STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Articles 17 and 71 of the New York State Environmental Conservation Law and Article 12 of the New York State Navigation Law,

ORDER

NYSDEC File No.
R2-20090522-316

- by -

366 AVENUE Y DEVELOPMENT CORPORATION,

Respondent.

In this administrative enforcement proceeding, staff of the New York State Department of Environmental Conservation ("Department") seeks a penalty and other relief for the alleged failure of respondent 366 Avenue Y Development Corporation to comply with a stipulation to clean up and remove a discharge of petroleum on property at 366 Avenue Y, Brooklyn, New York (site). The stipulation, which respondent entered into with the Department, became effective on February 14, 2007. The stipulation included a corrective action plan by which respondent was required to:

- file an investigation summary report within 60 days of the effective date of the stipulation;

- file a remediation action plan for Department staff's consideration and approval within 120 days of the effective date of the stipulation; and

- implement the plan and remediate the petroleum spill, within 45 days from the date of respondent's receipt of Department staff's approval of the remediation action plan.

The investigation summary report was due by April 16, 2007, and respondent failed to file the report. In addition, respondent did not file the required remediation action plan.

In accordance with 6 NYCRR 622.3(a)(3), Department staff commenced this enforcement proceeding against respondent by service of an August 4, 2009 notice of hearing and complaint, by certified mail. Respondent received the notice of hearing and complaint on August 6, 2009, but failed to file an answer. In addition, respondent did not appear at the pre-hearing conference scheduled for September 7, 2009 by the notice of hearing. Department staff subsequently served a notice of motion and motion for default judgment and order, both dated January 5, 2010, on respondent by first class mail. By letter dated January 5, 2010, the matter was referred to the Department's Office of Hearings and Mediation Services and was assigned to Administrative Law Judge (ALJ) Daniel P. O'Connell.

In a ruling dated April 23, 2010, ALJ O'Connell granted Department staff's motion for default judgment with respect to liability. ALJ O'Connell concluded, however, that a hearing was necessary to determine the appropriate relief. The hearing was held on June 14, 2010. ALJ O'Connell prepared the attached hearing report, which I adopt as my decision in this matter, subject to the following comments.

Respondent, by violating the stipulation, violated an order issued by the Department pursuant to its authority under ECL 17-0303 and Navigation Law article 12. The civil penalty of $37,500 that Department staff requested in its complaint and motion for default judgment and order, and that the ALJ recommended, is authorized and appropriate. At the hearing, Department staff for the first time requested an increase in the penalty from $37,500 to $75,000. The record does not indicate that any notice was provided to respondent regarding this proposed increase in any prior communications between Department staff and respondent, including the May 24, 2010 pre-hearing conference call between the parties and the ALJ. I concur with the ALJ that, in the circumstances of this proceeding, the manner in which this increase was raised provided insufficient notice, and deprived respondent of an opportunity to prepare its case prior to the hearing on the higher penalty amount. Accordingly, to grant staff's request would be prejudicial to respondent (see Loomis v Civetta Corinno Constr. Corp., 54 NY2d 18, 21-24 [1981]; see also CPLR 3215[b]). In any event, the penalty of $37,500 is warranted on the record of this proceeding.

The ALJ recommends that I suspend up to $12,500 of the civil penalty, contingent upon respondent's complying with the terms and conditions of the stipulation. As reflected in the record, respondent has undertaken remedial work at the site, but the completion of that work will entail additional expense. In consideration of the resources necessary to cleanup the site, and in recognition that respondent has commenced remedial work, I adopt the ALJ's recommendation and suspend $12,500 of the $37,500 civil penalty provided that respondent: (1) submit the investigation summary report required by the stipulation within 30 days of the service of this order upon respondent; (2) file the remediation action plan required by the stipulation within 90 days of the service of this order upon respondent and implement the remediation action plan immediately upon its approval by Department staff; (3) comply with all other terms and conditions of the stipulation; (4) implement in full and in a timely manner the remediation required; and (5) comply with the terms and conditions of this order.

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

I. The Ruling on Motion for Default Judgment dated April 23, 2010 of Administrative Law Judge Daniel P. O'Connell is affirmed.

II. Respondent 366 Avenue Y Development Corporation is adjudged to have violated the stipulation which became effective on February 14, 2007, by failing, among other things, to submit an investigation summary report and a remediation action plan in accordance with the terms of the stipulation. Respondent's violation of the stipulation is a violation of a duty imposed pursuant to ECL 17-0303 and a duty imposed pursuant to Navigation

Law § 176.

III. Respondent 366 Avenue Y Development Corporation is hereby assessed a civil penalty in the amount of thirty-seven thousand, five hundred dollars ($37,500). Of this amount, twenty-five thousand dollars ($25,000) shall be due and payable within thirty (30) days of the service of this order upon respondent. Payment of the penalty shall be by cashier's check, certified check or money order drawn to the order of the "Environmental Protection and Spill Compensation Fund" and sent by overnight delivery, certified mail, or hand-delivery to:

John K. Urda, Esq.
Assistant Regional Attorney
NYSDEC Region 2
47-40 21st Street
Long Island City, New York 11101-5407.

IV. The payment of the remaining twelve thousand, five hundred dollars ($12,500) shall be suspended upon the condition that respondent 366 Avenue Y Development Corporation:

(A) submits the investigation summary report required by the stipulation within 30 days of the service of this order upon respondent;

(B) files the remediation action plan required by the stipulation within 90 days of the service of this order upon respondent and implements the remediation action plan immediately upon its approval by Department staff;

(C) complies with all other terms and conditions of the stipulation;

(D) implements in full and in a timely manner the remediation required; and

(E) complies with the terms and conditions of this order.

