STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1010

In the Matter

- of -

the Alleged Violations of
Article 19 of the Environmental Conservation Law of the State of New York and Title 6, Parts 200 and 230 of the Official Compilation of Codes, Rules and Regulations of the State of New York

- by -

MAKHAN SINGH and L.I.C. PETROLEUM INC.,

Respondents.

DEC Case No. D2-1001-02-07

DECISION AND ORDER
OF THE COMMISSIONER

March 19, 2004

DECISION AND ORDER OF THE COMMISSIONER

Staff of the New York State Department of Environmental Conservation ("Department") move pursuant to 6 NYCRR 622.15 for a default judgment as against respondents Makhan Singh and L.I.C. Petroleum, Inc. Department staff's motion is granted for the reasons stated in the attached default summary report by Administrative Law Judge ("ALJ") Edward Buhrmaster, which I hereby adopt as my decision in this matter subject to the following clarification, and for the reasons that follow.

Pursuant to a notice of hearing and complaint dated September 9, 2003, staff of the New York State Department of Environmental Conservation commenced an administrative enforcement proceeding against respondents Makhan Singh and L.I.C. Petroleum, Inc. Respondents were served with the notice of hearing and complaint on September 13, 2003 by certified mail. Service of process was accomplished in accordance with 6 NYCRR 622.3(a)(3).

Respondents' time to serve an answer to the complaint expired and neither respondent served an answer to the complaint. Makhan Singh did appear at the pre-hearing conference on October 1, 2003.

Staff made a motion for default judgment, dated December 30, 2003, detailing respondents' failure to serve answers to the complaint. A copy of the motion was served on respondents. Together

with the motion, staff served on respondents a "statement of readiness" by which a "hearing" was requested. By letter dated January 2, 2004, the ALJ informed the parties that no hearing would be scheduled on the motion and imposed a deadline of January 15, 2004, for written responses to staff's motion. Respondents failed to file any response to the motion.

The ALJ correctly noted that the service and filing of a statement of readiness for adjudicatory hearing was not required where the motion for a default judgment is made in writing. The practice within the Department's Office of Hearings and Mediation Services is to resolve written motions for a default judgment on the papers and not in a hearing. Accordingly, in order to avoid confusion, a statement of readiness for adjudicatory hearing should not be filed with a motion for a default judgment.

Staff properly served, however, the notice of motion for a default judgment upon respondents in this case. The Department's regulations governing motions for a default judgment do not prescribe the circumstances under which a defaulting respondent is entitled to notice of the application by staff for a default judgment (see 6 NYCRR 622.15). In this circumstance, the provisions of the CPLR applicable to motions for default judgments should be consulted for the governing procedure. Under CPLR 3215(g)(1), notice of an application for a default judgment is required only where the defending party has appeared or where more than one year has elapsed between the date of

the default and the motion. Here, according to paragraph 2 of staff's statement of readiness, respondent Makhan Singh, was present at the pre-hearing conference on October 1, 2003. The presence of Makhan Singh constitutes an "appearance," thereby entitling him to notice of staff's application. Accordingly, staff correctly provided respondent Makhan Singh with notice of its motion for a default judgment.

With respect to respondent L.I.C. Petroleum, Inc., the record is unclear whether respondent Makhan Singh was authorized to appear on behalf of the corporation at the pre-hearing conference. If he was not so authorized, staff would not have been required to provide the corporate respondent with notice of its motion for a default judgment. Service of the additional notice in that circumstance has no legal effect on the motion for a default judgment.

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

I. Staff's motion for a default judgment as against respondents Makhan Singh and L.I.C. Petroleum, Inc., is granted.

II. Pursuant to 6 NYCRR 622.15, respondents are adjudged to be in default and have waived their right to a hearing in this enforcement proceeding. Therefore, staff's allegations against

respondents in the complaint are deemed to have been admitted by respondents.

III. Respondents are adjudged to have violated ECL article 19, 6 NYCRR 230.2(f)(4), 6 NYCRR 200.7, 6 NYCRR 230.2(g)(2), 6 NYCRR 230.2(k)(1)(ii), and 6 NYCRR 230.5(d), as charged in the complaint.

