

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violation of Article 27 of the Environmental Conservation Law (ECL) and Parts 371 and 372 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR)

ORDER

File No. 16-27
R9-20160425-33

-by-

HYDRAMEC, INC.,

Respondent.

In this administrative enforcement proceeding, staff of the New York State Department of Environmental Conservation (Department) alleges that, from 1995 through 2015, Hydramec, Inc. (respondent): (a) failed to properly characterize the filter press sludge waste that it generated from its zinc plating operations at its facility located in Scio, New York; and (b) shipped hazardous waste as non-hazardous waste to a facility not permitted to receive respondent's hazardous waste.

Specifically, Department staff seeks an order holding respondent liable for violating 6 NYCRR 372.2,¹ for failing to properly characterize its waste, and 6 NYCRR 371.1(f)(6)(iii)(a) for shipping hazardous waste to a facility that was not permitted to take that waste. In addition, Department staff seeks: a civil penalty in the amount of forty-four thousand five hundred dollars (\$44,500); a direction to respondent to ensure that all future shipments of filter press sludge waste are properly characterized and transported; and such other and further relief as may be just, proper and appropriate.

Department staff served a notice of hearing and complaint on respondent on February 27, 2017. This matter was thereafter assigned to Administrative Law Judge (ALJ) D. Scott Bassinson. Respondent did not serve or file an answer to Department staff's complaint, but did appear at the May 3, 2017 adjudicatory hearing held in the Department's Region 9 offices.

At the hearing, Department staff moved for a default judgment, and respondent's counsel acknowledged respondent's failure to serve an answer, and expressly conceded liability with respect to 6 NYCRR 372.2 and 6 NYCRR 371.1(f)(6)(iii)(a). The parties agreed that the only remaining issue for the hearing related to the civil penalty to be imposed for these admitted violations. The parties thereafter proceeded to put on their cases with respect to penalty.

¹ Specifically, 6 NYCRR 372.2(a) provides that a person who generates a solid waste "must determine if that waste is a hazardous waste."

The ALJ prepared the attached hearing report in which he found that respondent failed to answer the complaint, thereby defaulting, and that respondent admitted liability for the violations alleged in Department staff's complaint. The ALJ recommends that I (a) hold that respondent committed the violations alleged in the complaint; and (b) assess a civil penalty in the amount requested by Department staff -- forty-four thousand five hundred dollars (\$44,500) (see Hearing Report at 2, 18-19). I adopt the ALJ's hearing report as my decision in this matter, subject to my comments below.

Factual Background

Respondent owns and operates a facility in Scio, New York, that produces tool parts, a process that involves zinc plating operations, and generates, among other things, filter press sludge waste (see Hearing Report at 2, Findings of Fact Nos. 2-4). Respondent generates approximately one cubic yard of sludge per year (see Hearing Report at 2, Finding of Fact No. 4).

In 1995, respondent's contractor Safety-Kleen tested the sludge to determine whether it was a hazardous waste, and determined that the sludge was not hazardous waste. Safety-Kleen provided a total metals analysis to respondent, and a form stating that the sludge was "non-hazardous per TCLP [Toxicity Characteristic Leachate Procedure] LIMS #9505995" (see Hearing Report at 3, Findings of Fact Nos. 5-7). Based upon Safety-Kleen's report, respondent thereafter disposed each year approximately one cubic yard of filter press sludge waste as non-hazardous waste (see Hearing Report, Findings of Fact Nos. 9, 18).

During a routine inspection of the facility in 2015, Department staff reviewed the 1995 Safety-Kleen report and expressed concern that the data in the 1995 report did not support the conclusion that respondent's waste was non-hazardous. Neither respondent nor Safety-Kleen was able to locate and produce a copy of the actual TCLP analysis referred to in Safety-Kleen's 1995 report to respondent (see Hearing Report at 3-4, Findings of Fact Nos. 12-14).

Department staff requested that respondent have its filter press sludge waste tested again using a TCLP analysis and that respondent refrain from shipping waste off-site until the results of that analysis were provided. Respondent had the sludge tested by a different contractor. The report of the testing in 2015 reflected a chromium level which exceeded the 5 mg/l regulatory maximum concentration for the toxicity characteristic (see Hearing Report at 4, Finding of Fact Nos. 17, 18; see also 6 NYCRR 371.3[e]). Upon receipt of the results reflecting that the waste was indeed hazardous per TCLP, respondent began shipping the waste as hazardous waste (see Hearing Report at 4, Finding of Fact No. 18).

Discussion

Department staff's claims arise under the New York State statutory and regulatory scheme established to be consistent with the federal Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901 et seq., which governs the generation, management, storage, treatment and disposal of hazardous waste (see ECL 27-0900). New York's program to enforce RCRA's

requirements has been authorized by the federal Environmental Protection Agency (EPA) (see Hearing Report at 5-6).

As found by the ALJ, respondent defaulted in answering the complaint and, at the hearing, expressly conceded liability (see Hearing Report at 2, 2 n. 1, and 6). I adopt the ALJ's recommendation to hold respondent liable for violating: (a) 6 NYCRR 372.2, by failing to properly characterize its filter press sludge waste; and (b) 6 NYCRR 371.1(f)(6)(iii)(a), by shipping its hazardous waste as non-hazardous waste to a facility not authorized to accept respondent's hazardous waste.²

Civil Penalty

Department staff alleges that respondent's violations occurred over a twenty (20) year period (1995 to 2015). Department staff utilized EPA's October 1990 RCRA Civil Penalty Policy (penalty policy) to calculate the civil penalty that it seeks in this proceeding. The ALJ notes, however, the penalty policy and its matrices for determining penalty ranges have been revised since 1990, and the more recent versions would apply to at least a portion of the period during which the violations occurred (see Hearing Report at 6 n. 4). The more recent versions of the penalty policy and penalty matrices contain higher penalties than the penalty policy which Department staff utilized (see id.).

As discussed by the ALJ, under the penalty policy, the penalty calculation includes determining a gravity-based penalty component, utilizing a "multi-day" component to account for a violation's duration; consideration of any economic benefit inuring to a violator because of non-compliance, and applying adjustment factors including degree of willfulness, good faith efforts to comply, history of non-compliance, and ability to pay (see Hearing Report at 6-9).

Applying these factors in the present case, Department staff determined that an appropriate penalty for respondent's violations would be forty-four thousand five hundred dollars (\$44,500) (see Hearing Exhibit 2 [penalty worksheet]). In so calculating, Department staff determined that both elements of the gravity-based penalty – potential for harm and extent of deviation from the applicable legal requirement – were "moderate," rather than "minor" or "major" (see Hearing Report at 10-12).

I agree with the ALJ that staff's determination to characterize these elements as "moderate" was appropriate. The results of the 2015 test of the sludge waste reflect that respondent's waste is hazardous. Thus, respondent disposed of hazardous waste improperly (see id. at 11). Respondent argues that staff should have characterized the violations as "minor," but mischaracterization and improper disposal of hazardous waste for many years does not create a "minor" potential for harm, and does not reflect a "minor" deviation from the statutory and regulatory requirements. I also agree with the ALJ's determination that Department staff's use of the "multi-day" penalty matrix in this matter was appropriate (see id. at 12-13).

² I agree with the ALJ that it is unnecessary for me to direct respondent to ensure that all future shipments of its sludge are properly characterized and shipped (see Hearing Report at 19 n. 12). Respondent is already required to comply with applicable law.