In the event respondent 366 Avenue Y Development Corporation fails to meet any of these conditions, the suspended penalty shall immediately become due and payable. Payment shall be made in the manner provided for in paragraph III of this order.

V. All communications between respondent 366 Avenue Y Development Corporation and Department staff concerning this order shall be made to:

John K. Urda, Esq.
Assistant Regional Attorney
NYSDEC Region 2
47-40 21st Street
Long Island City, New York 11101-5407.

VI. The provisions, terms and conditions of this order shall bind 366 Avenue Y Development Corporation, its successors and assigns, in any and all capacities.

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

/s/

By: _____

Alexander B. Grannis,
Commissioner

Dated: Albany, New York
August 16, 2010

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1550

In the Matter

- of -

Alleged Violations of the Environmental Conservation Law
of the State of New York (ECL) Article 17,
and the New York State Navigation Law Article 12

- by -

366 AVENUE Y DEVELOPMENT CORPORATION,

Respondent.

DEC Case No: R2-20090522-316

HEARING REPORT

- by -

/s/

_____
Daniel P. O'Connell
Administrative Law Judge

Proceedings

With a cover letter dated January 5, 2010, Staff from the Department's Region 2 Office (Department staff) filed a notice of motion for default judgment, and a motion for default judgment, of the same date, with supporting papers (*see* Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York [6 NYCRR] § 622.15). According to Department staff's motion papers, 366 Avenue Y Development Corporation (Respondent) is an active domestic business corporation that owns property at 366 Avenue Y, Brooklyn (Kings County), New York. Respondent's property is the site of a petroleum spill (Spill No. 9511519).

Effective February 14, 2007, Respondent and Department staff entered into a stipulation (*see* DEE-18 [*Spill Site Remediation under Department Enforcement Policy*, revised December 18, 1995]) that outlines the sequence of events for the investigation and remediation of the referenced spill. Pursuant to the terms of the February 14, 2007 stipulation, Respondent agreed to file an investigation summary report within 60 days of the effective date of the stipulation. Subsequently, within 120 days of the effective date of the stipulation, Respondent agreed to file a remediation action plan with Department staff. Within 45 days from Department staff's approval of the remediation action plan, Respondent agreed to implement the approved plan, and remediate the petroleum spill. (Exhibit 3-B.)

According to Department staff, the investigation summary report was due by April 16, 2007, and Respondent did not file the report. In addition, Respondent did not file the required remediation action plan. Subsequently, Department staff served a notice of hearing and complaint dated August 4, 2009 (Exhibit 3-C), by certified mail, return receipt requested, to enforce the February 14, 2007 stipulation. After Respondent failed to filed a timely answer and attend a pre-hearing conference, Department staff filed the January 5, 2010 motion for a default judgment (*see* 6 NYCRR 622.15[a]).

In a letter dated January 11, 2010 (Exhibit 4), Respondent's legal counsel acknowledged receipt of Department staff's January 5, 2010 motion for default judgment. In addition, Respondent requested that Department staff's motion be held in abeyance due to a contractual dispute between Respondent

and the consultant retained to remediate the petroleum spill at the 366 Avenue Y property.

In a letter dated January 22, 2010 (Exhibit 5), Department staff objected to Respondent's request, and argued that Respondent's January 11, 2010 letter did not address the merits of the motion or the underlying allegations. Department staff argued further that any dispute between Respondent and its consultant is beyond the scope of the captioned matter.

In the August 4, 2009 complaint (Exhibit 3-C), Department staff requested an order from the Commissioner that would assess a total civil penalty of not less than $37,500. In the January 5, 2010 motion for default judgment (Exhibit 2), Department staff sought the same civil penalty.[1] In addition, Department staff requested at the hearing that the Commissioner issue an order directing Respondent to comply with the terms of the February 14, 2007 stipulation, and to remediate the petroleum spill (Tr. at 8, 34).

In a ruling dated April 23, 2010, I concluded that, with respect to liability, Department staff's January 5, 2010 motion for a default judgment meets the requirements outlined at 6 NYCRR 622.15(b) and related administrative precedents. I concluded further, however, that a hearing was necessary to determine the appropriate relief. The April 23, 2010 ruling is attached to this hearing report as Appendix A.

A hearing convened at 10:00 a.m. on June 14, 2010 at the Department's Region 2 Offices located at 47-40 21st Street, Long Island City, New York. Since the commencement of this proceeding, Department staff has been represented by John K. Urda, Esq., Assistant Regional Attorney. Respondent is represented by Norman S. Langer, Esq. (Brooklyn, New York).

At the June 14, 2010 hearing, Jeffery Vought, Engineering Geologist I, and Raphael Ketani, Engineering Geologist II, testified on behalf of Department staff. Jack Waide testified on behalf of Respondent.

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[1] During Department staff's opening statement (Tr. at 9), however, Mr. Urda requested a civil penalty of $75,000 because Respondent had violated the terms and conditions of the February 14, 2007 stipulation for a period of 842 days.

Appendix B to this hearing report is the Exhibit List. The Exhibits include the parties' papers related to the January 5, 2010 motion for default judgment. The parties did not offer any additional exhibits during the hearing. (Tr. at 39.)

The Office of Hearings and Mediation Services received the stenographic transcript of the June 15, 2010 hearing on June 30, 2010. Whereupon, the record of the hearing closed.

Findings of Fact

1. Due to the gray discoloration of the soil, the spilled petroleum product at the property located at 366 Avenue Y in Brooklyn (the site) is gasoline. The ground and ground water at the site are contaminated. (Tr. at 14-15.)

