

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

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In the Matter of Alleged Violations of New York State  
Navigation Law §§ 173 and 175

**ORDER**

- by -

DEC Case No.  
LER5-15-001323

**R. PATNODE PLUMBING & HEATING, LLC<sup>1</sup> and  
RICHARD W. PATNODE, Individually,**

Respondents.

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This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department or DEC) that, “on or about January 2015,” respondent Richard W. Patnode, violated sections 173(1) and 175 of the New York State Navigation Law by causing a discharge of petroleum in a basement of a residence at 27 Horicon Avenue, Town of Bolton, Warren County, New York (27 Horicon Avenue) and failing to report the discharge to the Department (Department Staff complaint dated November 16, 2015 [complaint], ¶¶ 35-36). Staff alleged in its complaint that the “acts or omissions” of respondent in performing work on the heating oil supply lines at 27 Horicon Avenue “caused or contributed to” the discharge of petroleum (*see* Complaint, ¶¶ 14-18).

Department staff commenced this proceeding by personal service of a notice of hearing and complaint upon respondent Richard W. Patnode on November 25, 2015 (*see* Hearing Exhibit 3 [Affidavit of Alan Brassard]). Department staff sought a Commissioner’s order:

- finding that respondent committed the violations pleaded in the complaint;
- assessing a civil penalty in the amount of twenty-five thousand dollars (\$25,000) to be paid no later than thirty (30) days from the date of the service of the Commissioner’s order on respondent;
- directing that respondent be strictly liable for cleanup and removal costs resulting from the discharge at 27 Horicon Avenue; and
- granting such other and further relief as may be deemed just and proper under the circumstances.

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<sup>1</sup> After commencement of this proceeding, Department staff withdrew its claims against respondent R. Patnode Plumbing & Heating, LLC (*see* Hearing Report at 2, 8, attached; *see also* Hearing Exhibit 3-A [Affidavit of Service of Amended Complaint sworn to by DEC Environmental Conservation Officer Marcia C. Goodrich dated August 30, 2017 with copy of Amended Complaint dated August 8, 2017 [Amended Complaint]).

(Complaint, at 6-7, ¶ 38 and §§ I-III, V; *see also* Amended Complaint, at 5-6, ¶ 36, and §§ I-III, V).

The matter was assigned to Administrative Law Judge (ALJ) Lisa A. Wilkinson of the Department's Office of Hearings and Mediation Services. ALJ Wilkinson prepared the attached ruling and hearing report, which I adopt as my decision in this matter, subject to my comments below.

As set forth in the record, respondent failed to answer the complaint, failed to appear at the prehearing conference that was scheduled for December 16, 2015, and failed to appear at the hearing that was convened on May 10, 2017 (*see* Hearing Report at 2, 7 [Finding of Fact No. 33]).<sup>2</sup> Accordingly, Department staff moved at the hearing for a default judgment (*see* Hearing Report at 2). Staff provided proof of service upon respondent of the notice of hearing and complaint, motions and a proposed order in this proceeding (*see* Hearing Exhibits 3, 3-A, 4-6). As a consequence of respondent's failure to answer or appear in this matter, Department staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15.

Furthermore, Department staff presented its case on the merits at the hearing. The record demonstrates that respondent violated Navigation Law § 173(1) by causing a discharge of petroleum and Navigation Law § 175 by failing to report the discharge (*see* Hearing Report at 9-13). Regarding the discharge, the ALJ found that the petroleum discharge in the basement made its way to the Town of Bolton's wastewater treatment plant causing damage at the facility (*see e.g.* Hearing Report at 5 [Findings of Fact 15, 19, and 20], 10, 12; *see also* Hearing Exhibits 24 and 25).

As indicated, Department staff seeks an order imposing a civil penalty in the amount of twenty-five thousand dollars (\$25,000) (*see* Complaint at 6, ¶ 38 and § II; *see also* Amended Complaint at 5, ¶ 36 and § II). Section 192 of the Navigation Law provides for a civil penalty of up to twenty-five thousand dollars (\$25,000) per day for each violation of the provisions of article 12 of the Navigation Law or any regulation promulgated thereunder. If the violation is of a continuing nature, however, each day during which it continues shall constitute "an additional, separate and distinct offense" (Navigation Law § 192).

Department staff's request in this proceeding is well below the maximum statutory penalty. Based upon the record, I conclude that the civil penalty of twenty-five thousand dollars (\$25,000) requested by Department staff is authorized.<sup>3</sup> Respondent is directed to pay the civil penalty within thirty (30) days of the service of this order upon him.

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<sup>2</sup> The hearing continued on August 8, 2017 at which respondent was also not present.

<sup>3</sup> A default judgment cannot exceed the amount demanded in complaint, absent proper notice to respondent that a greater penalty would be sought (*see Matter of 134-15 Rock Management Corp., et al.*, Order of the Commissioner, December 10, 2008, at 4, *see also* CPLR 3215[b]). Here staff requested, and I am granting, a civil penalty in the amount of twenty-five thousand dollars (\$25,000). For purposes of this matter, I need not determine whether the discharge at issue, or the failure to report the discharge, constituted continuing violations that would have warranted a higher penalty. I do not, however, accept that the maximum penalty in this matter was necessarily limited to fifty thousand dollars (\$50,000) as stated in the record (*see* Hearing Report at 14).

