

NEW YORK STATE: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of the New York State Environmental Conservation Law (ECL) article 17, New York State Navigation Law, article 12, and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) parts 612 and 613, and 17 NYCRR part 32 by

Ruling on Department Staff's Motion for an Order without Hearing

Spill No.: 03-11275

DEC Case No.: R2-20040916-244

Mohammad A. Malik, and
134 Plus 37 Maple Avenue Realty Inc.,
RESPONDENTS.

September 27, 2006

Proceedings

On January 5, 2004, a resident from the apartment building located at 134-37 Maple Avenue, Flushing, New York 11377 reported a petroleum oil spill at that location to the New York State Department of Environmental Conservation. Subsequently, Staff of the Department of Environmental Conservation (Department staff) commenced the captioned enforcement action by duly serving a motion for order without hearing and a complaint, both dated July 22, 2005, upon Mohammad A. Malik, 134 Plus 37 Maple Avenue Realty Inc., (Respondents) and Otis Allen, Esq. from Cohen & Hochman (New York, NY). With the motion, Department staff included an affirmation by John K. Urda, Esq., Assistant Regional Attorney, DEC Region 2, dated July 22, 2005, and an affidavit by Michelle Tipple, Engineering Geologist I, DEC Region 2, sworn to July 22, 2005, with attached Exhibits A, B, and C.

According to the July 22, 2005 motion and the complaint, Respondents own the residential apartment building located at 134-37 Maple Avenue, Flushing (Queens: County, Block: 05121, Lot: 0050), New York 11377 (the site). Department staff contends there is a 4,000 gallon underground petroleum storage tank at the site. In six causes of action, the July 22, 2005 complaint alleges that Respondents violated various provisions of ECL article 17, its implementing regulations at 6 NYCRR parts 612 and 613, as well as Navigation Law article 12 and its implementing regulations at 17 NYCRR part 32. The violations alleged in the complaint relate to the underground petroleum storage tank at the site. For these alleged violations, Department staff has requested a total civil penalty of \$212,500. In addition, Department staff has requested an order from the Commissioner that would direct Respondents to comply with all applicable regulatory requirements, and to remediate the alleged oil spill.

The July 22, 2005 notice of motion for order without hearing advised Respondents that, pursuant to 6 NYCRR 622.12(b), they must file a response to Department staff's motion with the Chief Administrative Law Judge (ALJ) within 20 days from receiving Staff's motion papers. The notice of motion further advised Respondents that their failure to respond to Department staff's motion in a timely manner would constitute a default and waiver of their right to a hearing. Since service of Department staff's July 22, 2005 notice of motion and complaint upon Respondents, the Office of Hearings and Mediation Services has not received any response from either Mr. Malik, or 134 Plus 37 Maple Avenue Realty Inc.

In a letter dated August 18, 2005, Department staff reported that Respondents failed to file a timely response to the July 22, 2005 notice of motion for order without hearing, or to answer the complaint. Staff requested a ruling on the merits of its motion. With the August 18, 2005 letter, Staff enclosed copies of the certified mail receipt and signed domestic return receipt to demonstrate service of the July 22, 2005 notice of motion and complaint upon Messrs. Malik and Allen.

After reviewing Department staff's motion, I noted in a letter dated January 25, 2006 to Mr. Urda that Staff did not provide proof of service of the July 22, 2005 motion and complaint upon 134 Plus 37 Maple Avenue Realty Inc. I noted further that I could not find anything in Staff's motion papers to demonstrate the assertions stated in paragraphs 3 through 6, inclusive, of the July 22, 2005 complaint concerning the identities of the corporate officers of 134 Plus 37 Maple Avenue Realty Inc., and the owner, or owners, of the property where the alleged petroleum spill took place in January 2004.

The January 25, 2006 letter provided Staff with the opportunity to provide proof of service of the July 22, 2005 motion and complaint upon 134 Plus 37 Maple Avenue Realty Inc., and to further supplement the proof offered with the July 22, 2005 motion to demonstrate who the corporate officers are, and who owns the property where the alleged petroleum spill took place.

I sent copies of the January 25, 2006 letter to the Respondents at the addresses provided in Department staff's motion papers. In addition, I stated that if Department staff personally served 134 Plus 37 Maple Avenue Realty Inc., with a copy of the July 22, 2005 notice of motion and complaint, the corporate Respondent would have 20 days from the date of personal

service to respond to the July 22, 2005 motion (see 6 NYCRR 622.12[b]).

With a cover letter dated March 2, 2006, Department staff provided affidavits of personal service of the July 22, 2005 notice of motion for order without hearing and the complaint upon 134 Plus 37 Maple Avenue Realty Inc. In addition, Staff provided information about 134 Plus 37 Maple Avenue Realty Inc. from the New York State Department of State, Division of Corporations. To demonstrate who owns the property where the alleged violations took place, Staff provided a copy of the bargain and sale deed. In addition, Department staff moved to amend paragraphs 5 and 6 of the complaint, as well as paragraph 2 of Mr. Urda's affirmation to conform the pleadings to the proof offered with the March 2, 2006 cover letter. Finally, Staff requested that the Commissioner disregard the calculations for the available maximum statutory penalties for each alleged violation.