2. From 2005 to 2008, Jeffery Vought (Engineering Geologist I) was the Department staff manager assigned to the petroleum spill (No. 9511519) at the site. During this period, Mr. Vought visited the site, and spoke with Respondent's representative (Jack Waide) and consultant (Andrew Gasparo, Landmark Consultants) concerning the remediation of the petroleum spill. (Tr. at 14, 17.)

3. When Mr. Vought visited the site after February 14, 2007, he observed a large, water-filled pit. The water in the pit had an oily sheen on the surface, which indicated petroleum contamination. (Tr. at 15.)

4. The excavation at the site shows that Respondent removed some contaminated soil (Tr. at 17). However, the extent of the spill, on and off the site, has not been delineated (Tr. at 19).

5. Though a substantial attempt has been made to remediate the site by excavating contaminated soil, Mr. Vought could not determine what additional action Respondent needs to undertake to complete the remediation of the site until Respondent provides Department staff with the results of the endpoint samples (Tr. at 18-19).

6. Subsequent to 2007, Mr. Vought requested, on numerous occasions, that Respondent provide Department staff with the results of endpoint samples, as well as proposed plans for the redevelopment of the property including the installation of a vapor barrier (Tr. at 15-16).

7. In 2008, Raphael Ketani (Engineering Geologist II) was assigned to manage the petroleum spill (No. 9511519) at the site. Mr. Ketani visited the site on or about July 9, 2009, and observed a water-filled pit. (Tr. at 23, 25.)

8. During the July 9, 2009 site visit, Mr. Ketani spoke with Mr. Waide about the status of the remediation. Mr. Ketani explained to Mr. Waide that additional work needed to be undertaken at the site in order to complete the remediation. For example, Mr. Waide, or his consultant, needed to provide Department staff with the results of the endpoint sampling, and ground water delineation. (Tr. at 23-25.)

9. Mr. Ketani had one telephone conversation with Mr. Gasparo, from Landmark Consultants. However, as of the date of the hearing, Mr. Gasparo had not provided Department staff with the required investigation summary report. (Tr. at 24.)

10. Since 1967, Jack Waide has owned and operated an automobile repair shop at 354 Avenue Y in Brooklyn. Mr. Waide also sells used cars at this business. (Tr. at 26.)

11. Between 1994 and 1996, Mr. Waide entered into a business agreement with Joshua and Mordechai Golan, and the three jointly purchased the 366 Avenue Y property. The owners intended to clean up the site and construct four, three-family houses as income properties. After the redevelopment of the property, the Golan brothers would own two houses and Mr. Waide would own two houses. (Tr. at 27-28.)

12. Joshua Golan signed the February 14, 2007 stipulation on behalf of 366 Avenue Y Development Corporation (Exhibit 3-B). Mr. Waide, Joshua Golan and his

brother, Mordechai Golan, entered into a "joint venture agreement" to develop the property located at 366 Avenue Y in Brooklyn (Tr. at 27-28).

13. Subsequently, Mr. Waide and the Golan brothers signed a contract with Landmark Consultants to remediate the site. According to Mr. Waide, the remediation costs were not to exceed $110,000 (Tr. at 30). Landmark Consultants agreed to excavate the contaminated soil, and backfill the excavated areas with gravel. The agreed upon cost for removing the contaminated soil was $90,000. The contract required Landmark Consultants to file all the required paperwork, and Mr. Waide and the Golan brothers agreed to pay Landmark Consultants the remaining balance of $22,000. (Tr. at 28-29.)

14. Pursuant to the terms of the agreement, Mr. Waide and the Golan brothers paid Landmark Consultants $90,000. Mr. Waide contributed half the amount (*i.e.*, $45,000), and the Golan brothers paid the other half. (Tr. at 29.)

15. A representative from Landmark Consultants advised Mr. Waide that, but for the required paperwork, the remediation of the site was complete. However, Landmark Consultants demanded payment of $80,000, rather than $22,000. (Tr. at 29-30.)

16. Given the dispute with Landmark Consultants over the total cost of the remediation, Mr. Waide is in the process of retaining American Environmental Assessment and Solutions (Antoinette Ollivierre, contact person) to complete the remediation. Mr. Waide received a contract from American Environmental Assessment and Solutions on May 28, 2010, and intended to execute the agreement by early July 2010. It is Mr. Waide's understanding that Ms. Ollivierre has conferred with Department staff about the status of the remediation (Tr. at 35-36.)

Discussion

I. Liability

For the reasons outlined in the April 23, 2010 ruling, Respondent is liable for failing to comply with the terms and conditions of the February 14, 2007 stipulation.

Attached to the February 14, 2007 stipulation is the corrective action plan for Spill No. 9511519. The corrective action plan requires Respondent, among other things, to provide an investigation summary report (*see* Exhibit 3-B, ¶ 2 of attached corrective action plan). The purpose of the investigation summary report is to delineate soil and groundwater contamination on and off the site. The investigation summary report must include the results of groundwater analyticals collected from onsite monitoring wells.

In addition to the investigation summary report, Respondent must provide a remediation action plan for Department staff's review and approval (*see* Exhibit 3-B, ¶ 3 of attached correction action plan). Also, the remediation action plan must include the results of the endpoint sampling analyticals from the final depth of excavation, and an operation, maintenance and monitoring plan.

II. Relief

Because Respondent has not provided Department staff with the required investigation summary report and the results of the groundwater analyticals, Department staff cannot determine the extent of the petroleum contamination. Also, Department staff has not approved any remediation action plan for the site. Therefore, the existing petroleum spill at the site will remain open until Respondent complies with the terms and conditions of the February 14, 2007 Stipulation.

Respondent claims, however, that the remediation is up to 90% complete (Tr. at 10). Therefore, the purpose of the hearing was to determine the status of the remediation at the site, and to determine the appropriate civil penalty.

