STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Articles 19 and 71 of the Environmental Conservation Law of the State of New York (ECL), and Part 201 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR)	Ruling on Motion for Order without Hearing
- by -	
SOLOW MANAGEMENT CORPORATION	DEC Case Nos. R2-20020425-119 and R2-20020425-120
and	
SHELDON H. SOLOW, Individually and As President and Owner of Solow Management Corporation, Respondents.	

PROCEEDINGS

Staff of the New York State Department of Environmental Conservation ("Department Staff") moved for an order without hearing against Respondents Solow Management Corporation ("SMC") and Sheldon H. Solow, both in his individual capacity and as president and owner of Solow Management Corporation (collectively, "Respondents"). Department Staff's motion was dated August 5, 2003, and Respondents filed their opposition to the motion on August 27, 2003. Respondents also cross-moved to dismiss the proceeding, and, by permission of the administrative law judge ("ALJ"), Department Staff filed a response to the cross-motion on September 17, 2003.

Department Staff's motion asserted that Respondents violated Articles 19 and 71 of the Environmental Conservation Law ("ECL") and Part 201 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"). The violations alleged relate to the statutory and regulatory requirements governing air emissions sources at two buildings owned and operated by Solow Management Corporation, one at 265 East 66th Street and the other at 501 East 87th Street in New York City. The buildings are collectively referred to herein as the "Facilities." The Facilities contain stationary-combustion boilers capable of burning both natural gas and fuel oil. In its

motion, Department Staff contended that Respondents failed to obtain the necessary approvals from the Department to operate the boilers, and by operating without those approvals for several years.

Department Staff maintained that no material issue of fact exists and that the Department is entitled to judgment as a matter of law for the violations alleged. Department Staff sought an order from the Commissioner requiring Respondents to comply with the statutory and regulatory provisions allegedly violated, and assessing a civil penalty in the amount of $191,375.

The motion was made pursuant to 6 NYCRR Section 622.12(a), which provides that "[i]n lieu of or in addition to a notice of hearing and complaint, the department staff may serve, in the same manner, a motion for order without hearing together with supporting affidavits reciting all the material facts and other available documentary evidence." In addition to a notice of motion, a complaint, and a submission entitled "Penalty Calculations," the motion included the affidavit of Robert G. Bolt, an Environmental Engineer II in the Department's Region 2 office (the "Bolt Affidavit"), sworn to August 5, 2003.

Respondents' filing in opposition to the motion, and in support of their cross-motion to dismiss, included a memorandum of law dated August 26, 2003, as well as an August 22, 2003 affirmation of Daniel Riesel, Esq. (the "Riesel Affirmation"). Respondents' cross-motion sought an order of the Commissioner: (1) dismissing the complaint as to Respondent Sheldon H. Solow; (2) dismissing the first and third causes of action alleged in Department Staff's complaint; (3) denying the motion for order without hearing in its entirety; and (4) granting a hearing to address the penalty, if any, to be assessed for the second violation alleged in the complaint.

After obtaining permission from the ALJ, Department Staff opposed the cross-motion by the affirmation of Assistant Regional Attorney John Byrne, Esq., dated September 16, 2003 (the "Byrne Affirmation"). Respondents objected to portions of the Byrne Affirmation as beyond the scope allowed by the ALJ, and moved to strike pages 16-17 of the Byrne Affirmation from the record. Department Staff opposed this request by letter dated September 19, 2003.

The pages in question contain argument by Department Staff as to the Department's policy with respect to settlement negotiations undertaken by the parties. However, Respondents' motion to strike refers to Department Staff's reply to Respondents' laches argument, which appears on pages 3-4 (¶¶ 4-5) of Department Staff's opposition. Given this ambiguity, it is difficult to ascertain exactly which portion of Department Staff's opposition is the subject of Respondent's motion. Department Staff's letter opposing the motion to strike states only that Department Staff believes that the Byrne Affirmation is in full compliance with the ALJ's direction. In any event, Department Staff was authorized to respond to the cross-motion, and that cross-motion raised laches as a defense. Consequently, the motion to strike is denied, and the Byrne Affirmation will be considered in its entirety.

Efforts to resolve this matter were unsuccessful, and in September 2004 Department Staff requested a ruling on the motion.