Department staff exercised its discretion in several respects that resulted in a significantly lower penalty than Department staff could have sought under the penalty policy. As discussed by the ALJ:

- staff used the 1990 version of the penalty policy and its matrices. Penalty amounts in the more recent matrices are higher (see Hearing Report at 6 n. 4);
- staff chose to assess a \$250 penalty figure, the lowest minimum daily penalty for “moderate-moderate” violations set forth in the penalty policy multi-day matrix (see id. at 16);
- staff treated the two violations as one for purposes of penalty calculation, so that the total penalty reflects only one penalty per day rather than two (see id.; see also id. at 13, and 13 n. 8);
- staff did not add any economic benefit amount to the calculated penalty, even though respondent saved approximately \$527 per shipment by shipping the hazardous waste as non-hazardous (see id. at 13, 17); and
- staff did not adjust the penalty for inflation (see id. at 17).

Adjustment Factors

Ability to Pay

The ALJ found that respondent did not satisfy its burden to demonstrate that it lacked the ability to pay the penalty. The ALJ noted that respondent’s documents establish that the company had a gross profit in 2014, 2015 and 2016, respondent has unrelated stock holdings of some value, and respondent owns its facility property and equipment without encumbrance (see Hearing Report at 14-15; see also id. at 4-5, Findings of Fact Nos. 19-26).

Good Faith

Both the RCRA statute and penalty policy require that a respondent’s good faith be considered in establishing an appropriate penalty. There is a presumption against reducing a penalty based upon “good faith,” where, as here, the “good faith” is merely coming into compliance after Department staff identifies a violation, as is the case here. The ALJ notes that the policy does allow for penalty mitigation when justified based on lack of willfulness or negligence (see Hearing Report at 15).

There is no dispute that, in 1995, respondent hired Safety-Kleen to determine whether respondent’s waste sludge should be treated as a hazardous waste. Nor is there any dispute that the contractor concluded that the waste was non-hazardous, and represented to respondent that such conclusion was based on a TCLP analysis. Department staff acknowledges that respondent

reasonably relied on its contractor's representation (see id. at 3, Finding of Fact No. 8), and the record contains no evidence that respondent otherwise knew the waste was in fact hazardous.³

Respondent's manufacturing processes has not changed substantially since 1995 (see id. at 3, Finding of Fact No. 11), and the ALJ notes that Department staff cited no legal authority requiring additional, or periodic testing here. Moreover, when Department staff conducted a routine inspection of the facility in 2015, respondent cooperated in all respects (see id. at 4, Findings of Fact Nos. 15 [respondent arranged for new test, and withheld shipments of sludge pending results] and 18 [based on test results, respondent began shipping waste as hazardous, at greater cost]).

Respondent argues that the penalty sought by Department staff is not warranted and should be reduced. The most recent version of EPA's RCRA penalty policy does provide for a downward adjustment of up to ten percent of the gravity-based and multi-day penalty where a respondent "demonstrates a highly cooperative attitude" during the inspection and enforcement process (see id. at 17-18 [quoting RCRA Civil Penalty Policy, rev. June 2003]). This downward adjustment, however, is applicable only in the settlement context; the policy expressly states that administrative law judges should not consider this downward departure in an enforcement proceeding (see id.).

Moreover, respondent rejected a lower proposed penalty prior to the commencement of this proceeding, thereby imposing on Department staff the burden of commencing and pursuing this administrative enforcement proceeding (see Respondent's Hearing Exhibit R4 [reflecting proposed penalty of \$32,500]). Department staff also made a number of attempts to obtain from respondent documentation to support respondent's claimed inability to pay, but respondent failed to produce financial information until just a few days before the hearing (see Hearing Report at 18 [citing Department staff statements at hearing regarding "[d]ozens of interactions" with respondent, and testimony by respondent's president that there was "[n]o particularly good reason" that respondent delayed providing financial information to Department staff]).

In recommending that I approve Department staff's requested penalty, the ALJ found that Department staff took respondent's good faith into account in its penalty calculation (see id. at 16). Even under the 1990 penalty policy, the penalty in this case could have been significantly higher (see e.g. Hearing Report at 16 [discussing a penalty in the six figures]).

Look-Back Period

As the ALJ notes, both parties referred to a "look back" period which, under the 2003 Penalty Policy, provides that penalties should be calculated for violations that have occurred within five years of the date of the complaint (see Hearing Report at 17 n. 11; Hearing Transcript at 53, 78). Using this method for calculating the penalty would also support staff's penalty request (see Hearing Report at 17).

³ I note that Safety-Kleen was not named as a respondent, and no representative of Safety-Kleen was called to testify at the hearing.

Conclusion

I concur with the ALJ that the civil penalty of forty-four thousand five hundred dollars (\$44,500) that Department staff requests is authorized and appropriate. In consideration of the record before me, however, I conclude that allowing for the payment of the civil penalty in installments over a six (6) month period would be appropriate. Respondent is directed to pay the civil penalty according to the following payment schedule:

- fifteen thousand dollars (\$15,000) by January 15, 2018;
- fifteen thousand dollars (\$15,000) by March 15, 2018; and
- fourteen thousand five hundred dollars (\$14,500) by May 15, 2018.

Each payment shall be submitted to the Department's Region 9 office.

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

- I. Respondent Hydramec, Inc. is adjudged to have violated (i) 6 NYCRR 372.2, by failing to properly characterize its waste; and (ii) 6 NYCRR 371.1(f)(6)(iii)(a), by shipping hazardous waste as non-hazardous waste to a facility not permitted to accept respondent's hazardous waste.
- II. Respondent Hydramec, Inc. is hereby directed to pay a civil penalty in the amount of forty-four thousand five hundred dollars (\$44,500) according to the following payment schedule:
 - fifteen thousand dollars (\$15,000), by January 15, 2018;
 - fifteen thousand dollars (\$15,000), by March 15, 2018; and
 - fourteen thousand five hundred dollars (\$14,500), by May 15, 2018.

Each of these payments shall be made by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation, and sent to the following address:

Office of General Counsel
NYS Department of Environmental Conservation, Region 9
270 Michigan Avenue
Buffalo, New York 14203-2999
Attn: Jennifer Dougherty, Esq.

- III. Any questions or other correspondence regarding this order shall also be addressed to Jennifer Dougherty, Esq. at the address referenced in paragraph II of this order.

- IV. The provisions, terms and conditions of this order shall bind respondent Hydramec, Inc., and its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Basil Seggos
Commissioner

Dated: November 13, 2017
Albany, New York

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violation of Article 27 of the Environmental Conservation Law (“ECL”) and Parts 371 and 372 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”)

**HEARING
REPORT**

File No. 16-27
R9-20160425-33

-by-

HYDRAMEC, INC.,

Respondent.

I. Background

This administrative enforcement proceeding concerns allegations that respondent Hydramec, Inc. (“respondent”), a New York business corporation that owns a tool parts manufacturing facility located at 4393 River Street, Scio, New York, violated 6 NYCRR parts 371 and 372 by failing to properly characterize its waste, and by shipping hazardous waste as non-hazardous waste to a facility not permitted to receive hazardous waste, on at least twenty occasions between 1995 and 2015.

