

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

In the Matter of the Alleged Violations of Article 19 of the New York State Environmental Conservation Law ("ECL") and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), Part 247,

**INTERIM DECISION
AND ORDER**

DEC Case No.
R7-20140206-13

-by-

JEFF MYERS,

Respondent.

In this administrative enforcement proceeding, staff of the New York State Department of Environmental Conservation ("Department") alleges that respondent Jeff Myers ("respondent") violated ECL article 19¹ and 6 NYCRR 247.8 by operating a new outdoor wood boiler ("OWB") that was not certified by the Department, on property owned by respondent at 249 Lake Road, Town of Dryden, Tompkins County.

Department staff commenced this proceeding by serving on respondent a notice of hearing and complaint dated December 15, 2014. Respondent served an answer dated March 6, 2015. Department staff's complaint contains one cause of action asserting that respondent violated 6 NYCRR 247.8 when respondent installed and operated an uncertified new OWB on his property.²

¹ Staff's papers did not assert a specific statutory provision of ECL article 19.

² Staff's papers cite the general section of 6 NYCRR 247.8 in the Complaint's "Statement of Matters Asserted," rather than the specific provision at issue here, 6 NYCRR 247.8(a). Section 247.8(a) reads as follows: "[n]o person shall sell, lease or operate a new outdoor wood boiler unless the model has been certified by the department pursuant to this section." Staff should include the particular subsection(s), paragraph(s) and subparagraph(s) at issue.

Department staff seeks an order: (a) finding respondent liable for violating ECL Article 19 and 6 NYCRR 247.8; (b) directing respondent to cease operation of the OWB; and (c) imposing on respondent a civil penalty of \$2,500 (see Complaint, Hearing Exhibit 2, at Wherefore Clause).

The matter was assigned to Administrative Law Judge ("ALJ") Michael S. Caruso, and a hearing was held on May 14, 2015 in the Department's Region 7 Office, 615 Erie Boulevard West, Syracuse, New York. The parties filed post-hearing briefs and the record closed on July 27, 2015. ALJ Caruso prepared the attached hearing report ("Hearing Report"), which I adopt as my decision in this matter, subject to my comments below.

Liability

I adopt the ALJ's recommendation to hold respondent liable for the violation of 6 NYCRR 247.8(a). Staff established by a preponderance of the evidence that respondent purchased and installed an OWB that is not certified by the Department, and operated the uncertified OWB during two winter seasons.

--Violation of 6 NYCRR 247.5(b)

The proceedings raise a liability issue that I briefly discuss here. The complaint contains the factual allegation that the uncertified OWB was located less than 100 feet from the nearest property boundary line. Section 247.5(b) of 6 NYCRR prohibits locating a new OWB less than 100 feet from the nearest property boundary line. The complaint, however, does not assert a claim that respondent violated 6 NYCRR 247.5(b) (see Complaint, Hearing Exhibit 2, at ¶¶ 10-14 and Wherefore Clause [alleging violation of 6 NYCRR 247.8, but not 6 NYCRR 247.5(b)]).

Staff stated at the adjudicatory hearing that it intended to prove a violation of 6 NYCRR 247.5(b) (see Transcript ["Tr"] at 13), put in proof on the issue (see e.g. Tr at 27-29) and argued in its post-hearing brief that it had proved a violation of section 247.5(b) (see Post Hearing Brief ["Staff Br."] at 3-4).

At the hearing, staff sought to amend the complaint with respect to the model number of the OWB at issue (see Tr at 82-83), but staff did not move to amend the complaint to add a claim regarding section 247.5(b) nor did it move to conform the

pleadings to the proof regarding such a claim. Because the complaint did not charge respondent with a violation of section 247.5(b), and Department staff did not move to amend the complaint or conform the pleadings to the proof, I decline to hold respondent liable for such violation.

--Respondent's Affirmative Defenses

Respondent, in his answer, asserted three affirmative defenses (see Answer, Hearing Exhibit 4, ¶¶ 4-6).

