

NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Articles 17
and 71 of the Environmental Conservation Law of the
State of New York,

ORDER

DEC Case No.
R2-20160309-96

-by-

300 WEST END AVE. ASSOCIATES CORP.,

Respondent.

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (the Department or DEC) that respondent 300 West End Ave. Associates Corp. (300 West End Ave. or respondent) failed to pay the civil penalty imposed by an order of consent dated January 4, 2016 (DEC File No. R2-20141208-569) (consent order). The consent order was intended to resolve respondent's violations of various regulatory provisions of the State's petroleum bulk storage regulations at its facility at 300 West End Avenue, New York, New York (see Exhibit C [paragraph 4] to the Affirmation of John K. Urda, dated March 31, 2016 [Urda Affirm]).

Staff seeks an order: (1) finding that 300 West End Ave did not pay the civil penalty of \$6,750 that was imposed by the consent order; (2) directing respondent to pay the civil penalty of \$6,750; and (3) assessing an additional civil penalty of \$10,000 for respondent's failure to comply with the terms and conditions of the consent order.

Staff commenced this proceeding by service of a notice of motion for an order without hearing in lieu of complaint dated March 31, 2016, together with supporting papers, upon 300 West End Ave. Staff served the motion papers by certified mail, return receipt requested, and 300 West End Ave. received them on April 1, 2016 (see Summary Report at 3 [Findings of Fact 1 and 2]).¹

Administrative Law Judge (ALJ) Daniel P. O'Connell of the DEC's Office of Hearings and Mediation Services (OHMS) was assigned to this matter, and prepared the attached summary report. I adopt the summary report as my decision in this matter, subject to my comments below.

¹ A response to a motion for order without hearing is due within 20 days after receipt of the motion, and the failure to file a response constitutes a default (see 6 NYCRR 622.12[b] and [c]). Respondent 300 West End Ave.'s response was due by April 21, 2016. To date, 300 West End Ave has not responded to the Department's March 31, 2016 motion for order without hearing. Accordingly, respondent 300 West End Ave. has defaulted, and has waived its right to a hearing.

Liability

Respondent 300 West End Ave. owns and operates a registered petroleum bulk storage (PBS) facility at a residential building located at 300 West End Avenue, New York, New York. The facility consists of one 10,000-gallon fuel oil tank (see Summary Report at 3 [Finding of Fact No. 4]). During an October 31, 2014 inspection, Department staff observed violations of various PBS regulations and subsequently a consent order was executed which became effective on January 4, 2016 (see id. at 3 [Findings of Fact Nos. 5 and 6]).

Section I.A of the consent order required 300 West End Ave. to pay a civil penalty of \$6,750, and to provide that payment when the respondent signed the consent order and returned the signed copy to the Department (see Urda Affirm, Exhibit C [§ I.A.]). Respondent has failed to pay the civil penalty imposed by the consent order and, accordingly, has violated the consent order's terms and conditions (see Summary Report at 4 [Finding of Fact No. 16], 5-6).

Civil Penalty

Respondent continues to be obligated to pay the \$6,750 it owes under the terms and conditions of the consent order. As provided thereunder, the civil penalty of \$6,750 is to be paid by check or money order payable to the Environmental Protection and Spill Compensation Fund.

The consent order at issue here addressed violations of regulations promulgated pursuant to title 10 of Environmental Conservation Law (EDL) article 17. ECL 71-1929(1) provides for a civil penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day against 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” (emphasis added). Respondent's failure to comply with the terms and conditions of the consent order subjects it to further penalty pursuant to ECL 71-1929(1). Department staff here is requesting a civil penalty for violation of the consent order in the amount of \$10,000.

Respondent has failed to respond to Department staff's motion for an order without hearing, and has not otherwise provided any reason or justification for its failure to comply with the consent order. Although staff considered requesting a higher civil penalty for violation of the consent order, it noted that its penalty request was “significantly lower” than in other cases because the corrective action at the facility “is complete” (see Urda Affirm ¶ 21).