POSITIONS OF THE PARTIES

Department Staff's motion alleged three violations, specifically, that Respondents:

(1) failed to obtain a certificate to operate the boilers at the Facilities between 1992 and 1997, in violation of the then-applicable statutory and regulatory provisions;

(2) failed to timely file a complete application under Title V of the federal Clean Air Act by June 9, 1997, or to accept an emission cap in order to avoid the Title V permit requirements; and

(3) failed to obtain a Title V permit or State Facility Permit or Air Facility Registration Certificate. Department Staff alleged that Respondents' Facilities are major stationary sources which operated without the necessary authorization for five years, from June 9, 1997 to August 19, 2002.

Respondents' cross-motion sought an order removing Sheldon Solow as a named respondent and dismissing the complaint as to him individually. Respondents argued that Department Staff's

motion provided no basis to involve Sheldon Solow in these proceedings in his individual capacity, noting that Department Staff failed to allege any facts that would warrant piercing the corporate veil in this instance. Riesel Affirmation, ¶¶ 13-15. In its submission in opposition to Respondents' cross-motion, Department Staff agreed to remove Sheldon Solow as a named Respondent in this action. Byrne Affirmation, ¶ 3. Respondents, by letter dated September 19, 2003, moved that "Mr. Solow be stricken from the caption and from these proceedings entirely." Respondents' motion is granted, and Mr. Solow, in his individual capacity, is removed as a named Respondent. Accordingly, this ruling will address only the liability of Respondent Solow Management Corporation, or "SMC." Until this recommendation is adopted by the Commissioner, Mr. Solow's name will remain in the caption, and this ruling will refer to the Respondents collectively.

Respondents went on to argue that the first and third causes of action should be dismissed, and that a hearing should be held to determine the amount of any penalty to be assessed for the second violation alleged. Respondents maintained that Department Staff's motion was the result of retaliatory animus resulting from unsuccessful settlement negotiations from approximately May to September 2002 over a "paperwork" violation that did not harm the environment and that did not result in any economic gain or benefit to Respondents. Respondents asserted that the allegations in the complaint did not involve "any contemptuous or even intentional conduct on the part of Respondents." Riesel Affirmation, ¶¶ 2 and 11. According to Respondents, the relief sought by Department Staff is unfounded and oppressive, and issues of material fact exist with respect to: (1) whether the first cause of action is barred by the doctrine of laches; (2) the basis for the third violation, which Respondents argue is essentially the same as the second violation; and (3) Department Staff's methodology in calculating the penalty sought.

The Facilities are currently in compliance. On August 19, 2002, Air Facility Registration Certificates for both Facilities were issued by the Department's Region 2 Division of Air.

Department Staff sought a total penalty of $191,375, and outlined the penalties calculated for each separate violation at both of the Facilities in a submission entitled "Penalty Calculations." The penalty calculation for violation No. 1 was based upon the allegations in the complaint that Respondents

violated the 1972 and 1993 versions of ECL Section 71-2103.[1] The 1972 version of ECL Section 71-2103 provided for a civil penalty of up to $10,000 for each first violation of ECL Article 19 and the 6 NYCRR Part 201 regulations, as well as an additional penalty of $500 for each day the violation continued. The statute also provided for criminal sanctions and injunctive relief, where appropriate. The version that took effect on August 4, 1993 also provided for a $10,000 civil penalty, but increased the additional penalty to $10,000 per day for each day of continuing violation. The current version of ECL Section 71-2103, which took effect on May 15, 2003, provides for a civil penalty of up to $15,000 for each violation of Article 19, as well as an additional penalty of $15,000 for each day of continuing violation.

Department Staff's complaint charged Respondents with three separate violations of ECL Articles 19 and 71 and 6 NYCRR Part 201 at both of the Facilities. The penalty calculation submission also contained arguments justifying the penalty, and included a matrix comparing the maximum penalty available under the ECL for each of the three violations at both Facilities with the penalty sought by Department Staff. For Violation No. 1, Department Staff sought a penalty of $38,395, which was 0.134% of the statutory maximum of $28,535,500. For Violation No. 2 (the second cause of action in the complaint), Department Staff maintained that Respondents should pay $76,100, or 0.203% of the statutory maximum of $37,420,000. With respect to Violation No. 3 (the third cause of action), Department Staff's penalty amount of $76,880 would be 0.202% of the $37,940,000 maximum penalty possible under the statute. Department Staff observed that the total penalty recommended by Department Staff would be less than 1% of the statutory maximum for each of the three violations alleged. As noted above, the grand total of all penalties sought by Department Staff in its motion was $191,375.