Department staff provided Respondents with copies of the March 2, 2006 letter and all enclosures. As of the date of this ruling, the Office of Hearings and Mediation Services has not received any response from Respondents concerning the July 22, 2005 motion for order without hearing and the complaint.

Discussion

Service of the July 22, 2005 Notice of Motion for Order without Hearing and Complaint

Service of a motion for order without hearing and complaint must be by personal service consistent with the CPLR or by certified mail (see 6 NYCRR 622.3[a][3]). With a cover letter dated August 18, 2005, Department staff provided a copy of the domestic return receipt card signed by Mohammad A. Malik. The signed domestic return receipt card was postmarked on July 23, 2005, and demonstrates that Mr. Malik received the July 22, 2005 notice of motion and complaint by certified mail, return receipt requested on July 23, 2005 in a manner consistent with the requirements outlined at 6 NYCRR 622.3(a)(3).

Personal service upon a domestic corporation shall be made by delivering the summons to, among others, a managing agent or to any other agent authorized by appointment to receive service

(see CPLR 311[a][1]). According to the affidavits¹ of service sworn on March 2, 2006, Environmental Conservation Officer (ECO) Jeffrey R. Conway personally served Virginia (Tina) Turner with the July 22, 2005 notice of motion for order without hearing and complaint on February 6, 2006. Ms. Turner is the Office Manager for 134 Plus 37 Maple Avenue Realty Inc., and is authorized to accept service for the Respondent corporation, according to the affidavits. Therefore, ECO Conway's affidavits of service demonstrate that Department staff personally served the corporate Respondent, 134 Plus 37 Maple Avenue Realty Inc., with copies of the July 22, 2005 notice of motion and complaint on February 6, 2006 in a manner consistent with the requirements outlined in 6 NYCRR 622.3(a)(3).

Amendment of Pleadings

Pursuant to 6 NYCRR 622.5, pleadings may be amended. A party may amend its pleading once without the ALJ's permission at any time before the period for responding expires, or if no response is required, at least 20 days before the hearing commences (see 6 NYCRR 622.5[a]). With the ALJ's permission, a party may amend its pleading at any time prior to the Commissioner's final decision absent prejudice to the ability of any other party to respond, consistent with the CPLR (see 6 NYCRR 622.5[b]).

Pursuant to CPLR 3025, pleadings may be amended without leave in a manner similar to what is authorized by 6 NYCRR 622.5(a) (see CPLR 3025[a]). They may be amended and supplemented with leave at any time, and leave must be freely given as may be just (see CPLR 3025[b]). With leave, pleadings may be amended to conform to the evidence upon such terms as may be just (see CPLR 3025[c]).

In the March 2, 2006 letter, Department staff moved to amend Paragraph Nos. 5 and 6 of the July 22, 2005 complaint. Paragraph No. 5 would be amended to read:

"At all relevant times, the Respondent 134 Plus 37 Maple Avenue Realty Inc. has been the owner of property at 134-37

¹ With the March 2, 2006 cover letter, Department staff filed two affidavits of personal service by ECO Conway. The first relates to personal service of the Notice of Motion for Order without Hearing dated July 22, 2005, and the second concerns personal service of the July 22, 2005 complaint.

Maple Avenue, Flushing, New York 11377, also known as
Borough: Queens, Block: 05121, Lot: 0050 (the 'Site')."

Paragraph No. 6 would be amended to read:

"The Respondent 134 Plus 37 Maple Avenue Realty Inc.
acquired the Site on December 23, 1996."

I grant Department staff's request. Respondents are not prejudiced by amending the July 22, 2005 complaint. As noted above, Department staff provided copies of its March 2, 2006 cover letter and enclosures to Respondents. Staff's March 2, 2006 letter outlines its request to amend the July 22, 2005 complaint. Respondents have had ample time to respond to Staff's motion to amend the complaint, and have not availed themselves of the opportunity. Consequently, Staff's motion to amend the July 22, 2005 complaint is unopposed. Accordingly, Paragraph Nos. 5 and 6 of the July 22, 2005 complaint are amended in the manner described above.

Motion for Order without Hearing

To commence an administrative enforcement action, Department staff may serve a motion for order without hearing with a complaint pursuant to 6 NYCRR 622.12. That provision is governed by the same principles that govern summary judgment pursuant to CPLR 3212. Section 622.12(d) provides that a contested motion for an order without hearing will be granted if, upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the New York Civil Practice Law and Rules (CPLR) in favor of any party. The Commissioner has provided extensive direction concerning the showing the parties must make in their respective motions and replies, and how the parties' filings will be evaluated (*see Matter of Amanda J. Bice*, VISTA Index No. CO7-20050322-2, Order, April 19, 2006 with attached Hearing Report on Motion for Order without Hearing, April 11, 2006, at 6; *Matter of Richard Locaparra, d/b/a L&L Scrap Metals*, DEC Case No. 3-20000407-39, Final Decision and Order, June 16, 2003 at 4).