IV. Respondents shall be jointly and severally liable for a civil penalty in the amount of Seven Thousand Five Hundred Dollars ($7,500). Respondents shall pay this penalty to the Department within 30 days from service of a copy of this order. Payment shall be made in the form of a certified check or money order payable to the order of the "New York State Department of Environmental Conservation" and delivered to the following address: New York State Department of Environmental Conservation, Division of Environmental Enforcement, 625 Broadway, 14th Floor, Albany, New York, 12233-5500, Attn.: Anthony A. London, Esq. All communications from respondent to the Department concerning this order shall be made to Mr. London.

V. Respondents shall immediately after having been served with a copy of this order comply with ECL article 19 and 6 NYCRR part 230 by removing from service, locking and sealing all dispensers with defective stage II components until approved replacement parts have been installed.

VI. The provisions and terms of this order shall bind respondents, their officers, directors, agents, servants, employees, successors and assigns and all persons, firms and corporations acting for or on behalf of respondents.

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

/s/

By: Erin M. Crotty, Commissioner

Albany, New York
March 19, 2004

TO: Makhan Singh (by certified mail)
110-06 91st Avenue, 2nd Floor
Richmond Hill, New York 11418

L.I.C. Petroleum, Inc. (by certified mail)
27-01 Jackson Avenue
Long Island City, New York 11101

Anthony A. London, Esq.
New York State Department of Environmental Conservation
Division of Environmental Enforcement
625 Broadway, 14th Floor
Albany, New York 12233-5500

STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of Article 19
of the Environmental Conservation Law ("ECL")
and Parts 200 and 230 of Title 6 of the Official
DEFAULT SUMMARY
Compilation of Codes, Rules and Regulations of
REPORT
the State of New York ("6 NYCRR")

-By-

MAKHAN SINGH and **L.I.C. PETROLEUM INC.**,

Respondents. Case No. D2-1001-02-07

Proceedings

On September 9, 2003, Staff of the Department of Environmental Conservation served a Notice of Hearing and Complaint upon Makhan Singh and L.I.C. Petroleum Inc. The notice announced that in accordance with 6 NYCRR 622.4, the Respondents were obliged to serve an answer to the complaint within 20 days of their receipt of the complaint.

By written motion dated December 30, 2003, Department Staff counsel Anthony A. London moved for a default judgment against the Respondents. The motion was based on the Respondents' alleged failure to file a timely answer. Staff's motion papers also included a statement of readiness requesting that the Department's Office of Hearings and Mediation Services set a hearing date in this matter.

The motion papers were sent to the Respondents and to the Department's Chief Administrative Law Judge, who assigned the matter to me. I then issued a letter dated January 2, 2004, informing the parties that no hearing date is necessary because Staff's motion for default is in writing. Rather than appear at a hearing, I wrote, the Respondents were obliged to file a written response to the motion.

All parties have five days after a motion is served to serve a response [6 NYCRR 622.6(c)(3)]. Granting a reasonable extension to address any confusion that was caused by the statement of readiness, my letter afforded the Respondents until January 15, 2004, to file their response. This was a deadline for postmarking of the response, which was to be sent to both Mr. London and me.

My letter indicated that either Respondent or any attorney or representative for one or both of them could contact me by

telephone with any questions about the Department's hearing procedures, including the procedures governing default motions, or to request an extension of the January 15 deadline. Also, my letter encouraged the Respondents to contact Mr. London directly by telephone to the extent they wanted to pursue a negotiated settlement to this matter.

No response to the default motion has been received, and the Respondents have not contacted me or Mr. London since my letter was sent to them. My letter indicated that if no timely response to the default motion was received, I would decide the motion based on the papers submitted by Department Staff.

Findings of Fact

1. On September 9, 2003, the notice of hearing and complaint in this matter were served upon the Respondents, Makhan Singh and L.I.C. Petroleum Inc., by certified mail, return receipt requested.

2. The notice of hearing and complaint were delivered to the Respondents on September 13, 2003.

3. The notice of hearing informed the Respondents that they were to serve an answer on Department Staff counsel within 20 days of their receipt of the notice of hearing and complaint, in accordance with the provisions of 6 NYCRR 622.4.

4. The notice of hearing also said that failure to serve a timely answer would result in a default and a waiver of the Respondents' right to a hearing.