Based on the record of this proceeding, Department staff's request for an additional civil penalty in the amount of \$10,000 for respondent's violation of the consent order is authorized and appropriate.

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

- I. Pursuant to 6 NYCRR 622.12, Department staff's motion for order without hearing is granted.
- II. Respondent 300 West End Ave. Associates Corp. is adjudged to have failed to comply with consent order DEC File No. R2-20141208-569 and to have violated ECL 71-1929(1).
- III. Within thirty (30) days of the service of this order on respondent, respondent shall submit the following two payments:
 - A. Six thousand seven hundred and fifty dollars (\$6,750), representing the outstanding unpaid amount of the civil penalty under consent order DEC File No. R2-20141208-569. Payment of the six thousand seven hundred and fifty dollars (\$6,750) shall be by cashier's check, certified check, or money order drawn to the order of the **Environmental Protection and Spill Compensation Fund**; and
 - B. A civil penalty in the amount of ten thousand dollars (\$10,000) for respondent's violation of consent order DEC File No. R2-20141208-569. Payment of the civil penalty in the amount of ten thousand dollars (\$10,000) shall be by cashier's check, certified check, or money order drawn to the order of the **New York State Department of Environmental Conservation**.
- IV. Both payments referenced in paragraph III of this order shall be mailed or hand-delivered to:

Karen Mintzer, Esq.
Regional Attorney
NYSDEC, Region 2
One Hunter Point Plaza
47-40 21st Street
Long Island City, NY 11101-5407
- V. Any questions or other correspondence regarding this order shall also be addressed to Karen Mintzer, Esq. at the address referenced in paragraph IV of this order.

- VI. The provisions, terms and conditions of this order shall bind respondent 300 West End Ave. Associates Corp. and its agents, successors and assigns, in any and all capacities.

For the New York State Department of
Environmental Conservation

_____/s/_____
Basil Seggos
Commissioner

Dated: Albany, New York
October 3, 2017

NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17
of the Environmental Conservation Law of the
State of New York, by

Summary Report on Motion for
Order without Hearing

DEC Case No.:
R2-20160309-96

300 WEST END AVE. ASSOCIATES CORP.,

Respondent.

November 7, 2016

Proceedings

Staff from the Region 2 office (Long Island City) of the New York State Department of Environmental Conservation (Department staff or staff) commenced this administrative enforcement proceeding with service of a notice of motion for an order without hearing, dated March 31, 2016, and supporting papers, upon 300 West End Ave. Associates Corp.¹ (300 West End Ave or respondent). Department staff served the motion papers by certified mail, return receipt requested, and 300 West End Ave received them on April 1, 2016 (*see* Urda Affirmation of Service dated May 4, 2016, ¶¶ 1 and 3, Exhibit A).

Staff seeks an Order from the Commissioner: (1) finding that 300 West End Ave did not pay the civil penalty stipulated in an Order on Consent, dated January 4, 2016 (DEC File No. R2-20141208-569), which resolved violations of the PBS regulations;² (2) directing respondent to pay the stipulated civil penalty of \$6,750; and (3) assessing an additional civil penalty of \$10,000 for failing to comply with the terms and conditions of the Order on Consent. The notice of motion advised 300 West End Ave that a response to the motion was due within 20 days following its receipt. The notice of motion advised further that the failure to respond in a timely manner would result in a default and waiver of 300 West End Ave's right to respond to the motion or to have a hearing.

With a cover letter dated May 4, 2016, Department staff provided the Office of Hearings and Mediation Services (OHMS) with a copy of the motion papers, which included an affirmation of service dated May 4, 2016. A list of the documents included with the motion papers is appended to this summary report as Appendix A.

¹ The corporate name as filed with the New York State Department of State (*see* Mr. Urda's March 31, 2016 affirmation [Urda Aff.] ¶ 3, Exhibit A).

² Effective October 11, 2015, Title 6 of the Official Compilation of Codes, Rules, and Regulations (6 NYCRR) parts 612, 613 and 614 were repealed and replaced by new part 613. However, for purposes of the violations considered in this matter the prior parts 612, 613 and 614 apply.

