to comply with the 2015 Order on Consent that they previously signed renders them subject, jointly and severally, to civil penalties under ECL 71-1929(1). Based on this record, the proposed civil penalty of ten thousand dollars (\$10,000) for the violation of the 2015 Order on Consent, as set forth in the motion for order without hearing, is authorized and appropriate. I hereby direct that this penalty be made in the amount of ten thousand dollars (\$10,000) to the Department within thirty (30) days of the service of this order upon them.

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<sup>1</sup> The violations cited in the 2015 Order on Consent relate to regulations promulgated pursuant to title 10 of ECL article 17.

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

- I. Department staff's motion for order without hearing is granted. Respondents 2918 Boston Post Road Realty Corp. and Alerton Ave Inc. are adjudged to have violated Order on Consent Nos. R2-20130215-54 and R2-20140512-261 by failing to pay the remaining twelve thousand nine hundred sixteen and 66/100 dollars (\$12,916.66) of the civil penalty which is due and owing under the terms of the Order on Consent.
- II. Within thirty (30) days of the service of this order upon respondents 2918 Boston Post Road Realty Corp. and Alerton Ave Inc., respondents shall submit to the Department a certified check, cashier's check or money order made payable to the Environmental Protection and Spill Compensation Fund in the amount of twelve thousand nine hundred sixteen and 66/100 dollars (\$12,916.66) for the remaining civil penalty assessed by Order on Consent Nos. R2-20130215-54 and R2-20140512-261 and which is due and owing. The payment shall be mailed or otherwise delivered to the address set forth in paragraph IV of this order.
- III. I also hereby impose a civil penalty in the amount of ten thousand dollars (\$10,000), jointly and severally, on respondents for their violation of the terms and conditions of Order on Consent Nos. R2-20130215-54 and R2-20140512-261. Within thirty (30) days of the service of this order upon respondents 2918 Boston Post Road Realty Corp. and Alerton Ave Inc., either respondent or both respondents shall pay the civil penalty in the amount of ten thousand dollars (\$10,000) in the form of a certified check, cashier's check, or money order payable to the New York State Department of Environmental Conservation.
- IV. The payments required by paragraphs II and III of this order shall be mailed or otherwise delivered to the following address:

Karen L. Mintzer, Esq.  
Regional Attorney  
NYS Department of Environmental Conservation, Region 2  
One Hunter's Point Plaza  
47-40 21<sup>st</sup> Street  
Long Island City, New York 11101-5401.
- V. All questions and correspondence regarding this order shall be addressed to Karen L. Mintzer, Esq., at the address referenced in paragraph IV of this order.

VI. The provisions, terms and conditions of this order shall bind respondents 2918 Boston Post Road Realty Corp. and Alerton Ave Inc., and their agents, successors and assigns, in any and all capacities.

For the New York State Department  
of Environmental Conservation

By: \_\_\_\_\_/s/\_\_\_\_\_  
Basil Seggos  
Commissioner

Dated: May 31, 2017  
Albany, New York

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Alleged Violation of Article 71 of  
the New York State Environmental Conservation Law,

- by -

**2918 BOSTON POST ROAD REALTY CORP., and  
ALERTON AVE INC.,**

Respondents.

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**SUMMARY REPORT**

DEC Case Nos.

R2-20130215-54

R2-20140512-261

Background

By notice of motion for order without hearing in lieu of complaint dated January 24, 2017, staff of the New York State Department of Environmental Conservation (Department) commenced this enforcement proceeding against respondents 2918 Boston Post Road Realty Corp. and Alerton Ave Inc. (respondents) alleging that respondents violated a March 20, 2015 Order on Consent Nos. R2-20130215-54 and R2-20140512-261 (2015 Consent Order). Staff served the notice of motion with supporting papers on respondents by serving the Secretary of State pursuant to Business Corporation Law § 306 on January 30, 2017.

Staff's papers consist of a notice of motion dated January 24, 2017, the Affirmation of Karen L. Mintzer, Esq. dated January 24, 2017 (Mintzer Affirmation), attaching five exhibits and the Affidavit of Regina Santos Seetahal. See Appendix A attached hereto. Staff alleges that respondents entered into the 2015 Consent Order to resolve several violations relating to a petroleum bulk storage (PBS) facility owned by respondent 2918 Boston Post Road Realty Corp. and operated by respondent Alerton Ave Inc. and respondents have failed to comply with the terms of the 2015 Consent Order. The PBS facility is located at 2918 Boston Post Road, Bronx, New York.