Staff commenced this proceeding by personal service of a notice of hearing and complaint on Gregg Shear, CEO of respondent Hydramec, Inc. on February 27, 2017. See Affidavit of Personal Service of Environmental Conservation Officer Russell Calanni sworn to May 5, 2017. The complaint asserts two causes of action, alleging that respondent violated (i) 6 NYCRR § 372.2 from 1995 to 2015 by failing to properly characterize its waste; and (ii) 6 NYCRR § 371.1(f)(6)(iii)(a) by shipping hazardous waste on at least twenty occasions to a facility not permitted to accept hazardous waste. Staff requests that the Commissioner issue an order: (i) finding that respondent committed the violations; (ii) directing respondent to pay a civil penalty in the amount of forty-four thousand five hundred dollars (\$44,500); (iii) directing respondent to ensure that all future shipments of filter press sludge are properly characterized and shipped; and (iv) for such other and further relief as may be just, proper and appropriate. See Complaint at fourth unnumbered page, Wherefore Clause ¶¶ I-V.

On May 3, 2017, an adjudicatory hearing was held before the undersigned administrative law judge at the Region 9 offices of the New York State Department of Environmental Conservation (“Department”), 270 Michigan Ave., Buffalo, New York. Jennifer Dougherty, Esq. represented Department staff, and Karim A. Abdulla, Esq. represented respondent.

At the beginning of the hearing, counsel for staff moved orally for a default judgment pursuant to 6 NYCRR § 622.15, stating that respondent was served with the notice of hearing and complaint and failed to serve an answer. Counsel also submitted a proposed order. See

Hearing Transcript (“Hearing Tr.”) at 4:14-22. Respondent’s counsel acknowledged service of the notice of hearing and complaint, and acknowledged respondent’s failure to serve an answer. See id. at 4:25-5:2, 6:2-6.

Prior to opening statements at the adjudicatory hearing, counsel for respondent conceded liability, see Hearing Tr. at 7:17-19,¹ and stated that the only remaining issue was the appropriate amount of penalty. See id. at 5:6-7 (“The issue has been that of the appropriate penalty to be applied in this case”). The hearing thereafter proceeded with respect to the issue of civil penalty for the admitted violations. Each side called one witness to testify: Department staff called DEC engineer Kathleen Emery, and respondent called Gregg Shear, President of Hydramec, Inc. Eleven exhibits were entered into evidence.²

As discussed below, I find that (i) respondent failed to answer the complaint, thereby defaulting and admitting the factual allegations in the complaint; and (ii) at the hearing on the record, respondent affirmatively admitted liability for the violations alleged in the complaint. I recommend that the Commissioner (i) hold that respondent committed the violations alleged in the complaint; and (ii) assess a civil penalty in the amount requested by staff, \$44,500.

II. Findings of Fact

1. Respondent Hydramec, Inc. (“respondent”) is an active domestic business corporation in the State of New York. See Complaint ¶ 3; see also New York State Department of State Division of Corporations, Corporation and Business Entity Database, https://appext20.dos.ny.gov/corp_public/CORPSEARCH.ENTITY_SEARCH_ENTRY, enter search term “Hydramec, Inc.”³
2. Respondent owns and operates a company that produces and manufactures tool parts, located at 4393 River Street, Scio, New York. See Complaint ¶ 4.
3. Respondent’s manufacturing process involves zinc plating operations, which generate, among other things, filter press sludge. See Complaint ¶¶ 11-12.
4. Respondent generates approximately one cubic yard of sludge per year. See Testimony of Kathleen Emery, Hearing Tr. at 24:7-10.

¹ Counsel for respondent repeated this concession during his closing argument. See Tr. at 77:5-8 (“We don’t dispute that there was a violation here, that there was material improperly classified and improperly sent out”).

² A list of the exhibits received into evidence is attached hereto as Appendix A. Counsel for staff stated at the hearing that an affidavit of service of the notice of hearing and complaint was being re-signed and notarized that day, but inadvertently failed to offer it into evidence at the hearing, instead emailing it later to respondent’s counsel and the undersigned. Respondent did not object to its submission, and I have accepted the affidavit of service into evidence as staff exhibit 3.

³ I take official notice of the information in the Department of State’s website database pursuant to 6 NYCRR § 622.11(a)(5).

5. In 1995, respondent contracted with Safety-Kleen to test the sludge to determine whether it should be characterized as hazardous waste and be disposed of accordingly. See Complaint ¶¶ 14-15; Testimony of Kathleen Emery, Hearing Tr. at 28:16-19, 43:9-14.
6. Safety-Kleen analyzed the sludge, and provided a total metals analysis with a December 11, 1995 letter that stated “Hazardous Waste Class: None.” See Complaint ¶¶ 16, 18.
7. Safety-Kleen also provided a “Waste Prequalification Evaluation form” that stated the waste sludge was “non-hazardous per TCLP [Toxicity Characteristic Leachate Procedure] LIMS #9505995.” See Complaint ¶ 19; see also Testimony of Kathleen Emery, Hearing Tr. at 34:18-35:1 (Safety-Kleen report included the statement that the waste was nonhazardous per TCLP); id. at 43:15-17 (test results indicated sludge not hazardous per TCLP analysis); id. at 36:10-25 (counsel for the parties agree that Safety-Kleen had characterized its 1995 analysis as a TCLP analysis).
8. Given Safety-Kleen’s analysis of the waste, staff believes there was no basis for respondent to question the analysis. See Testimony of Kathleen Emery, Hearing Tr. at 35:2-10.
9. Based upon Safety-Kleen’s 1995 characterization of the sludge waste as non-hazardous, respondent shipped approximately one cubic yard of the sludge for disposal each year as non-hazardous waste. See Complaint ¶ 20.
10. Following Safety-Kleen’s 1995 testing and characterization of respondent’s sludge waste, respondent did not have its waste tested again until 2015. See Complaint ¶ 25; see also Testimony of Kathleen Emery, Hearing Tr. 30:4-8 (waste was characterized improperly for 20 years, since 1995); Testimony of Gregg Shear, Hearing Tr. at 58:4-10 (respondent had waste re-tested in 2015).
11. Respondent’s manufacturing processes have remained substantially the same since 1995. Complaint ¶ 22.
12. In October 2015, DEC engineer Kathleen Emery conducted a routine hazardous waste inspection of respondent’s facility. Testimony of Kathleen Emery, Hearing Tr. at 32:2-9.
13. Based upon her review of the 1995 Safety-Kleen report, Ms. Emery expressed concern as to whether the 1995 testing data supported the determination that the sludge waste was non-hazardous. Testimony of Kathleen Emery, Hearing Tr. at 34:7-17; see also id. at 35:5-8 (“when I scanned the numbers, it appeared to me as though right away the numbers seemed very high”).