The first affirmative defense was that Department's representatives had no authority to be on respondent's property, and thus any information obtained was the result of an illegal search. At the hearing, respondent expressly waived the first affirmative defense (see Tr at 99-100).

His second affirmative defense was that Department representatives violated Office of General Counsel Policy-7 regarding accessing private property, and thus Department staff could not use any information so obtained against respondent. As for this affirmative defense, respondent put on no proof to support the defense, and therefore did not meet its burden on that defense (see 6 NYCRR 622.11[b][2] [respondent bears burden of proof regarding affirmative defenses]). In any event, the second affirmative defense, concerning the propriety of Department personnel's presence on respondent's property, arguably falls within the scope of the first affirmative defense that Department's representatives had no authority to be on his property, which respondent waived.

The third affirmative defense was that, prior to installing the OWB, the Town of Dryden's code office led respondent to believe that the OWB would comply with all environmental rules and regulations. As to this affirmative defense in which respondent asserted that he "was led to believe by the [Town of Dryden] code office that the unit would be in full compliance with all environmental rules and regulations," the Town's code office is not responsible for respondent's compliance with the Department regulations here at issue. Moreover, respondent's alleged lack of knowledge of the law is not a valid defense (see Hearing Report at 6-7).

Civil Penalty

Under ECL 71-2103(1), any person who violates a regulation promulgated under ECL article 19 (which includes 6 NYCRR 247.8[a], the regulation at issue here) shall be liable, for a first violation, for a penalty not less than five hundred dollars (\$500) and not more than eighteen thousand dollars (\$18,000). The statute authorizes an additional penalty of up to fifteen thousand dollars (\$15,000) for each day the violation continues (see id.). In addition, such person may be enjoined from continuing the violation (see id.).

Department staff, in computing its proposed penalty, assessed an amount of \$500 for each year of the two years that respondent operated the OWB -- for a penalty of \$1,000.

Staff witness Reginald Parker testified that he proposed increasing the initial \$1,000 penalty amount based upon the "gravity" (that is, the seriousness of the violation) and "respondent cooperation" elements of the penalty calculation (see Tr at 61-62, 64-65). Mr. Parker testified that certified outdoor wood boilers must meet certain emission limits, and that boilers such as the boiler used by respondent do not meet such limits, thereby causing greater air pollution.

In addition, staff cited respondent's (a) failure to respond to staff's initial notice of violation and proposed consent order, and (b) failure to comply with an agreed-upon course of action as aggravating factors in support of the penalty. As discussed at the hearing, respondent agreed to remove the outside tin jacket and insulation from the OWB and move the OWB into his garage (see Hearing Report at 5 [Findings of Fact Nos. 10 and 11; see also Tr at 49-50, 65, 70, 92; Hearing Exhibit 11]). Pursuant to this agreement, staff would have allowed him to continue to operate the OWB. Instead, respondent, without consulting Department staff, failed to remove the tin jacket and insulation, built an open structure around the OWB, and continued to operate it outdoors (see Hearing Report at 5 [Findings of Fact Nos. 12 and 13], 7).

Accordingly, Department staff, based on its review and application of ECL 71-2103(1) and the Department's Civil Penalty Policy, DEE-1 (June 20, 1990), requested a penalty of two thousand five hundred dollars (\$2,500).

The ALJ recommends that I impose a total civil penalty of \$2,500, as requested by staff, but that I suspend \$1,500 of that amount contingent upon respondent's compliance with the terms and conditions of the order. Among the reasons that the ALJ provides in support of his recommendation to suspend a portion of the penalty is that respondent is a "small time farmer" and a "man of modest means" who purchased the OWB at a significant cost (Hearing Report at 9; see also Tr at 17, 85).

I note that Department staff and the ALJ accepted respondent's claim that he did not know that he installed an uncertified unit (see Tr at 64; see also Hearing Report at 8). I have also taken into account other aspects of this record regarding respondent's actions (see e.g. Tr at 87-88, 90).

Accordingly, to ensure a more complete record on which to base my decision on penalty and in recognition of the equities in this matter, I hereby remand this matter to ALJ Caruso to develop the record further with respect to the assessment of a civil penalty. A relevant factor to consider would be respondent's financial ability to pay a penalty. In that regard, the ALJ may consider directing respondent to provide information on his income status, including income tax records or other financial documentation.