Respondents have not responded to staff's motion papers, although a response was due by February 20, 2017. See Section 622.12(c) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR).

Staff requests that the Commissioner issue an order: (i) finding that respondents violated the 2015 Consent Order by failing to pay twelve thousand nine hundred sixteen and 66/100 dollars (\$12,916.66) of the fifteen thousand five hundred dollar (\$15,500) penalty; (ii) directing respondents to pay the twelve thousand nine hundred sixteen and 66/100 dollars (\$12,916.66) unpaid penalty; (iii) imposing on respondents an additional civil penalty in the amount of ten thousand dollars (\$10,000) for a total penalty of twenty-two thousand nine hundred sixteen and

66/100 dollars (\$22,916.66); and (iv) granting such other and further relief as may be deemed just, proper and equitable. See Mintzer Affirmation at 5, Wherefore Clause.

### Findings of Fact

1. Respondents 2918 Boston Post Road Realty Corp. and Alerton Ave Inc. are active domestic business corporations. See Mintzer Affirmation ¶ 4; Exhibit C.
2. Respondent 2918 Boston Post Road Realty Corp. owned a petroleum bulk storage (PBS) facility (facility) located at 2918 Boston Post Road, Bronx, New York from December 17, 2001 until August 3, 2016. See Mintzer Affirmation ¶ 3; Exhibit A ¶ 3; Exhibit B.
3. Respondent Alerton Ave Inc. operated the facility. See Mintzer Affirmation ¶ 3; Exhibit A ¶ 3.
4. As a result of PBS violations at respondents' facility, respondents entered into a consent order with the Department. See Mintzer Affirmation ¶¶ 5 and 6; Exhibit A.
5. Respondents signed the consent order on March 13, 2015, and the consent order became effective on March 20, 2015, upon the signature of the Regional Director for Region 2. See Mintzer Affirmation ¶ 6; Exhibit A.
6. In the 2015 Consent Order, respondents admitted the violations and agreed to pay a civil penalty in the amount of fifteen thousand five hundred dollars (\$15,500), payable in twelve installments of one thousand two hundred ninety-one and 67/100 dollars (\$1,291.67) due on the 15th of each month. The first installment was due March 15, 2015. See Mintzer Affirmation ¶ 6; Exhibit A.
7. The Department received the March and April 2015 payments of one thousand two hundred ninety-one and 67/100 dollars (\$1,291.67) from respondents. See Mintzer Affirmation ¶ 7; Exhibit D; Seetahal Affidavit ¶ 4.
8. On September 30, 2016, Department staff advised respondents that respondents were in arrears on the penalty payments, in violation of the 2015 Consent Order, and directed respondents to appear at a calendar call scheduled for October 26, 2016 or pay the remaining balance of twelve thousand nine hundred sixteen and 66/100 dollars (\$12,916.66). See Mintzer Affirmation ¶ 9; Exhibit E.
9. Respondents did not appear at the October 26, 2016 calendar call or submit payment of the remaining balance of the penalty. See Mintzer Affirmation ¶ 10.
10. As of the January 24, 2017 commencement of this proceeding, respondents have failed to pay the remaining civil penalty of twelve thousand nine hundred sixteen and 66/100 dollars (\$12,916.66). See Mintzer Affirmation ¶ 8; Seetahal Affidavit ¶¶ 4 and 5.

## Discussion

Section 622.12 of 6 NYCRR provides for an order without hearing when upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party. “Summary judgment is appropriate when no genuine, triable issue of material fact exists between the parties and the movant is entitled to judgment as a matter of law.” (Matter of Frank Perotta, Partial Summary Order of the Commissioner, January 10, 1996, at 1, adopting ALJ Summary Report.)

CPLR 3212(b) provides that a motion for summary judgment shall be granted, “if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” Once the moving party has put forward a prima facie case, the burden shifts to the non-movant to produce sufficient evidence to establish a triable issue. (Matter of Locaparra, Commissioner’s Decision and Order, June 16, 2003.)

Respondents have not submitted any response to the Department staff’s motion and therefore have failed to provide any material fact that would require a hearing. On an unopposed motion for order without hearing, the issue is whether Department staff has established its entitlement to summary judgment on the violations alleged in the motion. See Matter of Edelstein, Order of the Commissioner, July 18, 2014, at 2; see also Matter of Hunt, Decision and Order of the Commissioner, July 25, 2006, at 7 n2.

Pursuant to 6 NYCRR § 622.12(a), staff has supported its motion for an order without hearing with the affidavit of an administrative assistant who is responsible for processing penalty payments and is custodian of those records.