The captioned enforcement proceeding was assigned to me on June 1, 2016. Upon review of staff's papers, I have prepared this summary report, which recommends that the Commissioner grant the unopposed motion.

I. Motion for Order Without Hearing

Pursuant to 6 NYCRR 622.3(b)(1), Department staff may commence an administrative enforcement proceeding by serving a motion for order without hearing, in lieu of a complaint (*see also* 6 NYCRR 622.12[a]). According to the motion, 300 West End Ave owns and operates a duly registered petroleum bulk storage (PBS) facility at a residential building located at 300 West End Avenue, New York, New York. The PBS facility (No. 2-217905) consists of one 10,000 gallon fuel oil tank. (*See* Urda Aff. ¶ 4, Exhibit B.) During an October 31, 2014 inspection, Department staff observed violations of the PBS regulations that were ultimately resolved with an Order on Consent (*see* Urda Aff. ¶ 5, Exhibit C).

After numerous reminders from staff, a representative from 300 West End Ave subsequently signed the Order on Consent on December 15, 2015, and the Regional Director from DEC Region 2 signed the Order on Consent on January 4, 2016. Whereupon, the Order on Consent became effective. Section I.A of the Order on Consent required 300 West End Ave to pay a civil penalty of \$6,750, and to provide payment when the respondent signed the Order on Consent and returned the signed copy to the Department's regional office. (*See* Urda Aff. ¶¶ 5 and 6, Exhibit C at 2.)

The March 31, 2016 motion alleged that 300 West End Ave violated the terms and conditions of the January 4, 2016 Order on Consent when 300 West End Ave failed to include payment of the \$6,750 civil penalty with the signed copy of the Order on Consent. As noted above, staff seeks an Order from the Commissioner that directs 300 West End Ave to pay the stipulated civil penalty of \$6,750, and which assesses an additional civil penalty of \$10,000 for not paying the assessed civil penalty as required by the terms and conditions of the January 4, 2016 Order on Consent. (*See* Urda Aff. ¶¶ 12 and 15.)

II. Response

A response to a motion for order without hearing is due within 20 days after receipt of the motion, and the failure to file a response constitutes a default (*see* 6 NYCRR 622.12[b] and [c]). 300 West End Ave received Department staff's March 31, 2016 notice of motion and supporting papers on April 1, 2016 (*see* Urda Affirmation of Service dated May 4, 2016, Exhibit A.) Therefore, 300 West End Ave's response was due by April 21, 2016.

To date, neither the Region 2 Department staff nor OHMS has received a response from 300 West End Ave to the March 31, 2016 motion for order without hearing. Therefore, 300 West End Ave has defaulted, which constitutes a waiver of its right to a hearing (*see* 6 NYCRR 622.12[b]).

Findings of Fact

The facts established as a matter of law are:

1. By certified mail, return receipt requested, Department staff served a copy of the March 31, 2016 notice of motion for an order without hearing and supporting papers upon 300 West End Ave. Association Corp. (300 West End Ave) at Douglas Elliman Property Management, Compliance Department, 675 Third Avenue, 6th Floor, New York, New York 10017 (*see* Urda Affirmation of Service dated May 4, 2016).
2. On April 1, 2016, 300 West End Ave received staff's March 31, 2016 notice of motion for an order without hearing and supporting papers. 300 West End Ave's response was due by April 21, 2016 (*see* 6 NYCRR 622.12[b] and [c]). 300 West End Ave did not respond to the March 31, 2016 motion. (*See* Urda Affirmation of Service dated May 4, 2016, Exhibit A.)
3. 300 West End Ave is an active domestic business corporation authorized to do business in the State of New York. 300 West End Ave's business address is c/o Douglas Elliman Property Management, Compliance Department, 675 Third Avenue, 6th Floor, New York, New York 10017. (*See* Urda Aff. ¶ 3, Exhibit A.)
4. 300 West End Ave owns a residential property at 300 West End Avenue, New York, New York 10023, where it owns and operates a petroleum bulk storage (PBS) facility. The PBS facility consists of one 10,000 gallon tank for #2 fuel oil. (*See* Urda Aff. ¶ 4, Exhibits B and C).
5. During an inspection of 300 West End Ave's PBS facility on October 31, 2014, Department staff observed several violations of 6 NYCRR parts 612 and 613, in effect at the time. Among the observed violations, 300 West End Ave failed to renew the registration of its PBS facility, which had expired in October 2007. (*See* Urda Aff. ¶ 5, Exhibit C.)
6. The violations at 300 West End Ave's PBS facility were purportedly resolved with an Order on Consent, effective January 4, 2016 (DEC File No. R2-20141208-569). Subsequently, 300 West End Ave renewed the registration for its PBS facility (No. 2-217905). The registration is effective through October 15, 2017. (*See* Urda Aff. ¶ 5, Exhibit B.)
7. Section I.A of the January 4, 2016 Order on Consent assessed a civil penalty of \$6,750, and directed 300 West End Ave to include the payment when it returned the signed Order on Consent to the Region 2 office (*see* Urda Aff. ¶ 7, Exhibit C at 2).
8. At the Department's Region 2 office, Ms. Seetahal's regular duties include receiving and processing civil penalty payments assessed pursuant to orders on consent, and the Commissioner's orders. Ms. Seetahal is also the custodian of records related to civil penalty payments. (*See* Regina Seetahal's March 31, 2016 affidavit [Seetahal Aff.] ¶ 3.)

9. Department staff has no record to show that 300 West End Ave paid, either in whole or in part, the \$6,750 civil penalty assessed in the January 4, 2016 Order on Consent (*see* Seetahal Aff. ¶¶ 4 and 5).
10. 300 West End Ave has yet to pay the stipulated civil penalty. The period from January 4, 2016, which is the effective date of the Order on Consent, to the date of the motion (*i.e.*, March 31, 2016) is 88 calendar days. (*See* Urda Aff. ¶¶ 9 and 13.)
11. With an email dated May 13, 2015 Mr. Urda sent an unsigned copy of the Order on Consent to Donna Auletta. Ms. Auletta is employed by 300 West End Ave. In his May 13, 2015 email, Mr. Urda set May 29, 2015 as the date by which 300 West End Ave had to return the signed Order on Consent to the regional office in order to settle the violations observed during Department staff's October 31, 2014 inspection. (*See* Urda Aff. ¶ 6, Exhibit D.)
12. In addition, Mr. Urda's May 13, 2015 email advised 300 West End Ave that the terms and conditions of the Order on Consent required respondent to submit the full amount of the civil penalty (\$6,750) with the signed Order on Consent. (*See* Urda Aff. ¶¶ 6 and 7, Exhibit D.)
13. When 300 West End Ave did not return the signed Order on Consent, Department staff sent respondent a notice of calendar call dated December 11, 2015. The December 11, 2015 notice advised 300 West End Ave that it was to appear at a calendar call on December 29, 2015 in order to discuss the violations observed during Department staff's October 31, 2014 inspection. (*See* Urda Aff. ¶ 6, Exhibit D.)
14. On December 15, 2015, Donna Auletta signed the Order on Consent as the managing agent for 300 West End Ave (*see* Urda Aff. Exhibit C at 4).
15. With his January 6, 2016 email, Mr. Urda provided Ms. Auletta with a copy of the fully executed Order on Consent. The Order on Consent became effective on January 4, 2016 when the Regional Director for the Department's Region 2 office signed the Order on Consent on behalf of the Commissioner. (*See* Urda Aff. ¶ 8, Exhibit E.)
16. In his January 6, 2016 email to Ms. Auletta, Mr. Urda noted that Department staff had not received the \$6,750 civil penalty stipulated in the Order on Consent (*see* Urda Aff. Exhibit E).
17. In an email dated January 6, 2016, Ms. Auletta inquired of John Janangelo when 300 West End Ave would be providing a check for the civil penalty assessed in the Order on Consent to the regional office. Ms. Auletta copied Mr. Urda on her January 6, 2016 email. (*See* Urda Aff. Exhibit E.)