14. The copy of the 1995 Safety-Kleen report provided to Department staff did not include a TCLP analysis, and neither respondent nor Safety-Kleen has produced a TCLP analysis to support the statement in the 1995 Safety-Kleen report that the waste sludge was “non-hazardous per TCLP LIMS #9505995.” Complaint ¶¶ 23-24; see also Hearing Tr. at 15:10-18 (respondent’s counsel’s opening statement that respondent contacted Safety-Kleen at request of DEC engineer, and Safety-Kleen informed respondent on November 20, 2015 that it could not locate a TCLP analysis for the sludge).
15. Upon request of the Department, respondent arranged for sludge to be characterized pursuant to TCLP, and withheld shipment of sludge pending results of the test using a TCLP analysis. See Complaint ¶ 26; see also Testimony of Gregg Shear, Hearing Tr. at 58:7-10, and Hearing Exhibit (“Hearing Ex.”) R2 (Pace Analytical Laboratory Report dated December 9, 2015).
16. The sample was taken on November 25, 2015, the results were received in December 2015 and were forwarded to Ms. Emery in January 2016. See Hearing Tr. at 15:16-23 (respondent’s counsel’s opening statement).
17. The report of the testing of the sludge in 2015 reflected that chromium levels in the sludge were 24.0 mg/l, which exceeds the 5mg/l regulatory maximum concentration level for the toxicity characteristic of solid waste. See Hearing Ex. R2; see also 6 NYCRR § 371.3(e)(1), Table 1; Hearing Tr. at 15:16-16:3 (respondent’s counsel’s opening statement).
18. Based upon the results of the 2015 test of the sludge, respondent shipped waste sludge for disposal as hazardous waste. It cost approximately \$500 more to ship respondent’s waste as hazardous waste than as non-hazardous waste. See Testimony of Gregg Shear, Hearing Tr. at 59:20-60:20; see also Hearing Tr. at 17:3-10 (respondent’s counsel’s opening statement); 78:25-79:2 (counsel statement that the economic benefit was \$527.88).
19. Respondent’s Form 1120S tax return for tax year 2014 (“2014 Return”) reflects gross receipts of \$1,928,191 and a gross profit of \$508,829. See Hearing Ex. R5; see also Testimony of Gregg Shear, Hearing Tr. at 64:17-25.
20. Respondent’s Form 1120S tax return for tax year 2015 (“2015 Return”) reflects gross receipts of \$1,897,383 and a gross profit of \$656,360. See Hearing Ex. R6.
21. Respondent’s Form 1120S tax return for tax year 2016 (“2016 Return”) reflects gross receipts of \$1,489,427, total sales of \$1,475,225, and a gross profit of \$320,729. See Hearing Ex. R7; see also Testimony of Gregg Shear, Hearing Tr. at 65:1-7.

22. According to respondent's president Gregg Shear, the company is in "significantly worse" financial shape in 2017 than it was in 2014. See Testimony of Gregg Shear, Hearing Tr. at 65:18-25; see also id. at 67:2-6 (gross sales down approximately 25%, and gross profit down by more than 35%, between 2014 and 2016).
23. In 2016, respondent sold approximately \$100,000 of "Snap On" stock. See Testimony of Gregg Shear, Hearing Tr. at 66:21-24; see also Hearing Ex. R7 at ninth unnumbered page, Schedule L, "Other Investments" (stating that "Investments – Snap On" totaled \$270,027 at the beginning of the tax year, and totaled \$173,204 at the end of the year).
24. As of April 28, 2017, respondent owned 500 shares of Snap-On Incorporated stock. See Hearing Ex. R8, Financial Statement of Hydramec, Inc., at 4, ¶ 15; see also Testimony of Gregg Shear, Hearing Tr. at 75:11-15; Hearing Ex. R7 at ninth unnumbered page, Schedule L, "Other Investments" (stating that "Investments – Snap On" totaled \$173,204 at the end of the 2016 year).
25. Respondent has one outstanding loan in the amount of "about \$50,000 right now," which is "almost paid off." Testimony of Gregg Shear, Hearing Tr. at 74:15-75:6.
26. Respondent owns the real property at its facility located at 4393 River Street, Scio, New York and the manufacturing machinery in the building on the property. See Hearing Ex. R8, at 6, ¶ 22(A). There are no encumbrances against the real property owned by respondent, including but not limited to mortgages and liens, "other than the usual utility easements." Id. at 7, ¶ 22(C).
27. Department staff utilized the October 1990 Resource Conservation and Recovery Act ("RCRA") Civil Penalty Policy ("1990 Penalty Policy") to calculate the civil penalty that it seeks in this proceeding. See Testimony of Kathleen Emery, Hearing Tr. at 20:12-21:6; see also Hearing Ex. 1.

III. Discussion

The federal Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 et seq., was enacted to reduce or eliminate the generation of hazardous waste as expeditiously as possible, and to treat, store and dispose of hazardous waste "so as to minimize the present and future threat to human health and the environment." 42 U.S.C. § 6902(b).

Although RCRA is a comprehensive federal statutory and regulatory scheme, states retain the authority to regulate hazardous waste so long as the state's statutory and regulatory scheme is at least as stringent as the federal program, and the state's program is authorized by the federal Environmental Protection Agency ("EPA"). New York has enacted its own statutory and regulatory scheme, see ECL article 27, title 9, intended to regulate the management of hazardous

waste “in a manner consistent with” RCRA. ECL § 27-0900. New York is an “authorized” state with respect to enforcement of RCRA’s requirements. See e.g. <http://www.dec.ny.gov/chemical/60828.html>.

As discussed above, respondent conceded liability on the record at the hearing. Thus, I am recommending that the Commissioner hold respondent liable for violating: (i) 6 NYCRR § 372.2 by failing to properly characterize the waste generated by its zinc-plating operations; and (ii) 6 NYCRR § 371.1(f)(6)(iii)(a) by shipping its hazardous waste as non-hazardous waste to a facility not permitted under 6 NYCRR part 373 (hazardous waste regulations). As the parties agreed, the sole issue at the hearing related to the amount of the civil penalty sought by Department staff.

A. RCRA Civil Penalty Policy

Department staff utilized the 1990 Penalty Policy to calculate the penalty that it seeks from respondent. See Hearing Tr. at 20:12-21:6.⁴ The 1990 Penalty Policy provides a “penalty calculation system” consisting of four elements: (1) determining a gravity-based penalty from a penalty assessment matrix; (2) adding a “multi-day” component to account for a violation’s duration; (3) adjusting the penalty amount up or down based upon case-specific circumstances; and (4) adding the appropriate economic benefit gained through non-compliance. See Hearing Ex. 1, 1990 Penalty Policy. A penalty calculation “shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.” 42 U.S.C. § 6928(a)(3); see also RCRA Civil Penalty Policy (rev. June 2003) (“2003 Penalty Policy”), at § I.

1. Gravity-Based Penalty Component

The gravity-based component of the penalty calculation “is a measure of the seriousness of a violation,” and is comprised of two elements: (1) potential for harm; and (2) extent of deviation from a statutory or regulatory requirement. See 1990 Penalty Policy, at 12.

a. Potential for Harm

The potential for harm from noncompliance is determined using two factors: (1) risk of human or environmental exposure to hazardous waste or constituents; and (2) adverse effect noncompliance may have on the statutory/regulatory purposes/procedures for RCRA program implementation. See id. at 12-13. The risk of exposure depends on the likelihood and degree of exposure, and the potential seriousness of harm if hazardous waste or constituents were in fact released to the environment. See id. at 13-14.

⁴ The policy and the matrices to use for calculating penalties have been revised during the period relevant here, and the penalty amounts in the matrix ranges have increased. See e.g. <https://www.epa.gov/enforcement/rcra-civil-penalty-policy> (RCRA Civil Penalty Policy, rev. June 2003); <https://www.epa.gov/sites/production/files/documents/revisionpenaltypolicy04910.pdf> (April 6, 2010 Revision to Adjusted Penalty Matrices Package Issued on November 16, 2009). Had Department staff utilized the revised penalty policy and the most recent penalty matrices, the calculated penalty would have been higher.

In calculating the adverse effect on the regulatory program, enforcement staff is reminded that “all regulatory requirements are fundamental to the continued integrity of the RCRA program.” Id. at 14. The policy provides examples of violations which may undermine RCRA’s purposes, and “may have serious implications and merit substantial penalties.” Id. at 14-15.