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

- I. Department staff's motion for a default judgment pursuant to 6 NYCRR 622.15 is granted. By failing to answer the complaint, failing to appear at the prehearing conference and failing to appear at the hearing, respondent Richard W. Patnode waived his right to be heard at the hearing.
- II. Based on the record evidence, respondent Richard W. Patnode is adjudged to have violated:
  - A. Navigation Law § 173(1) by causing a discharge of fuel oil at a residence located at 27 Horicon Avenue in the Town of Bolton, Warren County, New York in January 2015; and
  - B. Navigation Law § 175 by failing to report the aforementioned discharge of petroleum.
- III. Respondent Richard W. Patnode is hereby assessed a civil penalty in the amount of twenty-five thousand dollars (\$25,000) for the violations identified in paragraph II of this Order.

Within thirty (30) days of service of this Order upon respondent Richard W. Patnode, respondent shall pay the civil penalty in the amount of twenty-five thousand dollars (\$25,000) by certified check, cashier's check, or money order payable to the "New York State Department of Environmental Conservation" and delivered to the following address:

Scott Abrahamson, Esq.  
Office of General Counsel  
NYS Department of Environmental Conservation  
Region 5  
1115 State Route 86  
P.O. Box 296  
Ray Brook, New York 12977-0296.

- IV. Any questions or other correspondence regarding this order shall be addressed to Scott Abrahamson, Esq. at the address referenced in paragraph III of this Order.

- V. The provisions, terms and conditions of this Order shall bind respondent Richard W. Patnode and his agents, successors and assigns, in any and all capacities.

For the New York State Department  
of Environmental Conservation

By: /s/  
Basil Seggos  
Commissioner

Dated: May 15, 2019  
Albany, New York

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

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In the Matter of the Alleged Violations of the New York State  
Navigation Law §§ 173 and 175

- By -

**R. PATNODE PLUMBING & HEATING, LLC and  
RICHARD W. PATNODE, Individually,**

Respondents.

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**RULING AND  
HEARING  
REPORT**

DEC Case No.  
LER5-15-001323

Appearances:

- Thomas S. Berkman, Deputy Commissioner and General Counsel (Scott Abrahamson, Assistant Regional Attorney, of counsel), for staff of the Department of Environmental Conservation
- No appearance for respondents R. Patnode Plumbing & Heating, LLC and Richard W. Patnode.

**PRODECURAL HISTORY**

By notice of hearing and complaint dated November 16, 2015, staff of the New York State Department of Environmental Conservation (Department) commenced this enforcement proceeding against respondents R. Patnode Plumbing & Heating, LLC and Richard W. Patnode, individually, for violations of the Navigation Law.

The complaint alleges that respondents violated Navigation Law § 173 (1) by causing a discharge of petroleum in the basement of a residence at 27 Horicon Avenue in Bolton Landing, New York<sup>1</sup> (residence or 27 Horicon Avenue) on or about January 12, 2015, and that respondents violated Navigation Law § 175 by failing to timely report the spill of petroleum that occurred at the residence.

Department staff personally served respondent Richard W. Patnode (Richard Patnode or respondent) with the notice of hearing and complaint on November 25, 2015 and served respondent R. Patnode Plumbing & Heating, LLC on November 18, 2015 by service upon the Secretary of State. On March 1, 2017, Department staff served respondents with a notice of motion for default judgment dated February 28, 2017. Staff subsequently served respondents

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<sup>1</sup> Bolton Landing is a hamlet in the Town of Bolton, Warren County, New York.

with a statement of readiness for adjudicatory hearing scheduling a default hearing for May 10, 2017.

A hearing in this matter was convened on May 10, 2017. Administrative Law Judge (“ALJ”) Lisa A. Wilkinson presided, and the Department was represented by Scott Abrahamson, Esq., Assistant Regional Attorney, Region 5. Department Staff moved for a default judgment pursuant to section 622.15 of 6 NYCRR, and also elected to proceed with a hearing in respondents’ absence. Steve McCranels, one of the homeowners of 27 Horicon Avenue, and Steve Paszko, an assistant environmental engineer in the Department’s region 5 office, testified for Department staff.

At the hearing, Mr. Abrahamson moved to strike R. Patnode Plumbing & Heating, LLC from the complaint based on documents from the New York State Department of State Division of Corporations confirming that the company was formed after the date of the alleged violations and related acts and omissions giving rise to them (*see* Hearing Record, Tr at 143; Exhibits 1 and 2). I reserved on the motion pending staff’s filing of an amended complaint and its service upon respondent Richard Patnode. By letter dated September 5, 2017, Mr. Abrahamson provided a copy of the amended complaint and proof of service upon respondent, whereupon the hearing record closed.

A transcript recording was made of the hearing. Department staff offered thirty-two exhibits, all of which I received into evidence. An exhibit chart is attached to this report. As set forth below, this report recommends that the Commissioner hold respondent Richard W. Patnode liable for the charges pleaded in the complaint and impose a civil penalty in the amount of twenty-five thousand dollars (\$25,000) as requested by Department staff.

### **FINDINGS OF FACT**

1. Steve McCranels and Amy Ulrich own property located at 27 Horicon Avenue in the Village of Bolton Landing in the Town of Bolton, Warren County, New York (27 Horicon Avenue or residence). The residence is a two bedroom, two story house with an unfinished basement where the furnace and hot water heater are located. The furnace is connected to a 550 gallon underground fuel tank located next to the residence. (Exhibit 8; Testimony of Steve McCranels, Tr at 9, 17.)
2. A sump pump is located in the basement in the residence. At the time of the alleged discharge of fuel oil, any water that pooled in the basement would drain into the sump and be pumped into the Town’s sewage treatment plant. (*See* Testimony of Steve McCranels, Tr at 22.)