I note also that the record lacks any evidence regarding the cost of the OWB (see e.g. Tr at 30 [staff requested copy of receipt, but respondent "had no receipt for the purchase"]). Having respondent obtain and provide this information may be of further benefit to the record.

Cessation of Operation of Respondent's OWB

Department staff requested, and the ALJ has recommended, that respondent cease operation of the uncertified outdoor wood boiler immediately. During this proceeding, respondent indicated that the OWB was used to heat his home, and that he operated it "intermittently" over two winter seasons and it was not used continuously (see Tr at 94-96; see also Tr at 23).

I concur with the ALJ's recommendation that respondent cease operation of the OWB, with one modification. If respondent can demonstrate to Department staff a compelling need to operate the OWB for the heating of his residence during all or a portion of the current winter season and the early spring of 2016, Department staff may, upon good cause shown and under

such conditions as staff establishes, allow respondent to operate the OWB during all or a portion of the period from the issuance of this Interim Decision and Order until April 15, 2016. For example, Department staff may allow respondent to operate the OWB when the temperature falls below a specified level during that time period.

I would also encourage respondent to review with Department staff what, if any, options acceptable to Department staff may be available to allow for the use of the OWB in the future.

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

- I. Respondent Jeff Myers is adjudged to have violated 6 NYCRR 247.8(a) by operating an uncertified new outdoor wood boiler on property located at 249 Lake Road, Town of Dryden, New York.
- II. This matter is hereby remanded to Administrative Law Judge Michael S. Caruso for further development of the record with respect to the assessment of a civil penalty arising from respondent's violation of 6 NYCRR 247.8(a).
- III. Respondent Jeff Myers is directed to immediately cease operation of the uncertified outdoor wood boiler. To the extent that respondent can demonstrate to Department staff a compelling need to use the OWB for the heating of his residence, Department staff may, upon good cause shown and under such conditions as staff establishes, allow respondent to operate the OWB during all or a portion of the period from the issuance of this Interim Decision and Order ("order") until April 15, 2016.

IV. The provisions, terms and conditions of this order shall bind respondent Jeff Myers, and his agents, successors, and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By:

Basil Seggos
Acting Commissioner

Dated: February 24, 2016
Albany, New York

**NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violations
of Article 19 of the New York State
Environmental Conservation Law (ECL) and
Title 6 of the Official Compilation of
Codes, Rules and Regulations of the
State of New York (6 NYCRR), Part 247,

HEARING REPORT

-by-

DEC Case No.
R7-20140206-13

JEFF MYERS,

Respondent.

Appearances of Counsel:

- Edward F. McTiernan, Deputy Commissioner and General Counsel (Joseph Sluzar, Regional Attorney, of counsel), for staff of the Department of Environmental Conservation
- Patrick M. Snyder, for respondent Jeff Myers

In this administrative enforcement proceeding, New York State Department of Environmental Conservation (DEC or Department) staff charges respondent Jeff Myers (respondent) with operating an outdoor wood boiler (OWB) in violation of 6 NYCRR part 247 on property owned by respondent located in Tompkins County at 249 Lake Road, Dryden, New York. Department staff commenced this proceeding by serving respondent a notice of hearing and complaint dated December 15, 2014. Respondent served an answer dated March 6, 2015 on Department staff. Department staff filed a statement of readiness dated March 13, 2015.

The matter was assigned to me, and a hearing was held on May 14, 2015 in the Department's Region 7 Office, 615 Erie Boulevard West, Syracuse, New York. The parties filed post-hearing briefs and the record was closed on July 27, 2015.

Applicable Law

An OWB is defined as “[a] fuel burning device that: (i) is designed to burn wood or other fuels; (ii) is specified by the manufacturer for outdoor installation or installation in structures not normally occupied by humans; and (iii) is used to heat building space and/or water via the distribution, typically through pipes, of a gas or liquid (e.g., water or water/antifreeze mixture) heated in the device.” (6 NYCRR 247.2[b][10][i]-[iii].) The regulations define a “new outdoor wood boiler” as “[a]n outdoor wood boiler that commences operation on or after April 15, 2011.” (6 NYCRR 247.2[b][9].)