Following consideration of the above factors, staff determines the appropriate “category” of potential for harm for a given violation; that is, whether the potential for harm is “major,” “moderate” or “minor.” These categories reflect whether the violation may pose a substantial, significant or low risk of exposure, respectively, and/or whether the action may have a substantial, significant or small adverse effect on the statutory/regulatory purposes/procedures for implementing the RCRA program. See id. at 15-16.

b. Extent of Deviation

This element of the gravity-based penalty component “relates to the degree to which the violation renders inoperative the requirement violated.” Id. at 17. The policy contemplates a spectrum ranging from substantial compliance with a requirement to total disregard of the requirement. See id. As with the potential for harm element of the gravity-based penalty component of penalty calculation, the extent of deviation element can be categorized as “major,” “moderate” or “minor.” The “major” category applies to circumstances in which the violator deviates “to such an extent that most (or important aspects) of the requirements are not met resulting in substantial noncompliance.” The “moderate” category applies where the violator “significantly deviates” from the requirements “but some of the requirements are implemented as intended.” Finally, the “minor” category applies when the violator “deviates somewhat” from the requirements “but most (or all important aspects) of the requirements are met.” Id.

The policy’s “penalty assessment matrix” is comprised of two axes: (i) potential for harm, and (ii) extent of deviation, each containing categories of “major, moderate, minor.” This results in a matrix of nine cells, each of which contains a penalty range based upon the gravity-based characterization of the violation in terms of each axis, e.g. major-major, major-moderate, major-minor, moderate-moderate, etc.

2. Multi-Day Penalty

The RCRA Penalty Policy also authorizes consideration of the duration of a violation as a factor in determining an appropriate civil penalty. Calculating the “multi-day component” of a civil penalty requires determining (i) that a violation has continued for more than one day; (ii) the length of time the violation continued; and (iii) whether a multi-day penalty is mandatory, presumed or discretionary. See id. at 22.

Whether a multi-day penalty is mandatory, presumed or discretionary depends on the gravity-based characterization of the violation. Thus, multi-day penalties are mandatory for days 2-180 with respect to violations designated major-major, major-moderate and minor major. See id. at 23. Multi-day penalties are presumed appropriate for days 2-180 with respect to violations designated major-minor, moderate-moderate, minor-major. See id. Multi-day penalties are

discretionary with respect to all violations for days 181+, as well as with respect to violations designated moderate-minor, minor-moderate, minor-minor. See id.

Following a determination of whether a penalty is mandatory, presumed or discretionary, calculation of an appropriate penalty involves utilizing a multi-day matrix of minimum daily penalties, and multiplying the number of days of the violation by a dollar amount within the range of the appropriate cell in the matrix. See id. at 23-24.

3. Economic Benefit of Noncompliance

Penalty calculation under the 1990 Penalty Policy includes calculation of any economic benefit inuring to a violator because of noncompliance. The policy requires “recapture” of any significant economic benefit of noncompliance, to eliminate any economic incentive for noncompliance. See id. at 25. The policy authorizes agency personnel to forego including an economic benefit component where the amount is insignificant. See id. at 26.

4. Adjustment Factors

Penalties may be adjusted based upon factors such as degree of willfulness and/or negligence, history of noncompliance, ability to pay, and others. See id. at 30. The RCRA statute expressly requires consideration of any good faith efforts to comply with the applicable requirements. Id.; see 42 U.S.C. § 6928(a)(3) (“the Administrator shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements”); see also 2003 Penalty Policy, at § I (same).

a. Good Faith

The policy provides that a violator can manifest good faith “by promptly identifying and reporting noncompliance or instituting measures to remedy the violation before the Agency detects the violation.” Id. at 33 (emphasis added). There is a presumption against a downward adjustment, however, if good faith efforts merely consist of coming into compliance after the regulatory agency detects the violations, “since the amount set in the gravity-based penalty component matrix assumes good faith efforts by a respondent to comply after [the agency] discovery of a violation.” Id. Finally, a penalty may be adjusted downward where a respondent reasonably relied on written statements by the state or the EPA that an activity satisfied RCRA requirements, and it was later determined that the activity did not so comply. See id. at 34.

b. Degree of Willfulness and/or Negligence

Penalties may be adjusted upward based upon willfulness and/or negligence where, for example, a violation evidences heightened culpability, but is not sufficient to support criminal charges. See id. at 34. The policy also acknowledges, however, that “there may be instances where penalty mitigation may be justified based on the lack of willfulness and/or negligence,” even though RCRA is a strict liability statute. Id.

c. Ability to Pay

Ability of a violator to pay should be considered in determining an appropriate penalty. See id. at 36. The burden of demonstrating inability to pay rests on the respondent, “as it does with any mitigating circumstances.” Id.

B. ECL Penalty Provisions

In its complaint, Department staff cites two ECL provisions relating to the assessment of civil penalties in this matter. First, staff cites the ECL’s general civil penalty provision which authorizes the imposition of a civil penalty of up to \$1,000 for each violation of any chapter, rule, regulation or order under the ECL, “[e]xcept as otherwise specifically provided elsewhere in this chapter.” ECL § 71-4003; see also Complaint ¶ 8. Second, staff cites ECL § 71-2705, which authorizes the imposition of a civil penalty of up to \$37,500 for a first violation of ECL article 27, titles 9, 11 and 13, or any regulation promulgated pursuant thereto, and \$37,500 for each day during which such violation continues. See Complaint ¶ 9.

As stated above, the sole focus of the hearing was the amount of penalty sought by Department staff. The ECL provisions cited above were not mentioned during the hearing; rather, the testimony related to the civil penalty to be imposed under the EPA 1990 RCRA Civil Penalty Policy.⁵

C. Civil Penalty in this Matter

Department staff seeks a civil penalty of \$44,500 in this matter. In order to reach that figure, regional staff applied the 1990 Penalty Policy in consultation with central office staff. See Hearing Tr. at 20:12-21:6, 26:20-27:4, 29:21-25, 40:23-41:3, 42:9-15, 44:15-21, 45:9-12. In sum, staff:

- determined that both elements of the gravity-based penalty component were “moderate;”
- calculated the penalty using \$250, the lowest penalty in the range of the “moderate-moderate” cell of the multi-day penalty matrix;
- multiplied that figure by 179, the number of days that staff determined the violation persisted, pursuant to the 1990 Penalty Policy; and
- made no upward or downward adjustments for good faith, willfulness/negligence, history of non-compliance, economic benefit or ability to pay.

Respondent argues that the penalty should be “no more than \$8,624.24,” calculated as follows:

⁵ The federal RCRA statute provides for daily penalties of up to \$25,000 per day for each violation. See 42 U.S.C. § 6928(a)(3). Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701 note, federal agencies were required to issue regulations adjusting penalty amounts for inflation. The amended RCRA regulations reflect different penalty amounts depending on the dates of violations. See 40 C.F.R. § 19.4, Table 1 (penalties under 42 U.S.C. § 6928(a)(3) range from \$27,500 to \$37,500 per violation for violations occurring after January 1997). This matter involves allegations of violations covering the period 1995-2015.

- both elements of the gravity-based penalty component should be “minor;”
- using the “minor-minor” cell of the gravity-based matrix, as adjusted for inflation, a figure of \$814.09⁶ for each violation;
- an economic benefit amount of \$527.88 per shipment should be applied;
- the violation here should not be considered a multi-day violation, but rather violations relating to four separate shipments, in 2011, 2012, 2013 and 2014;
- the total penalty should be \$2,156 per shipment (apparently \$2,156.06 [$\$814.09 + \$814.09 + \527.88] x 4 = \$8,624.24);
- consideration should include good faith, lack of culpability or willfulness/negligence, and the financial status of the company.

See Hearing Tr. at 77:22-79:11.