A. Site Remediation

Department staff offered two witnesses who testified about the site conditions. Jeffery Vought is an Engineering Geologist I with the Department's Region 2 Spill Response Unit. Mr. Vought testified about his education and work experiences. From 2005 to 2008, Mr. Vought was assigned to manage the remediation of the petroleum spill at the site. (Tr. at 12-14.) Subsequently, Raphael Ketani was assigned to manage the remediation of the petroleum spill at the site. Mr. Ketani testified about his education and work experiences. (Tr. at 21-22.)

Based on their respective site visits and observations, Department staff's testimony establishes that the remediation of the site is incomplete (Tr. at 15; 18-19; 23-24; 25). Respondent has not provided Department staff with the results of sample (soil and groundwater) analyticals (Tr. at 15-16; 24). Consequently, Department staff cannot delineate the soil and ground water contamination on and off the site (Tr. at 19). Moreover, Respondent has not provided Department staff with a remediation action plan for review and approval (Tr. at 15-16; 18-19; 23-24; 25).

Mr. Waide testified about how he entered into a business venture with the Golan brothers to purchase, remediate and redevelop the site for residential use. Mr. Waide's testimony establishes that some of the petroleum-contaminated soil has been excavated from the site (Tr. at 27-29). Furthermore, Mr. Waide and his business partners paid Landmark Consultants a portion of the remediation costs (Tr. at 29). Due to a dispute, however, Landmark Consultants has not provided Department staff with the results of the groundwater analyticals collected from on-site monitoring wells, as well as the results of the endpoint sampling analyticals from the final depth of excavation (Tr. at 29-30). Consequently, Mr. Waide is in the process of retaining a new consultant to complete the remediation (Tr. at 35-36).

The results of the sampling required by the corrective action plan are essential to determining the status of the petroleum remediation at the property located at 366 Avenue Y. Neither Respondent nor his consultant has provided the results of these analyses to Department staff. Without these results, it cannot be determined whether the remediation thus far undertaken at the site is sufficient. Therefore, the

Commissioner should direct Respondent to comply with the requirements outlined in paragraphs 2 and 3 of the corrective action plan for Spill No. 9511519, which is attached to the February 14, 2007 stipulation (Exhibit 3-B).

B. Civil Penalty

Paragraph 6 of the February 14, 2007 stipulation (Exhibit 3-B) provides the Commissioner with authority to assess a civil penalty in this matter. Paragraph 6 of the February 14, 2007 stipulation state in full that:

> [t]his Stipulation is equivalent to an order pursuant to [Environmental Conservation Law] ECL §17-0303 and a directive pursuant to [Navigation Law] NL §176 and is enforceable as such.

ECL 71-1929 states that any person who violates an order of the Commissioner promulgated pursuant to ECL 17-0303 is liable for a civil penalty. Pursuant to ECL 71-1929, the maximum civil penalty for violations of ECL 17-0303 is $37,500 per violation, effective May 15, 2003. Similarly, Navigation Law § 192 provides that any person who fails to comply with a duty imposed under Navigation Law article 12 is liable for a civil penalty.

The issue now becomes what would be the appropriate civil penalty amount. The parties' arguments concerning this question are summarized below.

First, Respondent objects to the characterization that these proceedings are a default. Respondent contends that a default implies inaction, which Respondent argues is not the case here.

Second, Respondent notes that it has undertaken substantial remedial work at the site, and that the cost of this work, to date, has been significant. Respondent notes further that it recognizes the need to complete the remediation, and is in the process of retaining another consultant for that purpose. Finally, Respondent states that Mr. Waide owns half the site and, to date, has not been able to develop the site. Based on these circumstances Respondent contends that Mr. Waide has yet to reap any financial benefits from this business venture. Respondent recognizes that additional remediation costs will be

incurred. Based on these circumstances, Respondent argues that the Commissioner should not assess any civil penalty or, alternatively, a very small one. (Tr. at 10-12; 31-33.)

To support its civil penalty request of $75,000 in the captioned matter (Tr. at 9),[2] Department staff refers to the Commissioner's Decision and Order dated November 23, 2004 concerning the *Matter of Benedetto DiCostanzo and Edkins Scrap Metal Corporation* (Tr. at 8-9). In *DiCostanzo*, Department staff requested a total civil penalty of over $4.5 million for failing to comply with the terms and conditions of a DEE-18 stipulation, effective August 20, 2001, over 361 days. In the Decision and Order (*DiCostanzo, supra* at 6, ¶ III), the Commissioner assessed a total civil penalty of $725,000, of which $700,000 was suspended provided respondent complied with the terms and conditions of the August 20, 2001 stipulation.

With reference to DEE-18, Department staff argues that the purpose of the stipulation policy is to promote the prompt abatement and expeditious remediation of unauthorized petroleum discharges. Department staff argues further that the policy protects public health and restores natural resources, while conserving Department staff's resources. (Tr. at 6.)

Department staff contends further that Respondent obtained the following benefits from entering into the February 14, 2007 stipulation. First, formal enforcement proceedings were not commenced. As a result, Respondent avoided hearing costs, admissions of guilt, and findings of liability. Second, no civil penalty was assessed when Respondent entered into the stipulation. Third, Department staff was obliged to provide prompt review and, if appropriate, approval of a proposed remediation action plan. (Tr. at 7.)