3. In September 2013, Steve McCranels had a number of projects he wanted to undertake at 27 Horicon Avenue as well as at other property he owned in Bolton Landing. Mr. McCranels hired respondent Richard Patnode whom he had known since high school to do the work (*see* Testimony of Steve McCranels, Tr at 10-11).
4. Richard Patnode is a general contractor. During the relevant time periods in this proceeding, he represented himself as “Richard W. Patnode - General Contracting, Plumbing, Heating and Wiring” with an office located at 20 Center Street, Ticonderoga, New York 12883 (*see* Exhibits 9-22; Testimony of Steve McCranels, Tr at 14-15).
5. On September 17, 2013, respondent submitted a proposal to Steve McCranels to install a new hot air furnace, connect it to the existing duct work, and replace the old fuel lines and old oil tank at an estimated cost of \$6,559.04 (*see* Exhibit 9). Mr. McCranels and his wife decided not to install a new hot air furnace (*see* Testimony of Steve McCranels, Tr at 13).
6. On or about September 25, 2014, respondent installed two new copper tubing fuel lines at 27 Horicon Avenue. One line went from the underground fuel tank into the furnace. The other line was installed on the tank with the anticipation it would be connected to a forced hot air heating system. The second line was not capped at the end and the forced air heating system was never installed. (*See* Testimony of Steve McCranels, Tr at 18-19; Exhibit 21 [invoice for installation].)
7. Between September 30, 2013 and December 10, 2014, Steve McCranels received 13 invoices from respondent for work respondent performed, including labor and materials for plumbing, heating, and electrical work and a new fence. The heading on each of the invoices reads: Richard W. Patnode, General Contracting, Plumbing, Heating and Wiring, 20 Center Street, Ticonderoga, NY 12883. (*See* Testimony of Steve McCranels, Tr at 14-15; Exhibits 9-22.)
8. Steve McCranels only dealt with Richard Patnode on the home improvement and repair projects at his residence and Richard Patnode performed most of the work by himself, with occasional help from an assistant (*see* Testimony of Steve McCranels, Tr at 31-33; Exhibit 21).
9. On November 13, 2014, Polsinello Fuels, Inc. (Polsinello Fuels) delivered 380 gallons of fuel to the tank at 27 Horicon Avenue. On January 9, 2015, Polsinello Fuels delivered 107.2 gallons of fuel to the tank. (*See* Exhibit 28.)

10. Steve McCranels was on vacation when the Town of Bolton tried to contact him several times regarding a fuel oil spill the Town had traced to 27 Horicon Avenue.<sup>2</sup> Town personnel ultimately spoke to Mr. McCranels's tenant who went down into the basement and saw fuel oil running out of the uncapped line. The tenant contacted a chef at Steve McCranels's restaurant who put a temporary cap on the fuel line to stop the fuel oil from leaking in the basement (*see* Testimony of Steve McCranels, Tr at 23-24, 29-30).
11. Thomas French II is the water/wastewater superintendent for the Town of Bolton's public drinking water facility and wastewater treatment plant. He has worked at the wastewater treatment plant for 13 years and has been superintendent for four years. Mr. French is responsible for overseeing the operation of the wastewater treatment plant and ensuring that it complies with applicable State and federal regulations and health and safety requirements. (*See* Exhibit 7, Affidavit of Thomas French II sworn to May 3, 2017 [French Aff] ¶¶ 1-3.)
12. On January 12, 2015, at approximately 10:00 a.m., a Town employee advised Mr. French that he smelled fuel in the clarifier, a settling tank that mechanically removal solids from wastewater. A clarifier removes solid particles or suspended solids from liquid for clarification or thickening. The primary treatment of sewage involves removing floating and settleable solids through sedimentation. Primary clarifiers reduce the content of suspended solids and pollutants embedded in those solids. Prior to entering the secondary clarifier, waste water is spread over a plastic media where bacteria grow and consume the organic matter. Partially treated waste water enters the secondary clarifier (sedimentation tank), where biological growth created in the secondary treatment process is removed. Fuel oil can destroy the microbes upon which secondary treatment depends. (*See* French Aff ¶ 5.)
13. Mr. French examined the wastewater treatment plant and determined that heating oil had entered the secondary clarifier. He observed the fuel as a sheen on top of the liquid in the clarifier. (*See* French Aff ¶¶ 6-7.)
14. Mr. French reported the spill to the Department's spill hotline, noting an odor and color in wastewater from an unknown source and that an investigation was underway (*see* French Aff ¶ 7; Exhibit 24).

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<sup>2</sup> At the hearing, Steve McCranels could not recall when he was on vacation for purposes of determining when the Town tried to contact him. Evidence in the record, however, supports a finding that fuel oil flowed out of the uncapped fuel line following the January 9, 2015 fuel delivery and that the Town tried to contact Mr. McCranels at some point between January 12, 2015 and January 19, 2015 regarding the release of fuel at 27 Horicon Avenue that eventually discharged to the Town's waste water treatment facilities.