1. Gravity-Based Penalty Component

Staff determined that both elements of this penalty component – potential for harm and extent of deviation – were “moderate.” See Hearing Ex. 2 (Penalty Computation Worksheet); see also Hearing Tr. at 24:3-5. Respondent argues that both elements of the gravity-based penalty component should be “minor.” See id. at 78:6-10. As discussed below, I find Department staff’s determination to be reasonable.

a. Potential for Harm

With respect to its determination that the “potential for harm” element is “moderate” under the 1990 Penalty Policy, staff explained as follows:

The amount of plating sludge disposed at a non-hazardous landfill was relatively small ... but it MAY pose a significant risk of exposure of humans or other environmental receptors to chromium. The TCLP level of chromium in the waste from 1995 through January 2015 is not KNOWN to have been at a hazardous level, however TOTAL level of chromium was determined to be 1400ppm in 1995 (therefore TCLP may have been at ~70 mg/L). TCLP level of chromium in December 2015 was determined to be 24 mg/L (haz level is 5 mg/L).

Hearing Ex. 2 (caps in original); see also Hearing Tr. at 24:5-15; 27:25-28:12 (chromium amount in the waste was above regulatory limit; small quantity of waste disposed); id. at 55:10-17 (hazardous waste was disposed of at non-hazardous waste landfill).

Respondent asserts that the potential for harm should be characterized as “minor.” The 1990 Penalty Policy defines a “minor” classification for the potential for harm element of the gravity-based penalty component as follows:

⁶ Respondent cited no source for this figure.

MINOR (1) the violation poses or may pose a relatively low risk of exposure of humans or other environmental receptors to hazardous waste or constituents; and/or (2) the actions have or may have a small adverse effect on statutory or regulatory purposes or procedures for implementing the RCRA program.

1990 Penalty Policy, at 15-16. To support its position that the potential for harm element should be characterized as “minor,” respondent elicited testimony on cross-examination that there is no evidence that respondent’s waste caused any actual harm to humans or specific harm to the non-hazardous landfill to which the waste was sent or its surrounding environment. See Hearing Tr. at 49:3-14, 50:1-5.

As the actual name of the element “potential for harm” implies, however, actual harm is not required for a determination that this element is “moderate” under the 1990 Penalty Policy. Assessing the potential for harm involves consideration of the probability of exposure. As the 1990 Penalty Policy states,

[w]here a violation involves the actual management of waste, a penalty should reflect the probability that the violation could have resulted in, or has resulted in a release of hazardous waste or constituents, or hazardous conditions creating a threat of exposure to hazardous waste or waste constituents.

1990 Penalty Policy at 13.

This case involves the actual management of waste, and respondent has conceded that, for many years, it actually sent hazardous waste for disposal at a landfill not authorized to receive such waste. I find reasonable Department staff’s discretionary characterization of respondent’s actual improper disposal of hazardous waste as “moderate” with respect to potential for harm.⁷

b. Extent of Deviation

Staff determined that the “extent of deviation” element of the gravity-based penalty in this matter is “moderate,” defined in the 1990 Penalty Policy as follows:

MODERATE: the violator significantly deviates from the requirements of the regulation or statute but some of the requirements are implemented as intended.

1990 Penalty Policy at 17. Staff explained its determination as follows:

The extent of deviation present in this violation is moderate because the generator did have Safety Kleen analyze the plating sludge in 1995, however, the results package from this analysis included a table showing TOTAL metal content values (rather than TCLP) for the sludge and a statement by Safety Kleen “Non-

⁷ Moreover, this case does not involve, for example, a mere paper violation. See e.g. 2003 Penalty Policy, at 16 (minor potential for harm where, for example, otherwise-complete and correct manifest forms contain typed name rather than required handwritten signature).

hazardous per TCLP LIMS #9505995.” TCLP values were not provided in 1995 nor available from Safety Kleen per recent request (in November 2015) by generator. Moderate was chosen because analysis was done but results were apparently interpreted incorrectly and generator is ultimately responsible for waste determination.

Hearing Ex. 2 (caps and underline in original); see also Hearing Tr. at 28:13-23 (although respondent did hire Safety-Kleen to test, and received the test, no TCLP analysis was provided to substantiate the claim that the waste was non-hazardous); id. at 43:17-25 (the “significant deviation” here warranting “moderate” classification was the incorrect determination that the waste was non-hazardous); id. at 52:7-14 (respondent must still abide by regulations and cannot use statement by Safety-Kleen that waste was non-hazardous as a reason for not disposing it properly).

Respondent asserts that the extent of deviation element should be characterized as “minor.” The 1990 Penalty Policy defines a “minor” extent of deviation element of the gravity-based penalty component as follows:

MINOR: the violator deviates somewhat from the regulatory or statutory requirements but most (or all important aspects) of the requirements are met.

1990 Penalty Policy, at 17. To support its position that the extent of deviation element should be characterized as “minor,” respondent elicited testimony on cross-examination that respondent did send out the waste for testing, that it was tested and that the test results indicated that the waste was not hazardous per TCLP analysis. See Hearing Tr. at 43:4-20.

According to Department staff, the “significant deviation” in this matter included the fact that respondent’s waste was mischaracterized, and that the hazardous waste was actually disposed of at a non-hazardous waste landfill. See Hearing Ex. 2; see also Hearing Tr. at 43:17-25, 52:7-14. I find staff’s discretionary determination on this element to be reasonable. In so finding, however, I note that the record reflects respondent’s implementation of some of the requirements.

2. Multi-Day Penalty

Department staff determined that respondent mischaracterized its waste for twenty years, thus warranting the use of the multi-day penalty provisions of the 1990 Penalty Policy. Pursuant to the policy, multi-day penalties are “presumed” appropriate for days 2-180 with respect to violations designated, as in the present case, “moderate-moderate.” See id. Thus, Department staff determined that the multi-day penalty here should be for 179 days. See Hearing Tr. at 30:4-11.

Once it is determined that the penalty should be “multi-day,” penalty calculation involves utilizing the “multi-day matrix of minimum daily penalties.” See 1990 Penalty Policy at 24. The multi-day matrix provides a penalty range of \$250-\$1,600 for multi-day violations determined, as in the present case, to be “moderate-moderate.” Id. Department staff chose the lowest

amount in this penalty range – \$250 – to apply to the violations here at issue. See Hearing Ex. 2 (worksheet); see also Hearing Tr. at 26:9-19.

Staff’s penalty calculation also involved “collapsing” respondent’s two violations – failure to properly characterize waste and improper shipment of hazardous waste – into one violation, so that the total reflects only one penalty per day rather than two. Staff’s rationale was that the second violation was the result of the first one. See Hearing Tr. at 27:6-24. Staff calculated the penalty as follows: \$250 x 179 days, minus one day = \$44,500. See Hearing Ex. 2.⁸

With respect to staff’s multi-day violation determination, respondent’s counsel stated at the hearing:

We don’t believe that there’s a basis for having this set up as a multi-day violation, that really would be more appropriate to have this as a single instance violations such as a violation for failure to properly classify the waste and at worst, up to four violations for each of the shipments in 2011, ’12, ’13 and ’14.

Hearing Tr. at 78:10-16. On cross-examination, staff witness Emery agreed with respondent’s counsel that staff could have used the “single day matrix,” and imposed a penalty based upon two violations for each year, rather than the multi-day matrix. See Hearing Tr. at 45:15-46:21.

Respondent has provided no administrative or judicial precedent, or other legal authority, however, supporting the view that use of the multi-day penalty here was not authorized or was unreasonable. While a shipment of waste is a discrete event that begins and ends with each shipment, failure to properly characterize a waste continues for so long as the waste is not characterized properly. Thus, Department staff’s application of the multi-day penalty to respondent’s failure to properly characterize the waste, see Hearing Tr. at 30:4-11, was reasonable.