Respondent's objection to the characterization of this matter as a default is misplaced. The regulations expressly state that a respondent has defaulted when it fails either to timely answer a duly served notice of hearing and complaint, or

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[2] In the August 4, 2009 complaint (Exhibit 3-C), Department staff asserted that Respondent failed to comply with the terms and conditions of the February 14, 2007 stipulation for 842 days, and that the maximum potential civil penalty was about $31.5 million ($37,500 per violation for 842 days equals $31,575,000). Nevertheless, Department staff requested a total civil penalty of $37,500 in the August 4, 2009 complaint. In the January 5, 2010 motion for default judgment (Exhibit 2), Department staff requested the same amount (*i.e.*, $37,500).

to appear at a scheduled pre-hearing conference (*see* 6 NYCRR 622.15[a]). Subsequent to service of the August 4, 2009 notice of hearing and complaint, Respondent neither answered the complaint nor appeared at the September 7, 2009 pre-hearing conference. The circumstances of the default are thoroughly addressed in the April 23, 2010 ruling (*see* Appendix A).

In determining the appropriate civil penalty, the Commissioner should consider the following significant aggravating factors. First, Department staff commenced an enforcement proceeding with service of the August 4, 2009 notice of hearing and complaint because Respondent did not comply with the terms and conditions of the February 14, 2007 stipulation. Subsequently, Department staff had to move for default judgment when Respondent defaulted. Second, because Respondent entered into a stipulation based on the guidance outlined in DEE-18, a civil penalty was avoided, from which Respondent realized an economic benefit.

Nevertheless, Respondent retained Landmark Consultants to remediate the site, and paid a portion of the remediation costs. It is significant to note, however, that Mr. Waide and the Golan brothers split the remediation costs. (Tr. at 29). Although $90,000 was paid to Landmark Consultants (Tr. at 28-29), Mr. Waide's contribution, therefore, was half that amount or $45,000. Respondent is in the process of retaining another consultant to complete the remediation; however, the Golan brothers appear to have withdrawn from the business venture (Tr. at 30). As a result, Respondent will incur additional remediation costs.

In *DiCostanzo*, (*supra* at 4), the Commissioner determined that respondent's resources should be directed to the remediation of the site despite its failure to timely comply with the terms and conditions of the August 20, 2001 stipulation. Consequently, the Commissioner decided to suspend a substantial portion of the recommended civil penalty provided Respondent complied fully with the terms and conditions of the August 20, 2001 stipulation.

Like *DiCostanzo*, the priority here should be the remediation of the 366 Avenue Y property. Accordingly, the Commissioner should assess a total civil penalty of $37,500, which is the full amount requested by Department staff in the August 4, 2009 complaint and the January 5, 2010 motion for

default judgment. I decline to recommend the $75,000 civil penalty that Department staff requested at the hearing. The first and only time that Department staff requested a civil penalty of $75,000 since the commencement of this proceeding was at the hearing (Tr. at 9). I conclude that Respondent did not have sufficient notice of the larger civil penalty request.

The Commissioner should suspend up to $12,500 of the $37,500 civil penalty provided Respondent complies with the terms and conditions of the February 14, 2007 stipulation. The balance (*i.e.*, $25,000) should be due and payable immediately.

Conclusions

1. Respondent is liable for failing to comply with the terms and conditions of the February 14, 2007 stipulation.

2. Pursuant to the terms and conditions of the February 14, 2007 stipulation, the Commissioner has authority to order remediation of the property located at 366 Avenue Y in Brooklyn, and to assess a civil penalty.

Recommendations

1. With respect to liability, the Commissioner should affirm the April 23, 2010 ruling concerning Department staff's January 5, 2010 motion for default judgment.

2. The Commissioner should direct Respondent to comply with the terms and conditions of the February 14, 2007 stipulation, which includes the corrective action plan for Spill No. 9511519.

3. The Commissioner should assess a civil penalty of $37,500 and, as appropriate, suspend a portion of it provided Respondent complies with the terms and conditions of the February 14, 2007 stipulation.

Attachments: Appendix A Ruling on Motion for Default Judgment dated April 23, 2010
Appendix B Exhibit List

NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of the Environmental Conservation Law of the State of New York (ECL) Article 17, and the New York State Navigation Law Article 12, by 366 Avenue Y Development Corporation, Respondent.	Ruling on Motion for Default Judgment DEC Case No: R2-20090522-316 April 23, 2010

Proceedings

With a cover letter dated January 5, 2010, Staff from the Department's Region 2 Office (Department staff) filed a notice of motion for default judgment, and a motion for default judgment with supporting papers (*see* Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York [6 NYCRR] § 622.15). Department staff's notice and motion are dated January 5, 2010. In this matter, Department staff is represented by John K. Urda, Esq., Assistant Regional Attorney. A list of the documents provided by Department staff is attached to this ruling as Appendix A.

According to Mr. Urda's affirmation dated January 5, 2010, 366 Avenue Y Development Corporation (Respondent) is an active domestic business corporation that owns property at 366 Avenue Y, Brooklyn (Kings County), New York. Respondent's property is the site of a petroleum spill (Spill No. 9511519). (¶¶ 3, 4 Urda Affirmation; Exhibit A.)

Exhibit B to Mr. Urda's affirmation is a copy of a stipulation between Department staff and Respondent effective February 14, 2007. Pursuant to the terms of the February 14, 2007 stipulation, Respondent agreed to file an investigation summary report within 60 days of the effective date of the stipulation. Subsequently, within 120 days of the effective date of the stipulation, Respondent agreed to file a remediation action plan with Department staff. Within 45 days from Department staff's approval of the remediation action plan, Respondent agreed to implement the approved plan, and remediate the petroleum spill.

Mr. Urda states that the investigation summary report was due by April 16, 2007, and that Respondent did not file the report (¶ 7 Urda Affirmation). After several unsuccessful

attempts to gain Respondent's cooperation, Department staff served a notice of hearing and complaint dated August 4, 2009 by certified mail, return receipt requested (¶ 8, 9 Urda Affirmation; Exhibit C). After Respondent failed to filed a timely answer, and attend a pre-hearing conference (¶ 10 Urda Affirmation), Department staff filed the January 5, 2010 motion for a default judgment (*see* 6 NYCRR 622.15[a]).