As noted above, neither Department staff nor the Office of Hearings and Mediation services has received a response to Staff's July 22, 2005 motion for order without hearing from Respondents. A response to the motion or an answer to the complaint was due 20 days after Respondents received the July 22, 2005 motion and the complaint (*see* 6 NYCRR 622.12[b] and 622.4[a]). Mohammad A. Malik received the motion and complaint

on July 23, 2005 based on the signed domestic return receipt. The affidavits of personal service by ECO Conway sworn to March 2, 2006, establish that 134 Plus 37 Maple Avenue Realty Inc. was personally served with a copy of the July 22, 2005 notice of motion for order without hearing, and the complaint on February 6, 2006. The time for Respondents to respond to the July 22, 2005 notice of motion for order without hearing and to answer the complaint has expired. In the absence of a response or answer from Respondents, I consider Department staff's motion uncontested.

Liability

In this case, Respondents have not submitted any response to Department staff's motion. Accordingly, once it is concluded that Staff has carried its initial burden of establishing a prima facie case on the factual allegations underlying each of the alleged violations, it may be determined whether those allegations have been established as a matter of law. If so, Department staff's motion for order without hearing may be granted.

Department staff has alleged that Respondents have violated various provisions of ECL article 17 and article 12 of the Navigation Law, as well as their respective implementing regulations. However, other than to assert that Mohammad A. Malik is either the Chairman or Chief Executive Office of 134 Plus 37 Maple Avenue Realty Inc. (¶ 3 of the July 22, 2005 Complaint), Department staff alleged no other factual basis for imposing individual liability upon Mr. Malik.

With a motion for order without hearing, the Commissioner has previously determined that Department staff has a burden of making a prima facie showing that corporate officers should be held individually liable (see *Matter of RGLL, Inc., James Metz and Lauren Simons*, Decision and Order, dated January 21, 2005 at 4). In this case, Staff does not allege any facts which, for example, would warrant piercing the corporate veil, or imposing direct liability based on Mr. Milak's personal participation in the alleged violations. Therefore, I conclude that Department staff has failed to make a prima facie showing that Mr. Malik should be held individually liable. Absent such a showing, I deny Staff's motion with respect to Mr. Malik's personal liability for the violations alleged in the July 22, 2005 complaint.

The discussion that follows, addresses the violations alleged in the July 22, 2005 complaint against the corporate Respondent, 134 Plus 37 Maple Avenue Realty Inc.

1. Ownership

A copy of the bargain and sale deed provided by Department staff shows that 134 Plus 37 Maple Avenue Realty Inc. acquired the property located at 134-37 Maple Avenue, Flushing, New York 11377 (also known as Borough: Queens, Block: 05121, Lot: 0050) on December 23, 1996. The property located at 134-37 Maple Avenue in Flushing, New York is the site of the alleged violations. Based on this information, and absent any evidentiary proof to the contrary, I find that 134 Plus 37 Maple Avenue Realty Inc. continues to own the property located at 134-37 Maple Avenue in Flushing, New York.²

2. Registration of Facilities (6 NYCRR 612.2)

Pursuant to 6 NYCRR 612.2, effective December 27, 1985, the owner of any petroleum bulk storage facility that has a storage capacity of over 1,100 gallons must register the facility with the Department within one year from the effective date of the regulations (see 6 NYCRR 612.1[b][10]; 612.2[a][1]). Owners must renew the facility registration every five years until the facility is permanently closed or ownership has been transferred (see 6 NYCRR 612.2[a][2]). If ownership of the facility changes, then the new owner must register the facility with the Department within 30 days of the ownership transfer (see 6 NYCRR 612.2[b]). In the first cause of action, the July 22, 2005 complaint alleges that 134 Plus 37 Maple Avenue Realty Inc. has not registered its facility, which consists of a 4,000 gallon underground petroleum storage tank, with the Department.

Based on Ms. Tipple's September 14, 2004 site inspection, a 4,000 gallon underground storage tank is located at 134-37 Maple Avenue in Flushing, New York. After searching the Department's records, Ms. Tipple could not find any documentation to show that the facility, consisting of the 4,000 gallon underground petroleum storage tank, was ever registered with the Department.

² Facts appearing in the movant's papers that the opposing party fails to controvert may be deemed to be admitted (see *Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, 544 [1975]).