Discussion

A motion for order without hearing is governed by the same standards as are applicable to motions for summary judgment under the CPLR (*see* 6 NYCRR § 622.12[d]). 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; *Matter of Hunt*, Decision and Order of the Commissioner, July 25, 2006, at 7 n2).

I. Service of Department staff's Motion

Pursuant to 6 NYCRR 622.3(b)(1) and 622.12 (a), staff may commence an administrative enforcement proceeding by serving a motion for order without hearing, in lieu of a complaint. Service must be by personal service consistent with the CPLR or by certified mail (*see* 6 NYCRR 622.3[a][3]).

By certified mail, return receipt requested, Department staff served a copy of the March 31, 2016 notice of motion for an order without hearing and supporting papers upon 300 West End Ave at Douglas Elliman Property Management, Compliance Department, 675 Third Avenue, 6th Floor, New York, New York 10017. On April 1, 2016, 300 West End Ave received the March 31, 2016 motion. (*See* Urda Affirmation of Service dated May 4, 2016, Exhibit A.)

With service of the March 31, 2016 notice of motion for an order without hearing and supporting papers upon 300 West End Ave, by certified mail, return receipt requested, Department staff duly commenced the captioned enforcement proceeding in a manner consistent with the requirements outlined in 6 NYCRR 622.3 and 622.12.

II. Liability

With respect to the alleged violation, I conclude that staff has met the initial burden to show that 300 West End Ave failed to pay a civil penalty of \$6,750 as required by the terms and conditions of the January 4, 2016 Order on Consent. Pursuant to 6 NYCRR 622.12(a), Department staff supported the motion for order without hearing with the following.

Attached to Mr. Urda's March 31, 2016 affirmation as Exhibit A is a copy of 300 West End Ave's New York State Department of State, Division of Corporations, entity information page. Exhibit B to Mr. Urda's March 31, 2016 affirmation are copies of the current PBS Facility Information Report, and the PBS certificate. A copy of the January 4, 2016 Order on Consent (DEC File No. R2-20141208-569) is attached to Mr. Urda's March 31, 2016 affirmation as Exhibit C. Finally, staff provided an affidavit of Regina Seetahal, sworn to March 31, 2016.

The motion papers demonstrate that 300 West End Ave is an active domestic business corporation authorized to do business in the State of New York (*see* Urda Aff. ¶ 3, Exhibit A). 300 West End Ave owns a residential property at 300 West End Avenue, New York, New York, where it owns and operates a petroleum bulk storage (PBS) facility (*see* Urda Aff. ¶ 4, Exhibits B and C). The PBS facility consists of one 10,000 gallon tank for #2 fuel oil (*see* Urda Aff. ¶ 4, Exhibit B). During an inspection of the PBS facility on October 31, 2014, Department staff observed several violations of 6 NYCRR parts 612 and 613, in effect at the time. Among the observed violations, 300 West End Ave failed to renew the registration for its PBS facility, which had expired in October 2007. (*See* Urda Aff. ¶5, Exhibit C.)

The violations observed by Department staff during the October 31, 2014 inspection were purported resolved with an Order on Consent, effective January 4, 2016 (DEC File No. R2-20141208-569) (*see* Urda Aff. ¶¶ 5 and 21; Exhibit C). Subsequently, 300 West End Ave renewed the registration for its PBS facility (No. 2-217905), and the registration is effective through October 15, 2017 (*see* Urda Aff. ¶ 5, Exhibit B).

Section I.A of the January 4, 2016 Order on Consent assessed a civil penalty of \$6,750, and directed 300 West End Ave to include the payment when it returned the signed Order on Consent to the Region 2 office (*see* Urda Aff. ¶ 7, Exhibit C at 2). Ms. Seetahal's affidavit establishes that her regular duties at the Department's Region 2 office include receiving and processing civil penalty payments assessed pursuant to orders on consent, and the Commissioner's orders. In addition, Ms. Seetahal is the custodian of records related to the civil penalty payments. After a diligent search of the records at the Department's regional office, Ms. Seetahal states, in her March 31, 2016 affidavit, that staff has no record to show that 300 West End Ave paid, either in whole or in part, the \$6,750 civil penalty assessed in the January 4, 2016 Order on Consent. (*See* Seetahal Aff. ¶¶ 3, 4 and 5.) Because 300 West End Ave has not paid the \$6,750 civil penalty stipulated in the January 4, 2016 Order on Consent, I conclude that 300 West End Ave violated the terms and conditions of that Order related to the payment of the assessed civil penalty.