In a letter dated January 11, 2010, Norman S. Langer, Esq. (Brooklyn, New York), identified himself as Respondent's legal counsel, and acknowledged that he received a copy of Department staff's January 5, 2010 motion for default judgment. Accordingly, Respondent has appeared in these proceedings.

For the following reasons, Mr. Langer requests that Department staff's motion for default judgment be held in abeyance. Mr. Langer states that Respondent retained Landmark Consultants, Inc. to remediate the petroleum spill at the 366 Avenue Y property. The agreed upon cost for the remediation was $110,000, and that as of January 2010, Respondent had paid Landmark Consultants $80,000. According to Mr. Langer, Landmark Consultants now demands an additional $80,000 from Respondent. Mr. Langer explains that he will be initiating a civil proceeding on his client's behalf in Supreme Court, Kings County, to resolve this contractual dispute. Mr. Langer notes that Jeffrey Vought, a member of Region 2 Department staff is aware of the circumstances associated with the remediation of the 366 Avenue Y property.

By letter dated January 12, 2010, Chief Administrative Law Judge (ALJ) James T. McClymonds advised the parties that the captioned matter was assigned to ALJ Daniel P. O'Connell.

With leave, Mr. Urda filed a letter dated January 22, 2010 that responds to Mr. Langer's request to hold the captioned matter in abeyance. For the following reasons, Department staff objects. Department staff notes that the applicable regulations do not provide for a request to hold the motion in abeyance. Department staff argues that Respondent's January 11, 2010 letter is not properly an opposition to the default motion because it does not address the merits of the motion, or the underlying allegations. Department staff contends that the dispute between Respondent and its consultant is beyond the scope of the captioned matter. Finally, Department staff argues

further that Respondent's January 11, 2010 letter does not meet the standard to reopen a default (*see* 6 NYCRR 622.15[d]).

In addition, Department staff objects to Mr. Langer's characterization that the site has been remediated. Mr. Urda reports that he conferred with Mr. Vought. According to Mr. Vought, he last spoke with Respondent's representative on November 6, 2008. At that time, Mr. Vought advised Respondent that additional remediation was necessary, which included endpoint sampling and well installation. Department staff requests a ruling on the merits of the January 5, 2010 default motion.

Discussion

I. Commencement of an Enforcement Proceeding

Department staff may commence an administrative proceeding by serving a notice of hearing and a complaint (*see* 6 NYCRR 622.3[a][1]). Service of the notice of hearing and complaint must be by personal service consistent with the Civil Practice Law and Rules (CPLR) or by certified mail. Service by certified mail will be considered complete when the notice of hearing and complaint are received. (*See* 6 NYCRR 622.3[a][3].)

As noted above, after Respondent failed to comply with the terms and conditions of the February 14, 2007 stipulation (¶ 7 Urda Affirmation; Exhibit B), Department staff commenced an administrative proceeding with service of a notice of hearing and complaint dated August 4, 2009 (¶ 8, 9 Urda Affirmation; Exhibits C and D).

Exhibit D to Mr. Urda's affirmation includes an affidavit of service by Sheila Warner, sworn to August 4, 2009. According to the affidavit of service, Ms. Warner sent copies of the August 4, 2009 notice of hearing and complaint, by certified mail, return receipt requested, to the following: (1) 366 Avenue Y Development Corporation, 1578 Hewlitt Avenue, Hewlitt, New York 11557, and (2) to Respondent in care of Mr. Langer at 3047 Avenue U, 2nd Floor, Brooklyn, New York 11229.

In addition to Ms. Warner's affidavit of service, Exhibit D also includes a "track and confirm" printout from the US Postal Service for the item sent to Mr. Langer. The track and confirm

printout shows delivery at 10:53 a.m. on August 6, 2009. As part of Exhibit D, Department staff also includes a copy of the signed domestic return receipt for the item sent to Mr. Langer.

According to the information maintained by the New York State Department of State, Division of Corporations, 366 Avenue Y Development Corporation is an active domestic corporation. Norman S. Langer, Esq., is identified as the agent who will accept process on behalf of the corporation.

Based on this proof, I conclude that Department staff duly commenced an administrative enforcement proceeding by serving a notice of hearing and a complaint upon Respondent in a manner consistent with the applicable regulations. In addition, I find that Mr. Langer, as Respondent's duly authorized agent, received the August 4, 2009 notice of hearing and complaint on August 6, 2009.

Department staff's August 4, 2009 notice of hearing (Exhibit C) scheduled a pre-hearing conference for September 7, 2009, and advised Respondent that an answer to the complaint was due within 20 days following receipt of the notice of hearing and complaint (*see* 6 NYCRR 622.4). The notice advised further that if Respondent failed either to attend the September 7, 2009 pre-hearing conference, or to file a timely answer, then Respondent would be in default, and waive its right to a hearing (*see* 6 NYCRR 622.15[a]).

Because Mr. Langer received the notice of hearing and complaint on August 6, 2009, Respondent's answer was due by August 26, 2009. Respondent, however, did not file any answer, and did not attend the September 7, 2009 pre-hearing conference (¶ 10 Urda Affirmation).

II. Motion for Default Judgment

Pursuant to 6 NYCRR 622.15(a), a respondent's failure either to appear at a scheduled pre-hearing conference, or to file a timely answer to a complaint constitutes a default and waiver of that respondent's right to a hearing. The consequences of a default are that the respondent waives the right to a hearing, and is deemed to have admitted the factual allegations of the complaint on the issue of liability for the violations alleged (*see* 6 NYCRR 622.15[a]; *Matter of Alvin Hunt*, Decision and Order, July 25, 2006, at 4-5; *Rokina Opt. Co., Inc.*

v Camera King, Inc., 63 NY2d 728, 730 [1984]; *Reynolds Securities, Inc., v Underwriters Bank and Trust Co.*, 44 NY2d 568, 572 [1978]; M*cClelland v Climax Hosiery Mills*, 252 NY 347, 351 [1930]).