In addition, all new OWBs must be certified by the Department before being sold, leased or operated (6 NYCRR 247.8[a]) and be located 100 feet or more from the nearest property line (6 NYCRR 247.5[b]).

I. Summary of the Parties' Positions

A. Department Staff

In Department staff's complaint, staff alleges that respondent violated ECL article 19 and 6 NYCRR part 247.

1. Violations of 6 NYCRR part 247

Department staff argues in its complaint and at hearing that on or after April 15, 2011 respondent installed a new outdoor wood boiler at his residence at 249 Lake Road, Dryden, New York. The OWB was manufactured by Crown Royal Stove, Model RS7300.¹ This model is not certified by the Department. In addition, Department staff avers that respondent's new OWB is located less than 100 feet from the nearest property line.

It is Department staff's position that respondent violated 6 NYCRR 247.8(a) by operating an uncertified new OWB.

¹ The complaint refers to the OWB as model RS7300E, but a later inspection revealed the model number to be RS7300. Department staff orally moved to amend the pleadings to conform the model number of the OWB to the proof provided at the hearing. I granted staff's motion at the hearing (see Transcript at 83).

2. Penalty and Remedial Relief

Department staff's complaint sought a civil penalty of \$2,500. Staff repeated that request at hearing and justified the penalty requested based on the statutory penalty provision (see ECL 71-2103) and application of the Department's Civil Penalty Policy (DEE-1) dated June 20, 1990. In addition, staff seeks an order directing respondent to cease operating the uncertified new OWB.

B. Respondent

Respondent's opposition is based on two arguments - the first regarding Department staff's inspection and the second involving the purchase of the OWB. Respondent argues that the Department had no authority to be on respondent's real property, therefore, any information gathered was the result of an illegal search. Respondent also argues that Department staff violated the Department's policy (OGC-7) for accessing private property; therefore, any information gathered cannot be used against respondent. Respondent also claims that the company that sold him the OWB should have advised him that the unit was not certified in New York and could not be operated in New York. Lastly, it is respondent's position that he was led to believe by the Town of Dryden codes office that the new OWB would comply with all environmental rules and regulations.

II. Hearing

Regional attorney Joseph Sluzar appeared on behalf of Department staff and presented two witnesses, Thomas Gragg, Environmental Program Specialist-1 in DEC's Division of Air Resources (Region 7) and Reginald Parker, Regional Engineer (Region 7) (previously the Regional Air Pollution Control Engineer for Region 7).

Patrick M. Snyder, Esq. appeared on behalf of respondent Jeff Myers and presented one witness, Jeff Myers.

Department staff offered nine exhibits at the hearing, all of which were accepted into evidence. An exhibit chart is attached to this hearing report. Respondent did not offer any exhibits into evidence. At hearing, respondent withdrew his affirmative defense related to Department staff's authority to inspect the property.

III. Findings of Fact

1. Respondent Jeff Myers owns, and resides at, the property known as 249 Lake Road, Dryden, New York located in Tompkins County. (Exhibit 1, Complaint at ¶ 3; Exhibit 4, Answer at ¶ 1.)
2. In or about November 2013, respondent purchased a new OWB and installed it at 249 Lake Road, Dryden, New York. (Transcript at 30; Exhibits 7, 8, 9, 10, 13 and 14.)
3. Respondent purchased the new OWB from a vendor located in Pennsylvania. (Transcript at 84; Exhibits 7 and 13.)
4. The OWB purchased by respondent is Model RS7300 manufactured by Crown Royal Stove. (Transcript at 38, 77, and 79; Exhibits 11, 12, 13, 14 and 15.)
5. The Crown Royal Stove OWB Model RS7300 is not certified by the Department. (Transcript at 45, 55, 82 and 93; Exhibit 15; <http://www.dec.ny.gov/chemical/73694.html>.)
6. Due to a complaint received by Department staff, Environmental Conservation Officer Osman Eisenberg and Environmental Program Specialist-1 Thomas Gragg inspected respondent's OWB on January 17, 2014. (Exhibit 14; Transcript at 19-20; 23-26.)
7. The OWB is located less than 100 feet from the nearest property boundary line. (Transcript at 27 and 58; Exhibits 7 and 15.)
8. On January 21, 2014, Department staff sent respondent a notice of violation advising respondent that the operation of the OWB was in violation of 6 NYCRR 247.8(a) because the new OWB was not certified and in violation of 6 NYCRR 247.5(b) (1)² because the new OWB was located less than 100 feet from the nearest property line. (Exhibit 13.)
9. Crown Royal Stove also manufactures an indoor Model 7300 that is practically identical to the RS7300 but without the insulation and metal jacket of the RS7300. (Exhibit 11.)