5. Neither Respondent has served an answer on the Department or responded to the motion for default judgment.

Discussion

- - Basis for Default

According to the Department's hearing regulations, a respondent's failure to file a timely answer constitutes a default and a waiver of the Respondent's right to a hearing. [See 6 NYCRR 622.15(a).] In such an event, Department Staff may move for a default judgment, such motion to contain:

(1) proof of service of the notice of hearing and complaint;
(2) proof of the Respondent's failure to file a timely answer; and

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

Department Staff's motion papers include an affirmation by Mr. London, Department Staff counsel, explaining the basis for the default and the calculation of Staff's proposed civil penalty. Attached to this affirmation are a copy of the notice of hearing and complaint (Exhibit "A"), affidavits of certified mail service of the notice of hearing and complaint, one for each Respondent (Exhibit "B"), and copies of receipts for the certified mailings and the signed certified mail return receipt postcards, one for each Respondent (Exhibit "C"). Staff's papers also include affidavits of Department employees Robert Waterfall and Thomas Gentile explaining the significance of the alleged violations with regard to impacts on the environment and public health. (These affidavits are Exhibits "D" and "E".) Mr. London has also submitted a proposed order embodying Staff's requested relief.

Department Staff's papers adequately demonstrate that the Respondents failed to file a timely answer and therefore defaulted in this matter. According to the return receipt postcards furnished by Department Staff, Staff's certified mailings of the notice of hearing and complaint were delivered to both Respondents on September 13, 2003. An answer to the complaint was due within 20 days of the Respondents' receipt of the complaint, according to 6 NYCRR 622.4(a). No answer was served within this time frame, and none has been served since, as confirmed in Mr. London's affirmation.

- - Penalty Considerations

Department Staff request that the Respondents be held jointly and severally liable for a total civil penalty of Seven Thousand Five Hundred Dollars ($7,500) in this matter. The penalty would be assessed for various violations of ECL Article 19 and its accompanying regulations, in relation to a gasoline dispensing site the Respondents have owned and/or operated at 27-01 Jackson Avenue in Long Island City.

More particularly, the causes of action charged in the complaint are as follows:

1. Violation of ECL Article 19 and 6 NYCRR 230.2 (f)(4) by failing to ensure the proper operation of stage II vapor collection and control system components whenever gasoline is being loaded, unloaded or dispensed.
2. Violation of ECL Article 19 and 6 NYCRR 200.7 by failing to keep air contamination sources in a satisfactory state of maintenance and repair in accordance with ordinary and necessary practices, standards and procedures.

3. Violation of ECL Article 19 and 6 NYCRR 230.2(g)(2) by failing to remove from service, lock and seal dispensers with defective stage II components.

4. Violation of ECL Article 19 and 6 NYCRR 230.2(k)(1)(ii) by failing to perform dynamic back pressure, liquid blockage and leak tests at five-year intervals after commencing operation.

5. Violation of ECL Article 19 and 6 NYCRR 230.5(d) by failing to submit a notarized report of stage II system test results to the Department within 30 days of the test, by failing to retain the test results at their gasoline dispensing site, and by failing to make the test results available for Department inspection during normal business hours.

The violations were revealed during an inspection of the Respondents' facility on June 25, 2002. The first, second and third causes of action are alleged to involve multiple violations of the same provisions. A separate violation is alleged for each defective stage II component in the first cause of action, for each air contamination source in the second cause of action, and for each dispenser in the third cause of action.

Mr. London's affirmation explains that the $7,500 civil penalty requested in this matter was calculated by taking into consideration applicable guidance including the Department's civil penalty policy enforcement guidance memorandum. As Mr. London points out, the Department's penalty policy is designed to assess and collect penalties in a manner that will assist the Department in efficiently and fairly deterring and punishing violations.

Mr. London argues that successful deterrence provides the best protection to the environment and the health and welfare of the public, while also discouraging non-compliance and thereby reducing the resources necessary to enforce the laws. The penalty policy provides that penalty amounts that are calculated in adjudicated cases must, on average and consistent with fairness considerations, be significantly higher than the penalty amounts that the Department accepts in consent orders. This recognizes that a greater penalty is warranted if a violator is recalcitrant or unresponsive to enforcement action, or has negotiated in bad faith or sought to delay resolution of the violation.