Therefore, 134 Plus 37 Maple Avenue Realty Inc. violated the registration requirements at 6 NYCRR 612.2 by not registering its facility at 134-37 Maple Avenue in Flushing, New York after it acquired the property in December 1996. 134 Plus 37 Maple Avenue Realty Inc.'s liability for this violation began when it acquired the property at 134-37 Maple Avenue in December 1996. 134 Plus 37 Maple Avenue Realty Inc. cannot be held liable prior to December 1996, as alleged in the complaint, because it did not own the facility before that time. Consequently, the violation alleged in the July 22, 2005 complaint concerning the registration of the facility has continued since December 1996.

3. Tank Tightness Testing (6 NYCRR 613.5[a])

In the second cause of action, Department staff alleges that 134 Plus 37 Maple Avenue Realty Inc. violated 6 NYCRR 613.5(a) by not periodically testing the tightness of the underground storage tank located at 134-37 Maple Avenue. The owner of any underground petroleum storage tank must have the tank and pipes periodically tested for tightness (see 6 NYCRR 613.5[a][1]). For tanks storing No. 5 or No. 6 fuel oil, however, tightness testing is not required (see 6 NYCRR 613.5[a][2][i]). If periodic testing is required, the test results must be reported to the Department (see 6 NYCRR 613.5[a][4]).

After searching the Department's records, Ms. Tipple could not find any documentation to show that 134 Plus 37 Maple Avenue Realty Inc. had ever tested the tightness of the 4,000 gallon underground petroleum storage tank at 134-37 Maple Avenue. In addition, Ms. Tipple could not find any documentation to show that 134 Plus 37 Maple Avenue Realty Inc. had ever reported the results of such testing to the Department.

There is a issue of fact whether the petroleum product stored in the tank at the site is No. 5 or 6 fuel oil. In her July 22, 2005 affidavit (¶ 10), Ms. Tipple states that a breach in the fuel line between the underground petroleum storage tank and the building located at 134-37 Maple Avenue resulted in the release of "what *appeared* to be #4 fuel oil onto the surface as well as the subsurface" (emphasis supplied). Exhibit B to Ms. Tipple's affidavit is a letter dated January 8, 2004 from Ms. Tipple to the Management Agent/Owner of the property located at 134-37 Maple Avenue in Flushing, New York. Ms. Tipple's January 8, 2004 letter states, however, that Department staff "has identified #6 Fuel oil spill occurring on January 2, 2004 at the ... site." Exhibit A to Ms. Tipple's affidavit is a copy of the

DEC Spill Report Form, and on the form, the spilled material is identified as "unknown petroleum."

Given the tentative language used in Ms. Tipple's affidavit about the type of petroleum product that appeared to be discharged at the site, and the statement in Ms. Tipple's January 8, 2004 letter that the spilled petroleum was #6 fuel oil, I find that Department staff did not make a prima facie showing that 134 Plus 37 Maple Avenue Realty Inc. has been required since December 1996 to periodically test the tank for tightness pursuant to 6 NYCRR 613.5(a) because the type of petroleum product stored in the tank is something other than Nos. 5 or 6 fuel oil. As noted above, tightness testing is not required for tanks that store No. 5 or No. 6 fuel oil (see 6 NYCRR 613.5[a][2][i]).

Consequently, I cannot conclude, as a matter of law, that 134 Plus 37 Maple Avenue Realty Inc. violated 6 NYCRR 613.5(a) by failing to periodically test the tightness of the storage tank at the site. Therefore, I deny Department staff's motion for order without hearing with respect to the second cause of action alleged in the July 22, 2005 complaint. A hearing will be necessary to determine whether the alleged violation occurred.

4. Inventory Monitoring Requirements (6 NYCRR 613.4)

In the third cause of action, Department staff alleges that 134 Plus 37 Maple Avenue Realty Inc. violated 6 NYCRR 613.4 by failing to comply with the inventory monitoring requirements. Operators of underground petroleum storage tanks must keep daily inventory records for the purpose of detecting leaks (see 6 NYCRR 613.4[a][1]). Records, however, are not required to be kept for tanks storing No. 5 or No. 6 fuel oil (see 6 NYCRR 613.4[b][1]). When inventory records are required, they must be maintained for at least five years (see 6 NYCRR 613.4[c][1]).

As explained in the preceding section concerning the second cause of action, Department staff did not make a prima facie showing that the type of petroleum product stored in the tank at the site is something other than No. 5 or No. 6 fuel oil, which types are exempt from the record keeping requirements outlined at 6 NYCRR 613.4. Consequently, I cannot conclude, as a matter of law, that 134 Plus 37 Maple Avenue Realty Inc. violated 6 NYCRR 613.4 by failing to comply with inventory and monitoring requirements.

Therefore, I deny Department staff's motion for order without hearing with respect to the third cause of action alleged

in the July 22, 2005 complaint. A hearing will be necessary to determine whether the alleged violation occurred.