² Section 247.5(b) (1) of 6 NYCRR applies to OWBs installed on contiguous agricultural lands of larger than five acres. This is an obvious typo as staff recites the requirements of 6 NYCRR 247.5(b) in the notice of violation.

10. On December 11, 2014, respondent proposed moving the OWB into his garage and removing the metal jacket and insulation so that the OWB would essentially be the equivalent of the indoor wood boiler produced by the manufacturer. (Exhibit 11; Transcript at 49-50, and 92.)
11. Department staff agreed to respondent's proposal and agreed that the modifications and placement of the OWB in the garage would eliminate potential future violations.³ (Transcript at 65, 69-70, 73.)
12. Due to winter weather and the difficulty and expense of moving the OWB into the garage, respondent did not move the OWB. (Exhibit 15; Transcript at 87.)
13. Respondent built a three-sided structure with roof around the OWB without discussing that course of action with Department staff. (Exhibits 8, 9, 10, and 15; Transcript at 94.)
14. Department staff inspected respondent's OWB and the structure surrounding it on April 23, 2015. (Exhibit 15; Transcript at 53-58.)
15. In addition to housing the OWB, Respondent uses the three-sided structure to build raised beds that he sells for plantings and uses the structure to work on other various projects. (Transcript at 86-87.)
16. Respondent intends to keep one side of the shelter open to the elements and to keep the insulation and metal jacket on the OWB. (Exhibit 15.)
17. Respondent has operated the OWB for two winter seasons - 2013-2014 and 2014-2015. (Transcript at 92.)
18. Thomas Gragg is an Environmental Program Specialist-1 in DEC's Region 7 Division of Air Resources and has been employed in that position for 17 years. (Transcript at 19-20.)

³ By doing so, Department staff takes the position that the unit would no longer be "specified by the manufacturer for outdoor installation or installation in structures not normally occupied by humans" and, therefore, would not meet the definition of an outdoor wood boiler (see 6 NYCRR 247.2[b][10]). In short, the wood boiler would not be subject to Department regulation as an OWB.

19. Reginald Parker is the DEC's Region 7 Regional Engineer. Prior to his 2015 appointment as Regional Engineer, Mr. Parker was the Region 7 Regional Air Pollution Control Engineer for the previous 12 years. (Transcript at 41-43.)

IV. Discussion

Liability

Respondent purchased an OWB in or about November 2013 that commenced operation after April 15, 2011. By definition, respondent's OWB is a "new" OWB subject to the provisions of 6 NYCRR part 247 applicable to new OWBs (see 6 NYCRR 247.2[b][9] and 247.1). As a new OWB, the unit must be certified by the Department in order to be sold, leased or operated in New York (see 6 NYCRR 247.8[a]). In addition, the new OWB must meet the emission limits, setback and stack height requirements of 6 NYCRR 247.5. If respondent had purchased his new OWB in New York, the distributor would have been obligated to provide respondent with a notice and a copy of 6 NYCRR part 247 prior to the execution of a sales agreement (see 6 NYCRR 247.9[a]).