Under these circumstances, Department staff may move for a default judgment. Department staff's motion must include the following:

1. proof of service of the notice of hearing and complaint;

2. proof of respondent's failure to file a timely answer or to appear; and

3. a proposed order (*see* 6 NYCRR 622.15[b]).

For the following reasons, Department staff has met the requirements for a default judgment as outlined in 6 NYCRR 622.15. First, as noted above, Department staff demonstrated that it duly commenced an administrative enforcement proceeding with service of the August 4, 2009 notice of hearing and complaint upon 366 Avenue Y Development Corporation.

Second, Respondent received the August 4, 2009 notice of hearing and complaint on August 6, 2009. The notice of hearing advised Respondent that an answer to the complaint was due within 20 days from the date of receipt, and that a pre-hearing conference had been scheduled for September 7, 2009. Mr. Urda's January 5, 2010 affirmation (¶ 10) demonstrates that Respondent neither filed any answer, nor appeared at the September 7, 2009 pre-hearing conference.

Third, Staff submitted, as required by 6 NYCRR 622.15(b), a proposed order (Urda Affirmation; Exhibit E). Finally, consistent with the Commissioner's directive in *Matter of Derrick Dudley* (Decision and Order, dated July 24, 2009, at 2), Department staff provided Respondent with a copy of the January 5, 2010 motion for default judgment.

III. Respondent's Request

As noted above, Respondent's counsel, in a letter dated January 11, 2010, requested that Department staff's motion for default judgment be held in abeyance pending a resolution of a contractual dispute between Respondent and its consultant

concerning the remediation costs. Department staff's arguments for opposing Respondent's request are outlined above. I am persuaded by Department staff's arguments concerning Respondent's request.

Conspicuously absent from Respondent's request are assertions that it complied with the terms and conditions of the February 14, 2007 stipulation; it answered the August 4, 2009 complaint; and that it appeared at the September 7, 2009 pre-hearing conference. Moreover, Respondent does not argue, nor do I conclude, that the basis for Respondent's request could be considered a meritorious defense. Respondent offered nothing to show that good cause for the default exists. (*See* 6 NYCRR 622.15[d].) Therefore, I deny Respondent's request to hold Department staff's motion for default judgment in abeyance pending a resolution of the disputes between Respondent and its consultant.

IV. Liability

After the ALJ concludes that Department staff has met the requirements outlined at 6 NYCRR 622.15, the ALJ must then determine whether the complaint states a claim upon which relief may be granted, and must consider whether the requested relief is warranted and sufficiently supported (*Alvin Hunt*, *supra*, at 4-5). Upon review of the motion papers, I conclude that the August 4, 2009 complaint (*see* Urda Affirmation, Exhibit C) states claims upon which the Commissioner may grant the relief requested by Department staff.

In the August 4, 2009 complaint, Department staff alleges that Respondent violated the February 14, 2007 stipulation by not filing the required investigation summary report by April 16, 2007 (*see* Urda Affirmation, Exhibit C). By its terms, the February 14, 2007 stipulation "is equivalent to an order pursuant to ECL § 17-0303 and a directive pursuant to N[avigation] L[aw] § 176 and is enforceable as such" (Urda Affirmation, ¶ 6 Exhibit B).

As noted above, Respondent agreed, pursuant to the terms of the February 14, 2007 stipulation, to file an investigation summary report within 60 days from the effective date of the stipulation. Subsequently, within 120 days from the effective date of the stipulation, Respondent agreed to file a remediation action plan with Department staff. Within 45 days from

Department staff's approval of the remediation action plan, Respondent agreed to implement the approved plan. Respondent did not file the required investigation summary report (¶ 7 Urda affirmation). Therefore, I conclude that Respondent violated the terms of the February 14, 2007 stipulation.

Proof of the allegations concerning liability is not required pursuant to 6 NYCRR 622.15. However, where, as here, Department staff's motion papers include evidence to support the factual assertions underlying the claims of liability, the Commissioner has determined that the evidence may be examined to confirm whether the claims are meritorious. (*See Alvin Hunt*, *supra*, at 7.)

I conclude that the factual allegations of the August 4, 2009 complaint state a meritorious claim that Respondent violated the terms and conditions of the February 14, 2007 stipulation and, as a result, Respondent also violated provisions of ECL article 17 and the Navigation Law. I find further that Respondent has yet to provide the required investigation summary report and the remediation action plan for Department staff's review and approval. Therefore, the Commissioner may grant default judgment against Respondents on the issue of liability.

V. Relief

A respondent in default, however, is not deemed to have admitted the allegation of damages in the complaint (*see Rokina*, 63 NY2d at 730; *Reynolds Securities*, 44 NY2d at 572; *McClelland*, 252 NY at 351). As a result, when a respondent defaults, only liability for the violations alleged in the complaint is established as a matter of law. Damages must still be proven. Consequently, Department staff must offer some proof with its motion to support both the requested civil penalty and any necessary remedial measures. (*See Alvin Hunt*, *supra*, at 4.) In addition, when, as here, a respondent has appeared, the respondent is entitled to be heard at the penalty phase hearing (*see e.g. McClelland*, at 351).