3. Economic Benefit of Noncompliance

Department staff did not include in its requested penalty any amount reflecting the economic benefit enjoyed by respondent by failing to ship its waste as hazardous waste. See Hearing Ex. 2; see also Hearing Tr. at 39:5-7. The economic benefit in this case was approximately \$527, representing the differential in cost incurred in shipping the waste as hazardous rather than non-hazardous waste. See Hearing Tr. at 16:9-12 (\$527), 78:25-79:3 (\$527.88). Respondent included this amount in its calculation of an appropriate penalty.

⁸ The 2003 Penalty Policy allows for “compression” of penalties for related violations. See 2003 RCRA Penalty Policy at 21-22. The 2003 policy expressly states, however, that “failure to make a hazardous waste determination ... should not be compressed because this requirement determines which wastestreams are subject to further regulation.” Id. at 22 (citing 40 C.F.R. § 262.11 (the federal analogue to 6 NYCRR § 372.2(a)(2), the state regulation at issue here)) (emphasis added). Had Department staff not treated the two violations as one for purposes of calculating the requested penalty, the penalty figure would have doubled.

4. Adjustment Factors

Under the 1990 Penalty Policy, the total gravity-based penalty may be adjusted using factors such as history of noncompliance, ability to pay, degree of willfulness and/or negligence, and others. See id. at 30. The RCRA statute expressly requires consideration of any good faith efforts to comply with the applicable requirements. Id.; see 42 U.S.C. § 6928(a)(3); see also 2003 Penalty Policy, at § I. After calculating its total gravity-based penalty, Department staff did not make any adjustments based upon the factors identified above. See Hearing Tr. at 13:12-17, 30:12-22.

Respondent argued that the penalty should be adjusted downward using some of the factors mentioned above, and submitted exhibits and testimony to support a claim that respondent lacks the ability to pay. Each of these issues is addressed below.

a. History of Noncompliance

Department staff did not adjust its requested penalty based upon a history of noncompliance. Hearing Tr. at 30:20-31:1. Staff witness Emery testified on cross-examination that there was no upward adjustment for this factor “because there [were] no prior violations at the facility.” Id. at 39:7-25.

b. Ability to Pay

Ability of a violator to pay should be considered in determining an appropriate penalty. See 1990 Penalty Policy at 36. The burden of demonstrating inability to pay rests on the respondent, “as it does with any mitigating circumstances.” Id.

Respondent is an active business corporation in New York, see Finding of Fact No. 1. Respondent’s Form 1120S tax returns for the tax years 2014, 2015 and 2106, and a Financial Statement/Corporation form verified by respondent’s president Gregg Shear on April 28, 2017, were entered into evidence. See Hearing Exs. R5, R6, R7, R8, respectively. According to Mr. Shear, respondent is in “significantly worse” financial shape now than in 2014. See Hearing Tr. at 65:18-25. Mr. Shear testified that, based upon the tax returns in evidence, respondent’s gross sales are down approximately 25%, and its gross profit is down by more than 35%. See id. at 67:2-6. Mr. Shear testified that respondent has an outstanding loan with a current balance of approximately \$50,000 that is “almost paid off.” Id. at 74:15-75:6

The documents also reflect that respondent owns stock in the “Snap On” company which, according to respondent’s 2016 tax return, was worth \$173,204 at the end of that tax year. See Hearing Exhibit R7 at Schedule L, Other Investments.⁹ Respondent owns 500 shares of the company, see Hearing Ex. R8 at 4, and respondent’s president testified that respondent could sell more of the stock. See Hearing Tr. at 75:7-15. Nothing in the record suggests that this asset has been pledged as collateral or is otherwise subject to a claim by a creditor of respondent.

⁹ This figure represents the value of the Snap On stock remaining after respondent sold approximately \$100,000 worth of the stock in 2016. See Hearing Tr. at 66:21-24; see also Hearing Ex. R7 at Schedule L (value of Snap On investment was \$270,027 at beginning of tax year, and \$173,204 at end of tax year).

Respondent also owns the real property at which the manufacturing facility is located, and the manufacturing machinery in the building on the property. See Hearing Ex. R8 at 6. This property is not subject to any encumbrances, including mortgages and liens, “other than the usual utility easements.” Id. at 7. Finally, respondent is not a party in any pending lawsuit. See id. at 8.

Thus, the record does not support respondent’s position that it is unable to pay the civil penalty sought by Department staff. Its own documents establish that respondent’s property and facility are owned outright, without encumbrance, and that respondent has 500 shares of stock valued (as of the end of the 2016 tax year) at approximately \$173,000.

c. Good Faith and Willfulness/Negligence

Both the statute and penalty policy require that a respondent’s good faith be considered in establishing an appropriate penalty. The policy provides that a violator can manifest good faith “by promptly identifying and reporting noncompliance or instituting measures to remedy the violation before the Agency detects the violation.” 1990 Penalty Policy at 33 (emphasis added).

There is a presumption against a downward adjustment, however, if good faith efforts merely consist of coming into compliance after the regulatory agency detects the violations, “since the amount set in the gravity-based penalty component matrix assumes good faith efforts by a respondent to comply after [the agency] discovery of a violation.” Id. Finally, a penalty may be adjusted downward where a respondent reasonably relied on written statements by the state or the EPA that an activity satisfied RCRA requirements, and it was later determined that the activity did not so comply. See id. at 34.

Penalties may be adjusted upward based upon willfulness and/or negligence where, for example, a violation evidences heightened culpability, but not sufficient to support criminal charges. See id. at 34. The policy also acknowledges, however, that “there may be instances where penalty mitigation may be justified based on the lack of willfulness and/or negligence,” even though RCRA is a strict liability statute. Id.

In this matter, the parties agree to the following facts:

- In 1995, respondent contracted with Safety-Kleen to test the filter press sludge generated by respondent’s operations, to determine whether it should be characterized as hazardous waste and be disposed of accordingly, see Finding of Fact No. 5, and record citations therein;
- Safety-Kleen analyzed the sludge, and provided a total metals analysis with a December 11, 1995 letter that stated “Hazardous Waste Class: None,” see Finding of Fact No. 6, and record citations therein;¹⁰

¹⁰ Neither party sought to introduce a December 11, 1995 letter into evidence, but both parties admit to the letter’s existence and the contents discussed herein.

- Safety-Kleen also provided a “Waste Prequalification Evaluation form” that stated the waste sludge was “non-hazardous per TCLP [Toxicity Characteristic Leachate Procedure] LIMS #9505995,” see Finding of Fact No. 7, and record citations therein.
- Respondent relied upon Safety-Kleen’s representations as to the character of the waste, and there was no basis for respondent to question the analysis, see Finding of Fact No. 8, and record citations therein.

The record contains no evidence that, notwithstanding Safety-Kleen’s representations that the waste was non-hazardous pursuant to a TCLP analysis, respondent knew that the waste was hazardous. Nor does the record establish that respondent was under a duty to re-test the waste after 1995; for example, the record does not reflect, and staff did not allege, that respondent’s operations changed after 1995 so that respondent was obligated to re-test the waste. See e.g. Complaint ¶ 22 (respondent’s manufacturing processes have remained substantially the same since 1995).

Moreover, staff witness Emery agreed that respondent took reasonable precautions against the events constituting the violation, and that this fact could justify penalty mitigation under the RCRA policy, such as a decrease in penalty based upon respondent’s good faith. See Hearing Tr. at 46:23-47:18.