Based on review of the affidavit, affirmation and the exhibits attached thereto, I conclude that Department staff’s proof presents a prima facie showing that respondents violated the 2015 Consent Order by failing to pay the remaining twelve thousand nine hundred sixteen and 66/100 dollars (\$12,916.66) of civil penalty. I therefore recommend that the Commissioner grant staff’s unopposed motion for order without hearing, and hold respondents liable for the violation of the 2015 Consent Order.

### Penalty

Pursuant to Environmental Conservation Law (ECL) § 71-1929(1), the Commissioner may impose a penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day on any 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 ... orders ... of the commissioner promulgated thereto.” Respondents failed to make the payments due under the 2015 Consent Order starting with the payment due May 15, 2015, and failed to make any payments thereafter. I determine the maximum penalty from May 15, 2015 to the commencement of this proceeding, January 24, 2017 or 620 days to be \$23,250,000.

Department staff requests that the Commissioner impose a civil penalty in the amount of \$10,000 for violation of the 2015 Consent Order. See Mintzer Affidavit ¶ 11. To support the requested penalty, staff discussed several factors consistent with the Department's Civil Penalty Policy (DEE-1) and the Order on Consent Enforcement Policy (DEE-2), and recounted the extensive efforts of staff to obtain respondents' compliance with the Consent Order. See id. ¶¶ 14-17.

Because respondents failed to honor the commitments that respondents made in the 2015 Consent Order, and failed to appear in this proceeding or provide any basis for their failure to comply with the 2015 Consent Order, I find that staff's request for the imposition of a civil penalty of \$10,000 is authorized and appropriate in this matter.

#### Conclusion of Law

By failing to submit the remaining penalty of twelve thousand nine hundred sixteen and 66/100 dollars (\$12,916.66), respondents violated Order on Consent Nos. R2-20130215-54 and R2-20140512-261.

#### Recommendations

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

1. Granting Department staff's motion for order without hearing pursuant to 6 NYCRR 622.12;
2. Holding that respondents 2918 Boston Post Road Realty Corp. and Alerton Ave Inc. committed the violation of Order on Consent Nos. R2-20130215-54 and R2-20140512-261, as alleged in the motion for order without hearing in lieu of complaint;
3. Directing respondents 2918 Boston Post Road Realty Corp. and Alerton Ave Inc. to pay the amount of twelve thousand nine hundred sixteen and 66/100 dollars (\$12,916.66) for the remaining civil penalty assessed by Order on Consent Nos. R2-20130215-54 and R2-20140512-261 within thirty (30) days of service of the Commissioner's order on respondents;
4. Directing respondents 2918 Boston Post Road Realty Corp. and Alerton Ave Inc. to pay an additional civil penalty in the amount of ten thousand dollars (\$10,000) within thirty (30) days of service of the Commissioner's order on respondents;

5. Directing respondents 2918 Boston Post Road Realty Corp. and Alerton Ave Inc.to submit the penalty payments to the following:

Karen L. Mintzer, Esq.  
Regional Attorney  
NYSDEC Region 2  
47-40 21<sup>st</sup> Street  
Long Island City, New York 11101-5407; and

6. Directing such other and further relief as may be deemed just, proper and equitable.

\_\_\_\_\_/s/\_\_\_\_\_  
Michael S. Caruso  
Administrative Law Judge

Dated: April 25, 2017  
Albany, New York

## APPENDIX A

*Matter of 2918 Boston Post Road Realty Corp. and Alerton Ave Inc.*

DEC File Nos. R2-20130215-54 and R2-20140512-261

Motion for Order Without Hearing

1. Notice of Motion for an Order Without a Hearing, dated January 24, 2017
2. Affirmation of Karen L. Mintzer in Support of Motion for Order Without a Hearing, dated January 24, 2017, attaching the following exhibits:
  - A. Fully executed Order on Consent Nos. R2-20130215-54 and R2-20140512-261
  - B. Deed dated August 3, 2016
  - C. NYS Department of State Entity Information Sheets regarding 2918 Boston Post Road Realty Corp. and Alerton Ave Inc., reflecting information through January 23, 2017
  - D. Receipts and checks for payments received on March 19, 2015 and April 21, 2015
  - E. Notice of Non-Compliance, Notice of Calendar Call dated September 30, 2016 with USPS tracking attached
3. Affidavit of Regina Santos Seetahal in Support of Motion for Order Without a Hearing, sworn to January 24, 2017
4. Affidavits of Service of Drew Wellette, sworn to April 5, 2017