15. Spill number 1409998 was assigned to the spill. According to the spill report, the waste water treatment plant was severely impacted because the microbes in the clarifier were killed and oil residuals were present throughout the facility. The report noted that it was going to take a while to get the system back up and running properly. (*See Exhibit 24.*)
16. Mr. French called National Vacuum, a spill response company. National Vacuum recovered some of the fuel that was making its way through the treatment plant and also recovered fuel mixed with untreated wastewater in the collection of system manholes. (*See French Affidavit ¶ 7.*)
17. Mr. French and his employees determined which manholes the fuel-contaminated wastewater had entered and narrowed the potential source to Horicon Avenue and Maple Avenue in the Town of Bolton (*see French Affidavit ¶ 8*).
18. On January 19, 2015, Mr. French gained access to 27 Horicon Avenue and entered the basement and observed that the basement floor was very wet and multiple fans and a dehumidifier were running. The sump pump pit was connected to the residence's sanitary sewer line. (*See French Affidavit ¶ 9.*)
19. The discharge of fuel oil to the Town's wastewater treatment plant killed or impacted the beneficial bacteria that were present in the clarifiers and used to pre-treat the wastewater. The Town had to purchase materials to re-start the bacterial action of the clarifiers and the plant could not operate at full capacity until that happened. (*See French Affidavit ¶ 10.*)
20. The fuel oil also co-mingled with the treated waste water and discharged into the upflow and sand filter system where it would have flowed into the sand beds located outside the treatment plant building and eventually discharged into groundwater. The Town had to spend approximately \$10,000 to address the problems caused by the fuel discharge to the treatment plant. (*See id.*)
21. Steve Paszko has been employed by the Department since 1999. He has an Associate Degree in mechanical engineering from Hudson Valley Community College and is currently an assistant engineer, environmental, in the Department's region 5 office in Warrensburg. His responsibilities include spill response, remediation, and petroleum and chemical bulk storage inspection. He has investigated over 900 spills. (*See Testimony of Steve Paszko, Tr at 68.*)
22. Mr. Paszko was the on call spill responder on January 12, 2015. He arrived at the Town's waste water treatment plant, soon after Mr. French reported the spill, to investigate points in the waste water collection system. Mr. Paszko could smell fuel oil

from the manholes whose covers had been pulled and observed oil in the clarifier. (*See* Testimony of Steve Paszko, Tr at 73-74.)

23. Steve Paszko provided Town personnel with absorbent pads and a boom to control the spread of fuel oil in the clarifier. Mr. Paszko also went door to door in Bolton Landing in an attempt to ascertain the source of the spill. (*See* Testimony of Steve Paszko, Tr at 74-75; French Affidavit ¶ 7.)
24. On January 19, 2015, Martin Luther King Day, Lee Albanese of Polsinello Fuels reported an oil spill at 27 Horicon Avenue to the Department's spill hotline that purportedly occurred on January 17, 2015. Spill number 1410202 was assigned. (*See* Exhibit 25; Testimony of Steve Paszko, Tr at 74-75.)
25. Steve Paszko called Steve McCranels on January 20, 2015 to discuss the spill and his potential responsibility as the owner of the tank and advise him to contact his insurance company. (*See* Testimony of Steve Paszko, Tr at 81.)
26. Steve Paszko also called Richard Patnode and advised him that he was a potentially responsible party and to contact his insurance company (*see* Testimony of Steve Paszko, Tr at 81).
27. Steve Paszko inspected 27 Horicon Avenue on January 20, 2015 to document the source of the spill, its cause and how much product was lost from the tank. Steve McCranels's tenant gave Steve Paszko access to the basement. Mr. Paszko observed a fuel line that was capped off a few feet from the sump. The tenant advised Mr. Paszko during his inspection that he had observed Richard Patnode repairing the uncapped fuel line and that Mr. Patnode hosed down the residual oil remaining in the basement into the sump. (*See* Testimony of Steve Paszko Tr at 85-87.)
28. Steve Paszko measured fifteen inches of oil in the tank and estimated that approximately 150 gallons of oil remained in the 550-gallon underground tank. He observed that the basement was pretty clean considering the amount of oil that was lost. (*See* Testimony of Steve Paszko Tr at 88-89.)
29. Steve Paszko photographed the fuel lines installed on the tank. One of the lines connected to the furnace. The second line was not connected to anything, was uncapped and was situated about four feet from the basement sump. (*See* Testimony of Steve Paszko, Tr at 91-93; Exhibits 26 and 27.)

30. Steve Paszko photographed the sump and sump pump on the right hand side of the furnace. The sump pump was connected directly to the sanitary sewer line. (*See* Testimony of Steve Paszko, Tr at 93-94; Exhibit 27.)
31. Steve McCranels's insurance carrier Kemper Services Group hired Action Environmental Group (Action Environmental) to investigate the cause of the fuel oil spill at 27 Horicon Avenue. Anthony Murtaugh, P.G. (professional geologist) prepared a report dated April 13, 2015 documenting his findings as to the probable cause of the fuel oil discharge. (*See* Exhibit 23.)
32. On November 25, 2015, Environmental Conservation Officer (ECO) Alan Brassard personally served respondent Richard Patnode with the November 16, 2015 notice of hearing and complaint and the *Department's Guide to Enforcement Hearings* (*see* Exhibit 3, Affidavit of Service of Alan Brassard sworn to November 30, 2015 [Brassard Aff]).
33. Respondent failed to answer the complaint and failed to appear at the prehearing conference that was held on December 16, 2015 (*see* Hearing Record, Tr at 145-146).
34. On March 1, 2017, Department staff mailed a notice of motion for default judgment dated February 28, 2017, by first class mail, to Richard W. Patnode, 20 Center Street, Ticonderoga, New York 12883. The mailing consisted of the motion for default judgment, five exhibits, including the notice of hearing and complaint, and the affirmation of Assistant Regional Attorney Scott Abrahamson dated February 28, 2017. (*See* Exhibit 4, Affidavit of Mailing of Renee Fitzgerald sworn to March 1, 2017 [Fitzgerald Aff].)
35. On March 27, 2017, Department staff mailed the statement of readiness for adjudicatory hearing, including five exhibits, and cover letter from Assistant Regional Attorney Scott Abrahamson, all dated March 23, 2017, by certified mail, to Mr. Richard W. Patnode, 20 Center Street, Ticonderoga, New York 12883. (*See* Exhibit 5, Statement of Readiness for Adjudicatory Enforcement Hearing Affidavit of Service of Renee Fitzgerald sworn to Marcy 27, 2017.)
36. The return receipt for the March 27, 2017 certified mailing was not returned to the Department (Hearing Record, Tr at 54-55).
37. On April 22, 2017, ECO Marcia Goodrich personally served the statement of readiness dated March 23, 2017 and a cover letter dated April 14, 2017 signed by Scott Abrahamson on respondent. The cover letter was addressed to Richard W. Patnode at 20 Center Street Ticonderoga, New York 12883. The letter advised respondent in large boldface type that the date of the hearing had been changed to May 10, 2017, that the