Thus, the facts here do reflect respondent’s lack of willfulness and its good faith efforts to comply with the law. Respondent took reasonable precautions to avoid a violation: it hired a company to test the waste, received the results, and acted on the results. Moreover, respondent had the waste re-tested as soon as the Department requested, agreed to ship no waste until the test results were received and, upon receipt of the test results, immediately began shipping its waste as hazardous waste.

Department staff’s requested penalty reflects an acknowledgment of respondent’s good faith, and is significantly lower than a penalty that could have been sought. For example, staff chose the lowest minimum daily penalty in the multi-day matrix for “moderate-moderate” violations, \$250. The potential penalty range in that matrix cell was \$250-\$1,600. Had staff utilized the maximum amount in that matrix cell, and otherwise conducted the same calculation (179 days x \$1,600 minus one day), the penalty would have been \$284,800.

Moreover, staff collapsed the two violations per day into one. Had staff not collapsed the violations, the penalty would have been doubled: \$89,000 (using \$250 per violation) or \$569,600 (using \$1,600 per violation).

Respondent also argues that use of the multi-day penalty matrix (and hence the multiplication of the amount in the matrix by 179 days) was not appropriate. Respondent argues

that, using a five year look back period,¹¹ the violations occurred only four distinct times – 2011, 2012, 2013 and 2014. See Hearing Tr. at 78:10-16. Department staff points out, however, that the “moderate-moderate” cell of the gravity-based matrix contains a penalty range of \$5,000-\$7,999 per violation. See Hearing Tr. at 52:17-53:9; see also 1990 Penalty Policy at 19. Thus, had staff utilized the gravity-based matrix, the penalty for the eight violations (four years of two violations each) could have ranged from \$40,000 to \$63,992.

Department staff also did not use the most recent penalty policy matrix to calculate its penalty. See Revision to Adjusted Penalty Policy Matrices Package Issued on November 16, 2009, at Attachment B, <https://www.epa.gov/enforcement/revision-adjusted-penalty-policy-matrices-package-issued-november-16-2009>. Under the 2009 revised multi-day penalty matrix, a “moderate-moderate” violation is subject to a range of \$360-\$2,230, higher than the same type of violation under the 1990 Penalty Policy. Similarly, the “moderate-moderate” range under the gravity-based penalty matrix in the revised matrix is higher than in the 1990 Penalty Policy. See id. (“moderate-moderate” range \$7,090-\$11,330). Even utilizing the lowest penalties in the ranges from either revised matrix would have significantly increased the penalty amount sought here.

Department staff also did not increase the penalty by the amount of economic benefit to respondent of the violation, even though respondent conceded that it saved approximately \$527 for each shipment. See Hearing Tr. at 17:3-10, 78:25-79:2. Finally, according to respondent’s counsel, Department staff did not adjust its penalty amount for inflation. See Hearing Tr. at 78:22-25.

The 2003 Penalty Policy also provides for downward adjustments of up to ten percent of the gravity-based and multi-day penalty where “the violator demonstrates a highly cooperative attitude throughout the compliance inspection and enforcement process.” 2003 Penalty Policy, at 12. Such adjustment, however, is “only appropriate to apply in the context of settling a penalty claim,” and “[i]t is therefore contemplated that decisionmakers in administrative proceedings would not adjust penalty amounts downward based upon their assessment” of this or other “settlement only” factors. Id.; see also id. at 35 (“only Agency enforcement personnel, as distinct from an administrative law judge charged with determining an appropriate RCRA

¹¹ Both parties discussed a “look back” period, but neither party provided the source for this concept, and it is not included in staff’s penalty calculation worksheet. See Hearing Tr. 53:12-15, 78:10-16; see also Hearing Ex. 2. Although not mentioned in the 1990 Penalty Policy utilized by staff, the 2003 Penalty Policy states:

Enforcement personnel are counseled to only calculate penalties for those violations that have occurred within five years of the date of the complaint. Therefore, generally, penalties should not be calculated for one-time violations occurring more than five years before the date the complaint is to be filed and for continuing violations ending more than five years before the date the complaint is to be filed.

2003 Penalty Policy, at 21.

penalty,” should consider downward adjustment because of respondent’s cooperative attitude, because factor only relevant in settlement context). According to the policy, this adjustment factor “further reinforces the concept that respondents face a significant risk of higher penalties in litigation than in settlement.” Id. at 41.

At the hearing, staff stated that numerous attempts (“dozens of interactions”) were made to obtain from respondent financial information to support respondent’s claimed inability to pay, but the financial information was not provided to staff until just a few days before the hearing. See Hearing Tr. at 6:8-24. Respondent’s president testified that there was “[n]o particularly good reason” that respondent delayed providing this information to Department staff, and that it just “fell through the cracks.” Id. at 70:20-71:12.

Given the foregoing, I find that Department staff’s requested penalty of \$44,500 is authorized and appropriate. Such penalty is far below the statutory maximum, see e.g. ECL § 71-2705 (\$37,500 per violation and \$37,500 for each day violation continues), and below the maximum allowable under the penalty range in the matrix utilized by staff. The penalty was calculated utilizing the lowest penalty amount allowed in the “moderate-moderate” matrix cell from the 1990 Penalty Policy. The calculation did not utilize the most recent RCRA penalty policy and higher penalty matrix figures. The violations were collapsed from two violations to one for purposes of penalty calculation. The calculation did not include any upward adjustment for economic benefit, and was not adjusted for inflation.

IV. Recommendations

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

A. Holding that respondent Hydramec, Inc. violated:

1. 6 NYCRR § 372.2 from 1995 to 2015 by failing to properly characterize its waste; and

2. 6 NYCRR § 371.1(f)(6)(iii)(a) by shipping hazardous waste as non-hazardous waste to a facility not permitted to accept hazardous waste.

B. Directing respondent Hydramec, Inc. to pay a civil penalty in the amount of forty-four thousand five hundred dollars (\$44,500).¹²

_____/s/_____
D. Scott Bassinson
Administrative Law Judge

Dated: July 19, 2017
Albany, New York

¹² Department staff also requests that the Commissioner’s order direct respondent “to ensure that all future shipments of filter press sludge are properly characterized and shipped.” Because respondent is already required to comply with applicable law concerning characterization and shipment of waste, staff’s request is unnecessary. See e.g. Matter of Lopatowski, Order of the Commissioner, June 11, 2015, at 3.

APPENDIX A
Matter of Hydramec, Inc.
 DEC Case No. R9-20160425-33
 May 3, 2017 – Adjudicatory Hearing

EXHIBITS IN EVIDENCE

Exhibit	Description
Staff 1	EPA RCRA Civil Penalty Policy dated October 1990
Staff 2	Penalty Computation Worksheet for RCRA violations, dated March 18, 2016
Staff 3	Affidavit of Personal Service of Russell Calanni, sworn to May 5, 2017
Respondent ("R") 1	Letter from Hydramec to K. Emery dated November 13, 2015
R2	Pace Analytical Laboratory Report dated December 9, 2015
R3	Notice of Violation dated January 22, 2016
R4	Letter from J. Dougherty, Esq. to T. Walsh Esq. dated August 22, 2016, attaching Order on Consent
R5	2014 Tax Form 1120S for Hydramec, Inc.
R6	2015 Tax Form 1120S for Hydramec, Inc.
R7	2016 Tax Form 1120S for Hydramec, Inc.
R8	Financial Statement/Corporation, Hydramec, Inc., verified by Gregg D. Shear, President, on April 28, 2017