III. Relief

Pursuant to Environmental Conservation Law (ECL) § 71-1929, the Commissioner may assess a civil 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." In the motion, Department staff calculated the total maximum statutory penalty for the alleged violation would be \$3,300,000.³ (*See* Urda Aff. ¶¶ 13 and 14.)

I conclude that Department staff has met the initial burden to show that staff is entitled to the requested relief. Pursuant to 6 NYCRR 622.12(a), staff supported the relief requested in the motion with the following.

³ According to Department staff, the violation runs daily from the effective date of the January 4, 2016 Order on Consent to the date of the March 31, 2016 motion, which is 88 days. (88 days x \$37,500 per day per violation = \$3,300,000.) (*See* Urda Aff. ¶¶ 13 and 14.)

Attached to Mr. Urda's March 31, 2016 affirmation as Exhibit D is a copy of an email from Mr. Urda dated May 13, 2015 to Donna Auletta. Exhibit D also includes a copy of a notice of calendar call, dated December 11, 2015. Exhibit E to Mr. Urda's March 31, 2016 affirmation consists of copies of two emails. The first is from Mr. Urda dated January 6, 2016 (1:56 PM) to Donna Auletta. The second is from Ms. Auletta dated January 6, 2016 (2:30 PM) to John Janangelo, which was copied to Mr. Urda.

Department staff's papers demonstrate that Mr. Urda attached a copy of the Order on Consent with his May 13, 2015 email. Mr. Urda's May 13, 2015 email set May 29, 2015 as the date by which 300 West End Ave had to return the signed Order on Consent to the regional office in order to settle the violations observed during Department staff's October 31, 2014 inspection. Mr. Urda's May 13, 2015 email advised 300 West End Ave that the terms and conditions of the Order on Consent required 300 West End Ave to submit the full amount of the assessed civil penalty (\$6,750) with the signed Order on Consent. When respondent did not return the signed Order on Consent, Department staff sent 300 West End Ave a notice of calendar call dated December 11, 2015, which advised 300 West End Ave that it was to appear at a calendar call on December 29, 2015 to discuss the violations observed during Department staff's October 31, 2014 inspection. (*See* Urda Aff. ¶ 6, Exhibit D.) Subsequently, Ms. Auletta, as the managing agent of 300 West End Ave, signed the Order on Consent on December 15, 2015 (*see* Urda Aff. Exhibit C at 4).

With his January 6, 2016 email, Mr. Urda provided Ms. Auletta with a copy of the fully executed Order on Consent. The Order on Consent became effective on January 4, 2016 when the Regional Director from the Department's Region 2 office signed the Order on Consent on behalf of the Commissioner. Mr. Urda noted that the regional office had not yet received the civil penalty stipulated in the January 6, 2016 Order on Consent. In an email dated January 6, 2016, Ms. Auletta inquired of Mr. Janangelo when 300 West End Ave would be providing a check to the regional office. Ms. Auletta copied Mr. Urda on her January 6, 2016 email. (*See* Urda Aff. ¶ 8, Exhibit E.)