hearing would be held even if respondent failed to attend and that failure to appear may waive respondent's right to a hearing. Five exhibits were attached to the statement of readiness, including the November 16, 2015 notice of hearing and complaint. (*See* Exhibit 6, Affidavit of ECO Marcia C. Goodrich sworn to April 27, 2017.)

## **DISCUSSION**

### Motion to Amend Complaint

Department staff moved at the hearing to amend the complaint to remove R. Patnode Plumbing & Heating, LLC (*see* Hearing Record, Tr at 142-144). R. Patnode Plumbing & Heating, LLC was formed on February 12, 2015 (Exhibit 1 [New York State Department of State (DOS) entity information]; Exhibit 2 [Articles of Organization and Certificate of Publication]). Staff correctly points out that the limited liability company was established after the violations alleged in the complaint and the associated acts and omissions discussed at the hearing occurred. Mr. Abrahamson stated at the hearing that he did not have a good faith justification for proceeding against the limited liability company and the evidence demonstrated that respondent Richard Patnode was acting on his own behalf (*see* Hearing Transcript, Tr at 143-144).

Department staff served the amended complaint on respondent Richard Patnode by first class mail along with letter dated August 9, 2017 from Scott Abrahamson addressed to Richard W. Patnode at 20 Center Street, Ticonderoga, New York. Staff also personally served respondent with a copy of the amended complaint and Abrahamson letter on August 30, 2017 (*see* Affidavit of Service of ECO Marcia Goodrich sworn to August 30, 2017). R. Patnode Plumbing & Heating, LLC will not be prejudiced by its removal from the complaint. Moreover, no legal basis exists on which the company could be held liable for the alleged violations. Therefore, staff's motion to amend the complaint is granted.

### Default Judgment

A respondent must serve an answer on Department staff within twenty days of receiving a complaint (*see* 6 NYCRR 622.4[a]). The failure to timely serve an answer constitutes a default and a waiver of respondent's right to a hearing (*see id.*; 6 NYCRR 622.15[a]). The failure to attend a duly scheduled pre-hearing conference scheduled in the notice of hearing is also a default and a waiver of respondent's right to a hearing (*see* 6 NYCRR 622.3[a][2]; 6 NYCRR 622.15[a]).

When a respondent does not answer a complaint or appear for a pre-hearing conference scheduled in the notice of hearing, Department staff may make a motion for a default judgment (*see* 6 NYCRR 622.15[a]). A motion for a default judgment must contain (1) proof of service

upon the respondent of the notice of hearing and complaint; (2) proof of the respondent's failure to appear or failure to file a timely answer; and (3) a proposed order (6 NYCRR 622.15).

Staff's papers, accepted into evidence at the hearing, establish that Department staff served respondent with a notice of hearing and complaint by personal service (*see Brassard Aff*). In addition, staff served respondent with a notice of motion for default judgment by first class mail (*see Fitzgerald Aff*). Staff has established that respondent failed to answer the complaint and failed to appear at the prehearing conference that was held on December 16, 2015 and failed to answer the motion (*see Hearing Record, Tr at 145-146*). Staff also submitted a proposed order with its motion (*see Exhibit 4, exhibit 5*).

In addition to meeting the procedural prerequisites for a default motion, staff must also provide proof of the violations alleged in the complaint. As the Commissioner has held, "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them" (*Matter of Alvin Hunt, d/b/a Our Cleaners*, Decision and Order of the Commissioner, July 25, 2006, at 6). Department staff must also provide some proof of facts sufficient to support the causes of action pleaded in the complaint (*see Matter of Queen City Recycle Center*, Decision and Order of the Commissioner, December 12, 2013, at 3 [requiring staff on motions for default judgment to offer proof of facts constituting the claim charged]). For the reasons discussed below, staff's motion for a default judgment in this proceeding should be granted.

### Liability

At issue is whether Department staff submitted sufficient proof that respondent's acts or omissions resulted in the discharge of fuel pursuant to Navigation Law § 173 and that respondent failed to report the discharge as required pursuant to Navigation Law § 175. Based on the record evidence, and the reasonable inferences that can be drawn therefrom, I find that staff has submitted sufficient proof of the violations alleged in the complaint and recommend that the Commissioner hold respondent liable as requested by Department staff (*see Exhibit 3, complaint [wherefore clause]*).

#### *Navigation Law § 173 – Discharge of Petroleum*

Navigation Law § 173 prohibits the discharge of petroleum (Navigation Law § 173 [1]). "Discharge" means "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]). "Waters" of the State include groundwater (*see Navigation Law § 172 [18]*). "Petroleum" includes fuel oil (*see Navigation Law § 172 [15]*). Navigation Law §

181(1) imposes strict liability upon anyone who discharges petroleum, without regard to fault, for cleanup and removal costs and all direct and indirect damages.