5. Prohibited Petroleum Discharges (Navigation Law § 173)

In the fourth cause of action, Department staff alleges that 134 Plus 37 Maple Avenue Realty Inc. violated § 173 of the Navigation Law on January 5, 2004. Navigation Law § 173(1) prohibits the discharge of petroleum, except as may be provided by the conditions of a state or federal permit (see Navigation Law § 173[3]). A prohibited discharge includes "any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of petroleum into the waters of the state or onto lands from which it might flow or drain into said waters" (Navigation Law § 172[8]). Also, the "waters" of the state include both surface and groundwaters, whether natural or artificial (see Navigation Law § 172[18]).

Courts have determined that even when there is "nothing in the record to positively demonstrate" that spilled oil might have flowed through the ground into groundwater, or the nature and extent of the resulting harm, "judicial notice can be taken of the common knowledge that oil can seep through the ground into surface and groundwater ... and thereby cause ecological damage" (*Merrill Transport Co. v State of New York*, 94 AD2d 39, 42-43 [3d Dept 1983], *lv denied* 60 NY2d 555).

According to Ms. Tipple's unrefuted affidavit, a resident of the apartment building located at 134-37 Maple Avenue reported the petroleum spill to the Department via the telephone hotline on January 5, 2004. Exhibit A to Ms. Tipple's affidavit is a copy of the Department's spill report for the January 2004 petroleum spill at 134-37 Maple Avenue. According to her affidavit (¶ 9), Ms. Tipple observed evidence of heavy petroleum contamination on the outside of the building and impacting the surrounding grounds. Based on the foregoing, 134 Plus 37 Maple Avenue Realty, Inc. violated Navigation Law § 173 on or about January 5, 2004 when an unauthorized petroleum spill occurred at 134-37 Maple Avenue in Flushing, New York.

6. Reporting Petroleum Spills (ECL 17-1743; 6 NYCRR 613.8 and 17 NYCRR 32.3)

Department staff alleges, in the fifth cause of action, that 134 Plus 37 Maple Avenue Realty Inc. did not report the unauthorized petroleum spill that occurred at 134-37 Maple Avenue

on or about January 5, 2004, and that the failure to report the spill is a violation of ECL § 17-1743, 6 NYCRR 613.8, and 17 NYCRR 32.3. ECL 17-1743 requires any person who owns, possesses or controls liquids stored in bulk to notify the Department immediately of a spill, discharge or release. Pursuant to 6 NYCRR 613.8, any person with knowledge of a spill, leak or discharge of petroleum must report the incident to the Department within two hours of the discovery by telephoning the spill hotline. In a similar manner, 17 NYCRR 32.3 requires any person responsible for causing a prohibited discharge to notify the Department immediately, but in no case later than two hours after the discharge.

According to Ms. Tipple's July 22, 2005 affidavit, the only person to report the petroleum spill at 134-37 Maple Avenue was the resident of the apartment building. The remarks recorded on the spill report (Exhibit A) state that the apartment resident spoke to the building superintendent about the spill, and that the superintendent said there was nothing he could do. On January 6 and 7, 2004, Ms. Tipple attempted unsuccessfully to contact a building representative at 134-37 Maple Avenue about the petroleum spill reported to the Department on January 5, 2004. Subsequently, Ms. Tipple sent letters dated January 8, 2004 and April 15, 2004 to the "Management Agent/Owner" at the 134-37 Maple Avenue apartment building that went unanswered.

The reporting requirements identified above apply to "any person," and the Department's guidance reflects the broad application of this requirement in order to limit and abate unpermitted petroleum discharges (*see Final Guidance and Responsiveness Summary regarding Petroleum Spill Reporting*, effective May 1, 1996). Accordingly, I conclude that the reporting requirement concerning the January 2004 petroleum spill applies to 134 Plus 37 Maple Avenue Realty Inc. and its agents, such as, the building superintendent.

Therefore, 134 Plus 37 Maple Avenue Realty Inc. violated ECL 17-1743, 6 NYCRR 613.8 and 17 NYCRR 32.3 by failing to report the unauthorized petroleum spill that occurred at 134-37 Maple Avenue on or about January 5, 2004. This violation has continued since January 5, 2004 when it was reported to the Department. Staff has not requested separate civil penalties for each of the notification requirements outlined in ECL 17-1743, 6 NYCRR 613.8 and 17 NYCRR 32.3.

7. Spill Containment (Navigation Law § 176 and 17 NYCRR 32.5)

In the sixth cause of action, Department staff alleges that 134 Plus 37 Maple Avenue Realty Inc. violated Navigation Law § 176 and 17 NYCRR 32.5 when it failed to contain the illegal discharge that occurred on the site on or about January 5, 2004. Navigation Law § 176 and its implementing regulations at 17 NYCRR 32.5 require any person responsible for a petroleum discharge to contain it immediately, and to clean it up.

On January 8, 2004 and April 15, 2004, Ms. Tipple sent letters to the Management Agent/Owner at 134-37 Maple Avenue requesting information about the status of the January 2004 spill, and any cleanup efforts undertaken. Ms. Tipple sent the April 15, 2004 letter by certified mail, return receipt requested. The US Postal Service returned the signed receipt dated April 19, 2004 to the Department. 134 Plus 37 Maple Avenue Realty Inc. did not respond to Staff's letters dated January 8, 2004 and April 15, 2004.