A. Civil Penalty

In the August 4, 2009 complaint, Department staff requests an order from the Commissioner that would assess a total civil penalty of not less than $37,500. In the motion for default

judgment, Department staff seeks the same civil penalty. To support the civil penalty request, Department staff refers to ECL 71-1929, which authorizes a civil penalty not to exceed $37,500 per day for each violation, and that each day a violation continues is considered a separate violation. In addition, Department staff refers to Navigation Law § 192, which provides for a civil penalty of up to $25,000 per day for each violation.

In his January 5, 2010 affirmation (¶ 17), Mr. Urda states that the requested civil penalty is authorized by ECL 71-1929 and Navigation Law § 192. Mr. Urda states further (¶ 16) that Department staff's civil penalty request is reasonable and consistent with the Department's *Civil Penalty Policy* (Division of Environmental Enforcement [DEE] - 1, June 20, 1990), and the *Bulk Storage and Spill Response Enforcement Policy* (DEE – 4, March 15, 1991).

To justify the requested civil penalty, Mr. Urda argues the following. First, Respondent has not cooperated with the Department to remediate the petroleum spill. Second, Respondent did not file the required investigation summary report, and corrective action plan. Third, Respondent did not answer the August 4, 2009 complaint, or appear at the September 7, 2009 pre-hearing conference. Finally, Mr. Urda asserts that Respondent gained an economic benefit from neglecting the petroleum spill at the 366 Avenue Y property. (¶ 18 Urda Affirmation.) Department staff, however, did not quantify the economic benefit that Respondent may have realized from not complying with the February 14, 2007 stipulation.

In his January 22, 2010, Mr. Langer does not object to the civil penalty that Department staff requests. Nevertheless, because the requested civil penalty is an element of damages or relief, I reserve on Department staff's request for an Order from the Commissioner that would assess a civil penalty of $37,500.

B. Spill Remediation

Department staff also requested that the Commissioner direct Respondent to comply with the terms of the February 14, 2007 stipulation, and remediate the petroleum spill. Department staff has demonstrated that Respondent did not comply with the terms of the February 14, 2007 stipulation by establishing that

Respondent did not file the investigation summary report or the remediation action plan. Upon receipt of these documents, Department staff would review, and either approve or disapprove the remediation action plan.

However, Mr. Langer contends in his letter dated January 11, 2010 that "the cleanup has been performed . . . but that the paperwork necessary to complete this matter has not been done." As noted above, Mr. Langer contends further that Mr. Vought of Department staff is familiar with all the circumstances related to this petroleum spill remediation at the 366 Avenue Y property.

In Mr. Urda's January 22, 2010 letter, Department staff disputes Respondent's contention that the site has been remediated. According to Mr. Urda, Mr. Vought does not agree that the site has been remediated. For example, according to Department staff's January 22, 2010 response, Mr. Vought advised Respondent to undertake endpoint sampling and to install monitoring wells.

Given the conflicting information concerning the status of the site remediation, I conclude that the requested relief may not be warranted and, at present, is not sufficiently supported. Where the ALJ has questions concerning the penalty phase of the motion, the ALJ may conduct an inquiry (*Matter of Alvin Hunt*, *supra*, at 5; *McClelland*, 252 NY at 351). Before the Commissioner issues an Order, I will convene a hearing to determine the current status of the remediation at the site. Therefore, I deny Department staff' motion for default judgment with respect to the requested remediation.

Conclusions

Based on the foregoing discussion, I conclude that, with respect to liability, Department staff's January 5, 2010 motion for a default judgment meets the requirements outlined at 6 NYCRR 622.15(b) and related administrative precedents. However, a hearing is necessary to determine the appropriate relief.

Further Proceedings

A hearing is necessary to determine whether the relief requested by Department staff is warranted. The purpose of the hearing will be to ascertain the current site conditions, and to determine what additional remediation, if any, is necessary.

I would like to hold a telephone conference call with the parties at 10:00 a.m. on May 13 or 14, 2010 to discuss the schedule for the hearing. By 4:30 p.m. on April 30, 2010, the parties shall advise me about their availability on May 13 or 14, 2010 for a telephone conference call. If a party is not available on these dates, then the party shall provide alternative times and dates for the conference call by April 30, 2010.

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

Dated: Albany, New York
April 23, 2010

Appendix A: Motion Papers

Appendix A

Matter of 366 Avenue Y Development Corporation
Motion Papers
DEC Case No.: R2-20090522-316

1. Notice of Motion for Default Judgment and Order, dated January 5, 2010.

2. Motion for Default Judgment and Order, dated January 5, 2010.

3. Affirmation of John K. Urda in Support of Motion for Default Judgment and Order, dated January 5, 2010 with attached Exhibits:

    a. Exhibit A – Bargain and Sale Deed for real property located at 366 Avenue Y, Brooklyn, New York, dated January 13, 2004.

    b. Exhibit B – Stipulation pursuant to Section 17-0303 of the Environmental Conservation Law and Section 176 of the Navigation Law by 366 Avenue Y Development Corporation (Joshua Golan) for Spill No. 9511519, effective February 14, 2007.

    c. Exhibit C – Notice of Hearing and Complaint dated August 4, 2009.

    d. Exhibit D – Affidavit of Service by Shelia Warner, sworn to August 4, 2009; Track and Confirmation printout for Item No. 7004 1350 0004 2635 6174; Copy of Signed Domestic Return Receipt for Item No. 7004 1350 0004 2635 6174.

    e. Exhibit E – Draft Order, DEC Case No. R2-20090522-316.

4. Letter dated January 11, 2010 by Norman S. Langer, Esq., 3047 Avenue U, Brooklyn, New York 11229 to Mr. Urda requesting that the motion be held in abeyance.

5. Letter dated January 22, 2010 by Mr. Urda (Department staff’s Response).

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All documents listed above received into evidence (Tr. at 39).