The record demonstrates that respondent installed two copper fuel lines on the underground fuel tank at 27 Horicon Avenue. One line was connected to the furnace. The other line did not connect to anything and was uncapped (*see* Testimony of Steve McCranels, Tr at 27-28; Testimony of Steve Paszko, Tr at 81, 86; Exhibit 21). During a fuel delivery on January 9, 2015, Polsinello Fuels overfilled the fuel tank, having previously filled the tank with 380 gallons of fuel on November 13, 2014 (*see* Exhibit 28). On January 12, 2015, Town of Bolton employees discovered fuel oil in the waste water treatment plant, reported the spill to the Department and began looking for the source of the fuel (*see* Exhibit 24). On January 19, 2015, Polsinello Fuels reported the spill to the Department (*see* Exhibit 25). The spill report states that on January 17, 2015, fuel in a tank located at 27 Horicon Avenue leaked into the floor drain and into the sump that was connected by the sump pump to the waste water sewer system, and that the cause of the incident was equipment failure (*see id.*). Also on January 19, 2015, Thomas French II, the water/wastewater superintendent for the Town of Bolton, inspected the basement of 27 Horicon Avenue and noticed that the floor was very wet, that multiple fans and a dehumidifier were running, and that the sump pump pit was connected to the Town's sewer line (*see* French Aff ¶ 9).

Steve McCranels's tenant was the first person to observe the fuel leak in the basement of 27 Horicon Avenue. The tenant was unavailable to testify at the hearing, however, both of the Department's witnesses spoke with the tenant and testified as to the statements he made to them concerning the incident. Steve McCranels testified that his tenant saw fuel oil leaking from an uncapped fuel line in the basement and immediately contacted a chef at Mr. McCranels's restaurant, who was able to install a temporary cap on the line to stop the leak (*see* Testimony of Steve McCranels, Tr. at 23-24, 29-30). Steve Paszko testified that when he arrived at 27 Horicon Avenue on January 20, 2015 to investigate the spill, he spoke directly with the tenant. The tenant told him that he saw respondent capping the fuel line and hosing down the residual fuel into the sump (*see* Testimony of Steve Paszko, Tr at 86, 132-133). Mr. Paszko stated that the floor was very clean considering the amount of fuel that emptied from the tank, giving credence to the tenant's account of the leak and respondent's effort to remove fuel oil from the basement floor (*see* Testimony of Steve Paszko, Tr at 133).

The testimony of the Department's witnesses regarding what the tenant told them constitutes hearsay evidence and is admissible in this administrative proceeding. Hearsay evidence is defined as "a statement, other than one made by a witness testifying at the hearing, offered into evidence to prove the truth of the matter asserted" (6 NYCRR 622.2[i]). Hearsay evidence is admissible in an administrative adjudicatory proceeding and can be the basis of an administrative enforcement determination (*see Matter of Tractor Supply Company*, Decision and

Order of the Commissioner, August 8, 2008, at 2; State Administrative Procedure Act [“SAPA”] § 306[1][agencies need not observe the rules of evidence observed by courts, but shall give effect to the rules of privilege recognized by law]; 6 NYCRR 622.11[a][3]; *Matter of Gray v Adduci*, 73 NY2d 741, 742 [1988]; *People ex rel. Vega v Smith*, 66 NY2d 130, 139 [1985]; *Matter of Concerned Citizens Against Crossgates v Flacke*, 89 AD2d 759, 760 [3d Dept 1982], *affd for reasons stated below* 58 NY2d 919 [1983]). The tenant’s statements are based on his personal observations of fuel oil flowing out of the uncapped fuel line into the basement sump, and respondent’s actions to repair the fuel line and remove the residual oil following the discharge. The statements are probative of the violations alleged in the complaint and are therefore admissible as evidence in this proceeding (*see* SAPA § 306[1]).

The hearsay evidence also corroborates the opinion testimony offered by Steve Paszko with respect to his theory of how the fuel discharged from the uncapped line, the testimony of the Town’s water superintendent regarding how the fuel made its way through the wastewater treatment plant to the sandflats to the groundwater, and the report prepared by Anthony Murtaugh, P.G. of Action Environmental Group discussing the cause of the fuel release. During his site inspection, Mr. Paszko tested the tank and determined that only 150 gallons of fuel remained, indicating a significant amount of fuel had been released into the environment (*see* Testimony of Steve Paszko, Tr at 89). He also observed that the basement was “pretty clean, considering the amount of oil that was lost” and surmised that someone had hosed the residual fuel into the sump based on what the tenant had told him (*id.*, Tr at 89, 133). Mr. Paszko testified that in his opinion the delivery of fuel on January 9, 2015 had overfilled the tank, as indicated by evidence of black staining around the fill port (*see* Exhibit 23, photographs 14, 15, and 16), and resulted in a syphon effect whereby the fuel was pushed through the uncapped line and leaked onto the basement floor and entered the sump. Once the fuel entered the sump, according to Mr. Paszko, the sump pump transferred the fuel to the Town’s sewer system and into the waste water treatment plant. (*See* Testimony of Steve Paszko, Tr at 101-102, 116, 132; Exhibit 23, Findings and Figure 1 and 2, Exhibits 27 and 27-A). Mr. Paszko testified that if respondent had correctly installed the fuel line, the release of fuel into the environment would not have been as significant and may have been localized to the residence (*see* Testimony of Steve Paszko, Tr at 139).

The Town’s water superintendent attested to the fact that on January 12, 2015, Town employees discovered the presence of fuel in the Town’s wastewater treatment plant and that the fuel ultimately discharged into the upflow and sand filter system from where it would reach the groundwater (*see* Finding of Fact Nos. 18 and 19).