Subsequently, Ms. Tipple visited 134-37 Maple Avenue on September 14, 2004. During the site visit, Ms. Tipple observed that oil had leaked from a break in the fuel line between the 4,000 gallon underground petroleum storage tank and the building. Ms. Tipple saw petroleum product on the surface of the ground in the vicinity of the fuel line. Ms. Tipple could not inspect the boiler room because no one at the site had a key to unlock the boiler room door.

Based on Ms. Tipple's letters and her inspection on September 14, 2004, 134 Plus 37 Maple Avenue Realty Inc. has not done anything either to contain or clean up the petroleum spill that occurred at 134-37 Maple Avenue on or about January 5, 2004. Therefore, 134 Plus 37 Maple Avenue Realty Inc. violated Navigation Law § 176 and 17 NYCRR 32.5 when it failed to contain and clean up the illegal petroleum discharge that occurred on the site in January 2004.

Relief

Department staff seeks a total civil penalty of \$212,500, and provides a reasoned elaboration about how the requested civil penalty was calculated. The Department staff also requests an order from the Commissioner directing 134 Plus 37 Maple Avenue

Realty Inc. to remediate the site consistent with a work plan approved by the Department staff.

1. Civil Penalty

Effective May 15, 2003, ECL 71-1929 authorizes a civil penalty of \$37,500 per day for each violation of the requirements outlined in 6 NYCRR parts 612 and 613. Navigation Law § 192 authorizes a civil penalty of \$25,000 per violation, and states further that if the violation is of a continuous nature, each day during which the violation continues constitutes an additional, separate and distinct offense.

In the July 22, 2005 motion for order without hearing, Department staff calculates the potential maximum civil penalty for each alleged violation. In the March 2, 2006 cover letter, however, Department staff requests that these calculations be disregarded. For each of the violations alleged in the first through fifth causes of action of the July 22, 2005 complaint, Department staff requests a civil penalty of \$37,500. For the alleged violation of Navigation Law § 176 and its implementing regulation in the sixth cause of action, Department staff requests a civil penalty of \$25,000.

To calculate the requested civil penalty, Department staff relied on the guidance outlined in the Department's Civil Penalty Policy, dated June 20, 1990. Staff explains that the alleged violations occurred over a long period of time. With respect to the violations asserted in the first, second and third causes of action, Department staff argues that the violations commenced on December 27, 1986, which was a year after the effective date of 6 NYCRR parts 612 and 613. With respect to these violations, Staff observes that 134 Plus 37 Maple Avenue Realty Inc. has avoided the expenses associated with registering the petroleum bulk storage facility, periodically testing the tightness of the underground storage tank, monitoring the tank, and keeping records. Staff contends that by ignoring these regulatory responsibilities, 134 Plus 37 Maple Avenue Realty Inc. has reduced its operating costs, but increased the probability that a petroleum spill would occur at 134-37 Maple Avenue.

According to Department staff, the civil penalty for the violations alleged in the fourth, fifth and sixth causes of action should be calculated from January 5, 2004, which is the date that Department staff became aware of the petroleum spill at 134-37 Maple Avenue. Staff asserts that these alleged violations have continued to the date of July 22, 2005 motion for order

without hearing and the complaint. Staff contends that 134 Plus 37 Maple Avenue Realty Inc. has exacerbated the conditions at the site and has made a full cleanup more costly and difficult because 134 Plus 37 Maple Avenue Realty Inc. has yet to acknowledge and otherwise address the petroleum spill reported on January 5, 2004.

Department staff argues that each of the violations has prevented Staff from performing duties mandated by the Environmental Conservation Law, the Navigation Law and implementing regulations, which include expeditiously responding to, containing, and effectuating the cleanup of, the petroleum spill. Staff notes that the continued contamination of the apartment building presents a health and safety hazard to the residents.

Because there are issues of fact related to some of the causes of action alleged in the complaint, I reserve making a recommendation about the appropriate civil penalty until after a hearing has been held.

2. Regulatory Compliance and Remediation

Department staff requests an order from the Commissioner directing 134 Plus 37 Maple Avenue Realty Inc. to comply with applicable regulatory requirements, and to develop a remediation plan for the Department's approval to clean up the spilled petroleum at the apartment building located at 134-37 Maple Avenue. In addition, Staff requests that the order direct 134 Plus 37 Maple Avenue Realty Inc. to register the petroleum storage facility at 134-37 Maple Avenue pursuant to 6 NYCRR 612.1(b), as well as to direct compliance with other applicable requirements, such as testing the tightness of the 4,000 gallon underground storage tank, monitoring the tank and, if applicable, keeping records (see 6 NYCRR 613.5 and 613.4, respectively).

Because there are issues of fact related to some of the causes of action alleged in the complaint, I reserve making a recommendation about Staff's request for remediation until after a hearing has been held.