Respondent does not dispute the fact that the Crown Royal Stove Model RS7300 OWB is uncertified. At hearing, Department staff made a prima facie showing that the OWB is located less than 100 feet from the nearest property line. Respondent did not provide evidence or testimony to contradict staff's testimony regarding the OWB's location. Staff's complaint, however, did not allege a violation of 6 NYCRR 247.5(b) or request a finding that respondent violated section 247.5(b). Nor did staff move to amend the complaint to add a cause of action for violation of 6 NYCRR 247.5(b). Accordingly, the only violation before me is the undisputed violation of 6 NYCRR 247.8(a) for operating an uncertified OWB in New York.

Respondent argues in his defense that the distributor in Pennsylvania should have advised respondent that the Model RS7300 OWB was not certified in New York (Transcript at 17, 84-85). Respondent also testified that the local code officer should have advised him of the Department's OWB requirements (Transcript at 90). Respondent points to no legal authority that would relieve respondent of his obligation to comply with the law or his liability for non-compliance. If respondent is claiming ignorance of the law, that argument must be rejected. The OWB regulations have the force and effect of law, and

respondent and the public are charged with knowledge of those regulatory requirements. Ignorance of the law is no defense. (See e.g. Crow Properties, LLC, Ruling of the Chief ALJ, December 20, 2010 at 7; see also DEE-1 § IV.E.1 ["Culpability"] ["Ignorance of the law or rules is never a mitigating factor"].)

In December 2014, respondent sought a resolution of his violations when he proposed to place the OWB in his garage with the metal jacket and insulation removed. It was respondent's position that doing so would remove the OWB from the definition of an "outdoor wood boiler," thereby removing it from the requirements of part 247. After some research, Department staff agreed that this proposal would resolve continuing violations of part 247 as the unit would be rendered useless for outdoor operation and ostensibly become an indoor wood boiler (see Transcript at 49-50, 70 and 73).

Instead of pursuing the agreed upon course of action, however, respondent built a three sided structure with a roof around the OWB in an attempt to eliminate future violations. Though not articulated completely, respondent appears to argue that because he occupies the three-sided structure (constructing raised beds and conducting other work), the OWB does not meet the definition of an "outdoor wood boiler." An OWB is defined as "[a] fuel burning device that: (i) is designed to burn wood or other fuels; (ii) is specified by the manufacturer for outdoor installation or installation in structures not normally occupied by humans; and (iii) is used to heat building space and/or water via the distribution, typically through pipes, of a gas or liquid (e.g., water or water/antifreeze mixture) heated in the device." (6 NYCRR 247.2[b][10].) It is on the second portion of the definition that respondent has set his sights. Whether an OWB is specified for outdoor installation or installation in structures not normally occupied by humans is not determined by where it is installed or operated by the homeowner. It is a manufacturer specification. The respondent does not propose to remove the metal jacket and insulation from the OWB as he did when he proposed to move the unit into the garage. Doing so would alter the manufacturer's specification as Department staff learned in discussions with the manufacturer (see Transcript at 50).

I conclude that respondent's attempt to remove the OWB from the requirements of part 247 by building a structure around the

OWB was an honest but ill-conceived mistake and misreading of the regulations. Placing a wood boiler specified as an OWB by the manufacturer inside a structure of any kind does not change the fact that the wood boiler is an OWB subject to part 247. I also conclude that whether an OWB that has been altered, and thereby changing its manufacturer's specification, removes the OWB from regulation under 6 NYCRR part 247 can only be determined by Department staff on a case by case basis. I agree with Department staff, respondent's Crown Royal Stove Model RS7300 is and remains an OWB subject to the requirements of part 247.

Penalty and Relief Requested

Department staff requests a civil penalty of \$2,500 against respondent. The civil penalty of \$2,500 sought by Department staff is consistent with ECL 71-2103 and the Department's Civil Penalty Policy (DEE-1). ECL 71-2103 provides a civil penalty for any person who violates any provision of ECL article 19 or any code, rule or regulation promulgated pursuant thereto of not less than five hundred dollars or more than eighteen thousand dollars for said violation and an additional penalty not to exceed fifteen thousand dollars for each day the violation continues.