Anthony Murtaugh, P.G. of Action Environmental Group (Action Environmental), who was retained by Kemper Services Group<sup>3</sup> to evaluate the cause of the fuel release at 27 Horicon Avenue, also concluded that the uncapped fuel line precipitated the release of fuel into the sewer system (*see* Exhibit 23, Affidavit of Anthony Murtaugh sworn to May 2, 2017, attached exhibit 2 dated April 13, 2015). Mr. Murtaugh opined that “it is possible for an uncapped line not to leak if a drainage syphon has not been established” and that if the tank was properly filled to capacity, such as occurred during the November 13, 2014 delivery, fuel would likely not have drained into the basement. Mr. Murtaugh further stated that a capped line would not likely leak fuel into the basement. Mr. Patnode told Action Environmental that he had installed a cap on the line, according to Mr. Murtaugh, but he did not produce any photographs showing the cap at the time of installation. (*See* Exhibit 23, unnumbered page 1.)

Mr. Murtaugh stated that a syphon could develop on an uncapped fuel line if the fuel level became high enough to sustain a syphon flow from the tank to the basement. He opined that the fuel delivery on January 9, 2015 likely resulted in an overfill, as is evident by the staining around the fill port (*see* Exhibit 23, photographs 14, 15, and 16), and created a syphon effect whereby the flow entered the sump and was pumped to the waste water sewer and eventually into the wastewater treatment plant. Mr. Murtaugh concluded that the line was not capped until after the incident. (*See* Exhibit 23, unnumbered page 2 and Figures 1 and 2.)

In sum, the record evidence, and the reasonable inferences that can be drawn from the evidence, demonstrate that: (1) the discharge of fuel oil to the Town of Bolton’s waste treatment plant originated from a release at 27 Horicon Avenue; (2) respondent did not cap the second fuel line at the time of installation; (3) the delivery of fuel oil on January 9, 2015 overfilled the tank, initiating a syphon effect on the uncapped fuel line that caused the release of fuel oil; (4) the fuel oil flowed through the uncapped line and drained into the basement sump; (5) the sump pump pumped the fuel oil into the sewer system and to the Town’s waste water treatment plant; and (6) the fuel oil traveled through the waste water treatment plant, discharged to the sand flats outside the plant, and reached the groundwater.

Department staff has submitted proof sufficient to establish that respondent’s failure to cap the second fuel line at the time of installation caused the prohibited discharge of fuel oil into the waters of the State and is therefore entitled to a default judgment on liability on its first cause of action (*see* Navigation Law § 173[1]).

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<sup>3</sup> The Kemper Services Group insured the residence for Steve McCranels and his wife (see Hearing Record, Tr at 121).

### *Navigation Law § 175 – Failure to Report Discharge*

Navigation Law § 175 provides that any person responsible for causing a discharge of petroleum shall notify the Department pursuant to the rules and regulations established by the Department, but in no case more than two hours after the discharge. The statute does not excuse a responsible party's failure to report a petroleum spill, nor does it provide an exemption to the reporting requirement.

At the hearing, Steve Paszko testified that respondent, as a responsible party, had an obligation to report the discharge even though the Town and the Polsinello Fuels had already reported it (*see* Testimony of Steve Paszko, Tr at 125-126). Staff's position is consistent with the express language of Navigation Law § 175, which imposes a mandatory reporting obligation upon spillers without exception. Even if respondent could be excused for not reporting the discharge when Town employees first discovered it, because he was not aware of the spill at that time, he should have reported the discharge within two hours after becoming aware of it. At a minimum, respondent was aware of the discharge on January 20, 2015, when Steve Paszko called him and advised him that a spill had occurred at 27 Horicon Avenue and he was a potentially responsible party. Steve Paszko testified that Steve McCranels's tenant told him that he had observed respondent capping the line and hosing the residual fuel into the sump, suggesting that respondent may have known about the spill before he spoke with Mr. Paszko on January 20 (*see* Testimony of Steve Paszko, Tr at 85-86).

In sum, respondent failed to report the discharge of fuel oil to the Department even though he was aware of it in violation of Navigation Law § 175 (*see* Testimony of Steve Paszko, Tr at 124). Based on the record evidence, Department staff is entitled to a default judgment on liability on the second cause of action.

### Penalty

Section 192 of the Navigation Law provides for a civil penalty of up to twenty-five thousand dollars (\$25,000) per day for each violation of the provisions of article 12 of the Navigation Law or any regulation promulgated thereunder (*see Matter of Zenith Management LLC*, Order of the Commissioner, June 17, 2016, at 1; *Matter of Gasco-Merrick Road Gas Corp.*, Decision and Order of the Commissioner, June 2, 2008, at 3-11). The maximum statutory penalty for two violations of the Navigation Law is \$50,000. Department staff requested a civil penalty of \$25,000 in the complaint (see Exhibit 3, complaint ¶ 38).

The record supports Department staff's requested relief. At the hearing, Department Staff provided testimony that the penalty amount requested is consistent with the Department's

spill penalty matrix, Civil Penalty Policy (DEE-1), and applicable provisions of the Navigation Law.

Steve Paszko testified that significant factors in the penalty calculation included respondent's installation of an uncapped fuel line and respondent's deliberate hosing of fuel oil into the sump where it entered the sanitary sewer system (*see* Testimony of Steve Paszko, Tr at 132-133). In addition, Steve Paszko noted, and the Town water superintendent corroborated, that the fuel oil discharge caused actual environmental damage to a municipal waste water treatment facility and impeded its ability to treat sewage and waste water (*see* Testimony of Steve Paszko, Tr at 135-136; *see also* French Aff ¶ 10). Mr. Paszko testified respondent did not report the spill or address the violations with the Department or the Town (*see* Testimony of Steve Paszko, Tr at 139). According to the Town water superintendent, the Town had to spend \$10,000 to fix the problems caused by the fuel discharge into the treatment plant (*see* French Aff ¶ 10).