Findings of Fact

The follow facts established as a matter of law are:

1. Department staff served the July 22, 2005 notice of motion for order without hearing and complaint by certified mail,

return receipt requested upon Mohammad A. Malik. The signed domestic return receipt card is postmarked July 23, 2005, which is when Mr. Malik received the July 22, 2005 notice of motion and complaint.

2. On February 6, 2006, Environmental Conservation Officer (ECO) Jeffery R. Conway personally served the July 22, 2005 notice of motion for order without hearing and the complaint upon 134 Plus 37 Maple Avenue Realty Inc., by personally serving Virginia Turner. Ms. Turner is the office manager for 134 Plus 37 Maple Avenue Realty Inc. The location of the Respondent corporation's office is 47-11 Elmhurst Avenue, Queens, New York 11373.
3. 134 Plus 37 Maple Avenue Realty Inc. acquired the property located at 134-37 Maple Avenue, Flushing, New York 11377 (also known as Borough: Queens, Block: 05121, Lot: 0050) (the site) on December 23, 1996. Since December 1996, 134 Plus 37 Maple Avenue Realty Inc. has owned the property located at 134-37 Maple Avenue in Flushing, New York.
4. A 4,000 gallon underground petroleum storage tank is located at 134-37 Maple Avenue, Flushing, New York. Based on the record of the proceeding developed to date, no factual determination can be made about the type or nature of the petroleum product stored in the underground tank at the site.
5. On January 5, 2004, a resident of the apartment building located at 134-37 Maple Avenue reported a petroleum spill to the Department via the telephone hotline. The petroleum release was not authorized by any State permit. Department staff completed a spill report form, which identifies the spill by No. 03-11275.
6. Michelle Tipple has a Bachelor of Arts degree in Geology from the State University of New York College at Potsdam. Since February 2000, Ms. Tipple has worked as an Engineering Geologist I in the Department's Region 2 Office, Division of Environmental Remediation, Bureau of Spills Prevention and Response. Prior to her position with the Department, Ms. Tipple worked at the New York State Department of Transportation. Since February 2000, Ms. Tipple has conducted hundreds of petroleum spill investigations.
7. On January 6 and 7, 2004, Ms. Tipple attempted to contact a building representative at 134-37 Maple Avenue, but was not

successful. On January 8, 2004, Ms. Tipple sent a letter to the "Management Agent/Owner" at 134-37 Maple Avenue, which stated that a petroleum spill had occurred at the site on January 2, 2004. In the January 8, 2004 letter, Ms. Tipple requested documentation demonstrating that the spill had been properly cleaned up, and that any contaminated materials that could not be cleaned had been properly disposed. Department staff did not receive a response to the January 8, 2004 letter.

8. Ms. Tipple sent a second letter dated April 15, 2004 to the Management Agent/Owner by certified mail return receipt requested. In the April 15, 2004 letter, Ms. Tipple requested an investigation and assessment report detailing the extent of the petroleum spill at the site, as well as a remediation plan outlining the steps to clean up the spill and to dispose of any contaminated soil. Department staff did not receive a response to the April 15, 2004 letter.
9. On September 14, 2004, Ms. Tipple visited the apartment building at 134-37 Maple Avenue to investigate the petroleum spill. During the inspection, Ms. Tipple observed petroleum on the ground outside the building. Upon further investigation, Ms. Tipple determined that the spill was the result of a breach in the fuel line between the 4,000 gallon underground petroleum storage tank and the building. Ms. Tipple attempted to gain access to the boiler room of the apartment building, but no one at the site had a key to unlock the door to the boiler room.
10. Since the September 14, 2004 site visit, Ms. Tipple reviewed the Department's files and did not find any records related to the registration, tank tightness results, or other required records and documents concerning the 4,000 gallon underground petroleum storage tank at 134-37 Maple Avenue.
11. Since December 1996, 134 Plus 37 Maple Avenue Realty Inc. has neither registered the facility, which consists of a 4,000 gallon underground petroleum storage tank, at 134-37 Maple Avenue in Flushing, New York pursuant to 6 NYCRR 612.2, nor renewed the required registration.
12. As of July 22, 2005, 134 Plus 37 Maple Avenue Realty Inc. had not notified the Department about the petroleum spill at 134-37 Maple Avenue, which was reported to the Department on January 5, 2005 by a resident of the building.

13. As of July 22, 2005, 134 Plus 37 Maple Avenue Realty Inc. has neither contained, nor cleaned up the petroleum discharge that occurred at 134-37 Maple Avenue on or about January 5, 2004.