According to Mr. London's affirmation, the number of gasoline dispensing sites that are subject to 6 NYCRR Part 230 is great in relation to the number of facilities that are actually inspected by the Department. Therefore, he reasons, Department Staff should seek a penalty that is large enough to send a message to regulated gasoline dispensing sites that, although the risk that

violations will be discovered is remote, the magnitude of penalties for such violations makes non-compliance an unacceptable risk.

According to the civil penalty policy, successful deterrence requires that penalties should at a minimum remove any economic benefit that a violator received from failure to comply with the law. This portion of the civil penalty is known as the "benefit component." Removing the benefit of non-compliance only puts the violator in the same position it would have had if timely compliance had been achieved. Both deterrence and fundamental fairness require that the penalty include an additional amount (known as the "gravity component") to ensure that the violator is economically worse off than if it had obeyed the law.

Department Staff argue that in this case, the benefit component of the civil penalty calculation is de minimis because Staff are not aware of any significant delayed or avoided costs that have accrued to the Respondents as a result of non-compliance. Therefore, Staff's proposed civil penalty is based entirely on an assessment of the gravity of the violations.

Under the civil penalty policy, the gravity component is determined by considering the potential harm and actual damage caused by the violation, the relative importance of the type of violation in the regulatory scheme, and adjustment factors that may increase or decrease the gravity component.

Potential Harm and Actual Damage - - This factor focuses on whether and to what extent the Respondents' violation resulted in or could potentially result in loss or harm to the environment or public health. The potential harm and actual damage are considered in relation to the amount and toxicity of the pollutant, the sensitivity of the environment, and the length of time of the violation. According to Department Staff, the potential harm and actual damage attributable to the Respondents' violations appear to have been very significant, based on the following factors:

Amount of Pollutant - - The Respondents are alleged to have operated their gasoline dispensing site without properly functioning gasoline vapor recovery equipment. Such violations, Staff argue, result in the release of excess vapor into the environment, hindering the state's ability to meet National Ambient Air Quality Standards that are designed to protect the environment and the public from the harmful effects of air pollution, as explained in Mr. Waterfall's affidavit. Though Staff have not estimated the amount of pollutants released due to the Respondents' equipment violations, Mr. Waterfall states that such violations would typically render the vapor recovery system highly ineffective and result in excess gasoline vapor being

released into the atmosphere above legal limits. The Respondents are alleged to have operated their gasoline dispensing site without properly functioning stage I or stage II vapor recovery equipment. According to Mr. Waterfall, a properly maintained stage I system reduces volatile organic compound (VOC) emissions at gasoline dispensing sites by 46 percent, and if both stage I and stage II systems are used, such emissions are reduced by 87 percent.

Toxicity of Pollutant - - Department Staff contend that the release of excess gasoline vapor into the atmosphere at the Respondents' facility could cause serious health problems for the public and adversely impact the environment. According to Mr. Gentile's affidavit, such a vapor release contains VOCs which react with nitrogen oxides and sunlight to form ground level ozone. Mr. Gentile writes that ozone enters the human body primarily through the respiratory tract and exerts numerous adverse toxicological effects, including irritation of the nasal, throat and bronchial tubes, lung inflammation, impairment of the body's immune function (which may result in increased susceptibility to pulmonary and other forms of infection), morphological effects and decreased lung function. In large urban areas, ozone mixes with other pollutants to create smog, which contributes to haze, reduces visibility and irritates and inflames eye tissues. Ozone can also harm plant life, lower crop yields and damage materials such as rubber, plastics, synthetic fibers, dyes and paints. Apart from causing ozone formation, uncontrolled releases of gasoline vapor result in elevated levels of hazardous air pollutants such as benzene, toluene and xylene.

Sensitivity of the Environment - - Department Staff explain that the Respondents' facility is located within the New York City metropolitan area, which is classified as a severe ozone non-attainment area. Staff argue that the gravity component of the civil penalty should be increased to account for the fact that the Respondents' violations contributed to ozone formation in an area which already exceeds desired ozone thresholds.