In light of the statutory maximum, which would authorize a penalty of \$50,000 for one day of violations, the penalty requested by staff is authorized, reasonable and consistent with the purposes and objectives of the Department's penalty policies. I recommend that the Commissioner conclude the same.

### **CONCLUSION OF LAW**

Department staff has provided sufficient testimonial and documentary evidence to establish respondent Richard Patnode's liability for the violations alleged in the complaint and the appropriateness of the penalty being sought for those violations (*see Matter of Queen City Recycle Center*, at 3).

### **RECOMMENDATION**

Based upon the foregoing, the Commissioner should issue an order:

1. Granting Department staff's motion for a default judgment, and finding respondent Richard W. Patnode in default pursuant to the provisions of section 622.15 of 6 NYCRR;
2. Holding respondent Richard W. Patnode in violation of Navigation Law § 173 (1) for discharging petroleum in the basement of 27 Horicon Avenue in the Town of Bolton on or about January 12, 2015;

3. Holding respondent Richard W. Patnode in violation of Navigation Law § 175 for failing to timely report the spill of petroleum in the basement of 27 Horicon Avenue in the Town of Bolton that occurred on or about January 12, 2015;

4. Directing respondent Richard W. Patnode to pay a civil penalty in the amount of twenty-five thousand dollars (\$25,000).

/s/

Lisa A. Wilkinson  
Administrative Law Judge

## EXHIBIT CHART

*Matter of R. Patnode Plumbing & Heating, LLC and Richard W. Patnode*  
DEC Case No. LER5-15-001323

Exhibit #	Description	Offered?	Admitted?
1	NYS Department of State, Division of Corporations, Entity Information on R. Patnode Plumbing & Heating, LLC	YES	YES
2	NYS Department of State, Division of Corporations, Articles of Organization of R. Patnode Plumbing & Heating, LLC and Certificate of Publication	YES	YES
3	Affidavit of Service of Alan Brassard sworn to November 30, 2015, with Notice of Hearing and Complaint dated November 16, 2015 attached	YES	YES
3-A	Cover Letter dated September 5, 2017, and Affidavit of Service of Amended Complaint of Marcia Goodrich sworn to August 30, 2017, with Amended Complaint dated August 8, 2017 and cover letter dated August 9, 2017, attached	YES	YES
4	Affidavit of Service of Renee Fitzgerald sworn to March 1, 2017 of Staff's Notice of Motion for Default Judgment on R. Patnode Plumbing & Heating, LLC and Richard W. Patnode	YES	YES
5	Affidavit of Rene Fitzgerald sworn to March 27, 2017 of <b>First</b> Service of Statement of Readiness on R. Patnode Plumbing & Heating, LLC and Richard W. Patnode	YES	YES
6	Affidavit of Marcia C. Goodrich sworn to April 27, 2017 of <b>Second</b> Service of Statement of Readiness on R. Patnode Plumbing & Heating, LLC and Richard W. Patnode to notify respondents of new date for default hearing.	YES	YES
7	Affidavit of Thomas French II sworn to May 3, 2017	YES	YES

Exhibit #	Description	Offered?	Admitted?
8	Warranty Deed: William J. Reed and Vickie J. Reed to Steve McCranels and Amy Ulrich. Warran County Clerk's Office - Volume: 4376 Page: 227	YES	YES
9 - 22	<p>Proposal and Service Orders (Invoices) from Richard W. Patnode to Mr. Steve McCranels:</p> <p>Ex. 9: 9/17/13 Proposal  Ex. 10: 9/30/13 Service Order  Ex. 11: 10/7/13 Service Order  Ex. 12: 10/29/13 Service Order  Ex. 13: 10/14/13 Service Order  Ex. 14: 11/4/13 Service Order  Ex. 15: 12/13/13 Service Order  Ex. 16: 1/2/14 Service Order  Ex. 17: 1/21/14 Service Order  Ex. 18: 2/14/14 Service Order  Ex. 19: 3/24/14 Service Order  Ex. 20: 4/4/14 Service Order  Ex. 21: 9/25/14 Service order  Ex. 22: 12/10/14 Service Order</p>	YES	YES
23	Affidavit of Anthony D. Murtaugh, Action Environmental Group sworn to May 2, 2017	YES	YES
24	DEC Spill Report, Spill No. 1409998, January 12, 2015, called in by Tom French. <b>NOTE: On May 10, 2017 this Exhibit was marked for identification as Exhibit "25". It is now marked as Exhibit 24.</b>	YES	YES
25	DEC Spill Report, Spill No. 1410202, January 17, 2015, called in by Polsinello Fuels, Inc.	YES	YES
26	Image, basement of McCranel-Ulrich home, 27 Horicon Ave., Bolton Landing, NY	YES	YES
27	Image, basement of McCranel-Ulrich home, 27 Horicon Ave., Bolton Landing, NY	YES	YES
27-A	Drawing, basement of McCranel-Ulrich home, 27 Horicon Ave., Bolton Landing, NY	YES	YES

<b>Exhibit #</b>	<b>Description</b>	<b>Offered?</b>	<b>Admitted?</b>
28	Cover letter from Polsinello Fuels, Inc. to Scott Abrahamson dated February 18, 2016 and copy of fuel delivery manifest	YES	YES
29	DEC staff's Penalty Matrix	YES	YES
30	Affidavit of Service of Renee Fitzgerald of Subpoena Duces Tecum on Polsinello Fuels sworn to February 4, 2016		