Conclusions

1. Department staff establishes as a matter of law that service of the July 22, 2005 notice of motion for order without hearing and the complaint upon Mohammad A. Malik, and 134 Plus 37 Maple Avenue Realty Inc., was in a manner consistent with the requirements outlined in 6 NYCRR 622.3(a)(3).
2. Department staff fails to make a prima facie showing that Mr. Malik should be held individually liable.
3. Because 134 Plus 37 Maple Avenue Realty Inc., owns the apartment building and 4,000 gallon underground petroleum storage tank at 134-37 Maple Avenue in Flushing, New York, it is obliged, pursuant to ECL 17-1009 and 6 NYCRR 612.2, to register the facility with the Department.
4. With respect to the first cause of action alleged in the July 22, 2005 motion for order without hearing and complaint, Department staff establishes as a matter of law that 134 Plus 37 Maple Avenue Realty Inc. has violated the registration requirements at 6 NYCRR 612.2 by not registering the facility, which consists of a 4,000 gallon underground petroleum storage tank, since December 1996.
6. Department staff fails to establish as a matter of law that 134 Plus 37 Maple Avenue Realty Inc. has violated the requirements at 6 NYCRR 613.5 by not periodically testing the tightness of the 4,000 gallon underground petroleum storage tank at 134-37 Maple Avenue in Flushing, New York, and reporting the results of those tests to the Department. There is an issue of fact about the type and nature of the petroleum product that is stored in the underground tank at the facility, which may exempt 134 Plus 37 Maple Avenue Realty Inc. from the requirements outlined at 6 NYCRR 613.5.
7. Department staff fails to establish as a matter of law that 134 Plus 37 Maple Avenue Realty Inc. violated 6 NYCRR 613.4 by not complying with the inventory monitoring requirements. As noted above, there is an issue of fact about the type and nature of the petroleum product that is stored in the underground tank at the facility, which may exempt 134 Plus

37 Maple Avenue Realty Inc. from the monitoring requirements outlined at 6 NYCRR 613.4.

8. Department staff establishes as a matter of law that 134 Plus 37 Maple Avenue Realty Inc. violated § 173 of the Navigation Law when an unauthorized petroleum spill occurred at 134-37 Maple Avenue in Flushing, New York on or about January 5, 2004.
9. Department staff establishes as a matter of law that 134 Plus 37 Maple Avenue Realty Inc. did not report the unauthorized petroleum spill that occurred at 134-37 Maple Avenue on or about January 5, 2004, which violates the reporting requirement outlined in ECL 17-1743, 6 NYCRR 613.8 and 17 NYCRR 32.3.
10. Department staff establishes as a matter of law that 134 Plus 37 Maple Avenue Realty Inc. violated § 176 of the Navigation Law and 17 NYCRR 32.5 when it failed to contain and clean up the illegal discharge that occurred on the site on or about January 5, 2004.

Ruling

With respect to the individual respondent, Mohammad A. Malik, I deny Department staff's motion for order without hearing dated July 22, 2005. At hearing, Department staff may make a prima facie showing that Mr. Malik, as a corporate officer of 134 Plus 37 Maple Avenue Realty Inc., should be held individually liable for the violations alleged in the July 22, 2005 complaint as amended by this ruling.

I grant Department staff's motion for order without hearing dated July 22, 2005 with respect to the charges alleged in the first, fourth and fifth causes of action against the corporate Respondent, 134 Plus 37 Maple Avenue Realty Inc.

I deny Department staff's motion for order without hearing dated July 22, 2005 with respect to the charges alleged in the second and third causes of action against the corporate Respondent, 134 Plus 37 Maple Avenue Realty Inc. With respect to the second and third causes of action, the issue of fact to be resolved at hearing is the nature and type of the petroleum product stored in the underground tank at the site. If the petroleum product is No. 6 fuel oil as stated in Exhibit B to Ms. Tipples' July 22, 2005 affidavit, then 134 Plus 37 Maple Avenue

Realty Inc. would be exempt from the requirements outlined in 6 NYCRR 613.4 and 613.5

I reserve making a recommendation to the Commissioner about the appropriate civil penalty and the need to remediate the site until after a complete record has been developed at hearing.

Further Proceedings

A hearing is necessary to resolve disputed issues related to Mr. Malik's individual liability and the violations alleged in the second and third causes of action of the July 22, 2005 complaint as amended by this ruling.

I will initiate a telephone conference call with the parties at 10:00 a.m. on Thursday, October 12, 2006. The purpose of the conference call will be to select a date for the adjudicatory hearing. In the meantime, the parties should confer with their witnesses to determine their availability for the adjudicatory hearing.

Immediately upon receipt of this ruling, 134 Plus 37 Maple Avenue Realty Inc. shall provide me with the name of the person, who will be participating in the October 12, 2006 conference on behalf of the corporation, and the telephone number for that representative.

Pursuant to 6 NYCRR 622.9(e), I am required to inform Respondents that their failure to participate in this pre-hearing telephone conference, as scheduled above, will constitute a default and a waiver of their respective rights to a hearing. The October 12, 2006 telephone conference call will proceed, as scheduled, without their participation.

/s/

Daniel P. O'Connell
Administrative Law Judge
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Dated: Albany, New York
September 15, 2006

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