Department staff justifies its requested penalty of \$2,500 based on a gravity component of \$500 for each year that respondent operated the OWB. The respondent operated the OWB for two years for a gravity component penalty of \$1,000. Staff then added an additional \$1,500 penalty based on respondent's lack of cooperation. Staff cites respondent's lack of acknowledgement and response to the notice of violation and consent order that staff sent to respondent. Additionally, staff found it significant that staff had an agreement with respondent that respondent would relocate the OWB into the garage with the metal jacket and insulation removed and thereby eliminate future violations. Respondent, however, acting at variance to the agreed upon course of action and without notice to the Department, built a structure around the OWB.

The relief requested by Department staff is authorized under the ECL and consistent with the Civil Penalty Policy. I accept, as staff has, that Mr. Myers did not know he installed an uncertified OWB. I also accept respondent's testimony that he has not been trying to deceive the Department. He has attempted to rectify the problem, but altered his course of action without first discussing it with staff. While staff's penalty request is

justified and respondent should be directed to cease operating the uncertified OWB, I recommend that \$1,500 of the penalty be suspended so long as respondent complies with the Commissioner's order. I do so for two reasons. The first reason is based on respondent's representations that he is a "small time farmer" raising produce for sale at local farmers' markets, and that he is a man of modest means who incurred a significant cost in the purchase of the OWB. Secondly, the suspended penalty may induce respondent to reach out to Department staff to determine if the initial proposed resolution of this matter is still a possibility.

V. Recommendation

Accordingly, I recommend that the Commissioner issue an order:

1. Holding respondent Jeff Myers violated 6 NYCRR 247.8(a) for operating an uncertified new outdoor wood boiler.
2. Directing respondent Jeff Myers to pay a civil penalty of two thousand five hundred dollars (\$2,500) for the above referenced violations, with payment of one thousand five hundred dollars (\$1,500) of the penalty suspended, conditioned upon respondent's compliance with the provisions of the Commissioner's order.
3. Directing respondent Jeff Myers to cease operating the uncertified new outdoor wood boiler.
4. Directing such other and further relief as the Commissioner may deem just and proper.

/s/

Michael S. Caruso
Administrative Law Judge

Dated: July 30, 2015
Albany, New York

EXHIBIT CHART

Matter of Jeff Myers, Case No. R7-20140206-13
May 14, 2015 – NYSDEC Region 7 Office, Syracuse, NY

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
1	Notice of Pre-Hearing (Calendar Call) dated August 4, 2014 and Affidavit of Service dated August 26, 2014	✓	✓	Hearings Record	
2	Amended Notice of Prehearing, Hearing and Complaint dated December 15, 2014	✓	✓	Hearings Record	
3	Admission of Service and Appearance dated December 18, 2014	✓	✓	Hearings Record	
4	Answer dated March 6, 2015	✓	✓	Hearings Record	
5	Statement of Readiness dated March 13, 2015	✓	✓	Hearings Record	
6	Notice of Hearing from ALJ Caruso dated April 9, 2015	✓	✓	Hearings Record	
7	Email from Thomas Gragg to Reginald Parker dated January 21, 2014	✓	✓	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
8	Photograph of 249 Lake Road, Dryden, NY with outdoor wood boiler	✓	✓	Department Staff	
9	Photograph of outdoor wood boiler and newly constructed shed located at 249 Lake Road, Dryden, NY	✓	✓	Department Staff	
10	Photograph of outdoor wood boiler and newly constructed shed located at 249 Lake Road, Dryden, NY	✓	✓	Department Staff	
11	Email from Jeff Myers to Reginald Parker dated December 11, 2014	✓	✓	Department Staff	
12	Photograph of inside of control panel door of outdoor wood boiler located at 249 Lake Road, Dryden, NY	✓	✓	Department Staff	
13	Notice of Violation dated January 30, 2014 with cover letter from Joseph Sluzar to Jeff Myers dated February 10, 2014	✓	✓	Department Staff	
14	NYSDEC Office of Public Protection Complaint Log dated January 13, 2014 with inspection report dated January 17, 2014	✓	✓	Department Staff	
15	Inspection Report dated April 23, 2015	✓	✓	Department Staff	