Length of Time of Violations - - The violations in this matter were discovered during an inspection on June 25, 2002. At the time of the inspection, the dispensers with defective stage II components were still being operated. Therefore, Department Staff conclude, it is likely that the Respondents either neglected to perform daily inspections of the stage II equipment, which are required under 6 NYCRR 230.2(g)(1), or performed the inspections but made no effort to repair the damaged equipment. In light of these circumstances, Staff contend it is possible that the violations occurred for a considerable period prior to the inspection. On the other hand, Staff acknowledge that the exact length of time of the violations is unknown. The facility passed a stage II equipment test

performed on September 19, 2002, according to results provided to the Department.

Relative Importance of the Type of Violation in the Regulatory Scheme - - The stage II violations by the Respondents involve the improper maintenance and operation of vapor, to the detriment of air quality and public health. As Staff argue, the regulations violated by the Respondents are essential to the Part 230 regulatory scheme, and these regulations must be enforced to achieve the policy behind ECL Article 19, which is to "maintain a reasonable degree of purity of the air resources of the state" [ECL 19-0103]. Because the violations are so important to the regulatory scheme, Staff argue that a "significant" civil penalty is warranted.

Adjustment Factors - - The civil penalty policy establishes the following adjustment factors to determine whether to adjust the gravity component upward or downward: culpability, violator cooperation, history of non-compliance, and ability to pay.

Culpability - - According to the civil penalty policy, where a violation is intentional, reckless or (in some situations) negligent, significant upward adjustment of the penalty is appropriate. In assessing the degree of intent, recklessness or negligence, the policy states that the following points should be considered: (1) how much control the violator had over the events contributing to the violation, and (2) the foreseeability of the events constituting the violation. Staff argue that if the Respondents had performed daily visual inspections of their equipment, as required by 6 NYCRR 230.2(g)(1), dispensers with defective stage II components would have been identified quickly so that they could be removed from service, locked and sealed, as required by 6 NYCRR 230.2(g)(2).

Violator Cooperation - - The civil penalty policy provides that penalties may be adjusted downward based on a violator's prompt self-reporting of non-compliance (in circumstances where self-reporting is not required by law) and the cooperation of the violator in remedying the violation. In this case, Staff argue, the Respondents never reported non-compliance to the Department, and the violations were discovered only after an independent Department inspection. The Respondents failed to answer the complaint in this matter and, according to Staff, refused to accept settlement offers. As a result, Staff assert that they have been required to expend substantial resources to seek a default judgment ensuring that the Respondents are punished appropriately and deterred from future violations.

History of Non-Compliance - - According to the civil penalty policy, a history of violations subsequent to enforcement actions is usually evidence that the violator has been deterred by the previous enforcement response. In this case, Department Staff are not aware of any previous Part 230 violations at this gasoline dispensing site.

Ability to Pay - - The civil penalty policy provides that, in limited circumstances, the Department may reduce a civil penalty based on the violator's demonstration of its inability to pay the amount that would normally be assessed. According to Department Staff, although Respondent Makhan Singh attended a pre-hearing conference and claimed that he was experiencing financial hardship, he has not provided Staff with any information to verify his financial circumstances. In particular, Staff requested in October, 2003, that Mr. Singh provide copies of his 2001 and 2002 state and federal income tax returns. These returns have not been provided, and therefore Staff contend there should be no downward adjustment of the civil penalty based on alleged inability to pay.

Conclusions

1. By failing to answer the complaint in a timely manner, the Respondents have defaulted and waived their right to a hearing in this matter.

2. Department Staff's proposed total civil penalty of $7,500 is rational and supported by the record. The penalty is justified particularly because of the environmental and human health risks that are posed by the types of violations committed by the Respondents. Furthermore, though Staff have not apportioned the penalty among the enumerated violations, the penalty is below the statutory maximum amount that could be assessed for any one of them. As Staff points out, at the time of the subject violations, ECL 71-2103(1) provided that except in cases not relevant here, any person who violated any provision of ECL Article 19 or any regulation promulgated pursuant thereto, would be liable, in the case of a first violation, for a penalty not less than $250 nor more than $10,000 for said violation, and an additional penalty not more than $10,000 for each day the violation continued. On that basis, there is ample statutory support for the penalty requested by Department Staff.

Recommendation

The Commissioner should sign the attached order confirming the default and providing the relief requested by the Department.

/s/
Edward Buhrmaster
Administrative Law Judge

Albany, New York
January 27, 2004