With reference to the Civil Penalty Policy (DEE-1) and the Order on Consent Enforcement Policy (DEE-2), Department staff offered Exhibits D and E to support the request for an additional \$10,000 civil penalty because 300 West End Ave failed to submit the \$6,750 civil penalty stipulated in the January 4, 2016 Order on Consent. Staff noted the following circumstances. First, staff provided 300 West End Ave several extensions of time to sign the Order on Consent. Second, only after staff provided 300 West End Ave with a notice of the December 29, 2015 calendar call did 300 West End Ave sign the Order on Consent. Third, 300 West End Ave did not comply with the requirement in the Order on Consent to provide full payment of the \$6,750 stipulated civil penalty when respondent eventually signed the Order on Consent, and returned it to the regional office. Fourth, 300 West End Ave has yet to pay the \$6,750 stipulated civil penalty. Finally, on this motion, staff has commenced a second enforcement proceeding against 300 West End Ave to collect the civil penalty initially assessed in the January 4, 2016 Order on Consent. Staff argued that these circumstances are aggravating factors that justify the requested civil penalty. (*See* Urda Aff. ¶¶ 6, 9, and 15-19.)

Department staff acknowledged that 300 West End Ave registered its PBS facility, as required by the January 4, 2016 Order on Consent. Based on this circumstance, staff tempered its request for the additional civil penalty (*compare Matter of 10 East 85th Street, Inc.*, Commissioner's Order, dated February 22, 2016). (*See Urda Aff.* ¶¶ 20-21.) Because 300 West End Ave did not pay the civil penalty initially assessed in the January 4, 2016 Consent Order (\$6,750), and failed to appear in this proceeding or provide any basis for its failure to pay the civil penalty assessed in the Consent Order, I find that Department staff's request for an additional civil penalty of \$10,000 is authorized and appropriate.

Conclusions

1. With service of the March 31, 2016 notice of motion for order without hearing and supporting papers upon 300 West End Ave, by certified mail, return receipt requested, Department staff duly commenced the captioned enforcement proceeding in a manner consistent with the requirements outlined in 6 NYCRR 622.3 and 622.12.
2. Consistent with 6 NYCRR 622.12(a), Department staff supported the March 31, 2016 motion for order without hearing, and established its entitlement to summary judgment on the alleged violation.
3. When 300 West End Ave failed to pay the \$6,750 civil penalty stipulated in Section I.A of the January 4, 2016 Order on Consent, it violated an Order of the Commissioner issued pursuant to ECL article 17.

Recommendation

The Commissioner should grant Department staff's March 31, 2016 motion for order without hearing.

_____/s/_____
Daniel P. O'Connell
Administrative Law Judge

Dated: Albany, New York
November 7, 2016

Attachment: Appendix A

Appendix A

Matter of 300 West End Ave. Associates Corp.
DEC File No. R2-20160309-96
Motion for Order Without Hearing

1. Cover letter dated May 4, 2016 from John K. Urda, Esq., Assistant Regional Attorney, NYS DEC Region 2 to James T. McClymonds, Chief Administrative Law Judge, Office of Hearings and Mediation Services.
2. Notice of Motion for Order without Hearing dated March 31, 2016.
3. Affirmation of John K. Urda in Support of Motion for Order without Hearing dated March 31, 2016.

Exhibit A – New York State Department of State, Division of Corporations, Entity Information for 300 West End Ave. Associates Corp.

Exhibit B – NYS DEC Petroleum Bulk Storage Facility Information Report for 300 West End Ave. Associates Corp. (PBS No. 2-217905); PBS Certificate for 300 West End Ave. Associates Corp. (effective 02/06/2015 to 10/15/2017).

Exhibit C – *Matter of 300 West End Ave. Associates Corp.*, January 4, 2016 Order on Consent (NYS DEC File No. R2-20141208-569).

Exhibit D – Email dated May 13, 2015 from John K. Urda to Donna Auletta, and a Notice of Calendar Call dated December 11, 2015.

Exhibit E – Email dated January 6, 2016, 2015 (1:56 PM) from John K. Urda to Donna Auletta, and email dated January 6, 2016, 2015 (2:30 PM) from Donna Auletta to John Janangelo with copy to John K. Urda.

4. Affidavit of Regina Seetahal in Support of Motion for an Order Without Hearing, sworn to March 31, 2016.
5. Affirmation of Service by John K. Urda dated May 4, 2016.

Exhibit A – US Postal Service tracking sheet (Tracking No. 70153010000092188890).