Department Staff went on to argue that the penalty sought is reasonable based upon several factors. First, Department Staff noted that the violations continued for a number of years, in that Respondents operated the boilers at both Facilities during that time without applying for a certificate to operate, or

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[1] While the complaint alleges violations of various iterations of Article 71, that provision of the ECL does not impose an affirmative duty upon Respondents. Rather, Article 71 articulates the penalties that the Department may impose for violations of other statutory requirements in the ECL.

subsequently, a Title V permit or State Facility Permit or Air Facility Registration Certificate. Department Staff referred to Paragraph 10 of the Bolt Affidavit, which stated that on March 30 and 31, 1998, Respondent Solow Management Corporation received notice letters from the Department explaining the regulatory requirements, but failed to apply for Air Facility Registration Certificates for the Facilities until July 24, 2002, over four years after receiving the letters.

According to Department Staff, Respondents did not come into compliance until August 19, 2002, after receiving a notice of violation dated April 22, 2002. Department Staff went on to assert that "[a]ssessment of a significant penalty against Respondents will send a strong reminder to the regulated community" and noted that Respondents had not indicated that they lacked the resources to pay a penalty. Penalty Calculations, at 18, ¶ 3.

Respondents argued that the requested civil penalty was oppressive and excessive, and that the pursuit of such a penalty without a hearing was not supported by the facts. Respondents contended further that the scope of the complaint and the magnitude of the penalty requested resulted from "retaliatory animus directed at Respondents after Staff terminated settlement discussions." Riesel Affirmation, ¶ 25. According to Respondents, the Facilities never violated any emission performance standard, nor did they require a Title V permit. Riesel Affirmation, ¶ 21. Respondents took the position that given the size of the penalty, Respondents should be able to offer evidence as to its appropriateness, and that a hearing was therefore required.

DISCUSSION AND RULING

Motion for Order without Hearing and Respondents' Cross-Motion to Dismiss

Department Staff requested an order without hearing pursuant to 6 NYCRR Section 622.12. Section 622.12(d) provides that a contested motion for an order without hearing will be granted if, upon all the papers and proof filed, summary judgment is warranted under the New York Civil Practice Law and Rules ("CPLR") in favor of any party. Under the CPLR, a motion for summary judgment shall be granted "if, upon all the papers and proof submitted, the cause of action or defense shall be

established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. . . . [T]he motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." CPLR § 3212(b).

In seeking summary relief, the moving party "must make a prima facie showing of an entitlement to judgment as a matter of law sufficient to demonstrate the absence of any material issue of fact." Flacke v. NL Indus., 228 A.D.2d 888, 890 (3rd Dept. 1996); see Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). The burden then shifts to the non-moving party "to demonstrate, through evidence in admissible form, the existence of material questions of fact requiring a trial." State v. Williamson, 8 A.D.3d 925, 928(3rd Dept. 2004); citing Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003); Zuckerman, supra, at 562. That evidence is viewed in the light most favorable to the non-moving party. Williamson, supra, at 927-28; citing Trionfero v. Vanderhorn, 6 A.D.3d 903, 903 (3rd Dept. 2004).

In order for SMC to prevail on its cross-motion to dismiss, the documentary evidence submitted must conclusively establish SMC's defenses to the allegations in the complaint as a matter of law. Leon v. Martinez, 84 N.Y.2d 83, 88 (1994). The trier of fact must accept as true the material facts alleged in the complaint as well as in any submissions in opposition to the motion. CPLR § 3211; 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152 (2002); Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y.2d 409, 414 (2001). Moreover, Department Staff must be accorded "the benefit of every possible favorable inference." Sokoloff, 96 N.Y.2d at 414 (citations omitted).

Application of these standards to the record in this case leads to the conclusion that SMC's liability for the violations alleged has been established. There is no dispute that the Facilities were and are subject to regulation under 6 NYCRR Part 201 and Article 19 of the ECL. It is uncontroverted that SMC failed to timely file for the necessary approvals to operate its boilers, and continued to operate the Facilities for some time without those approvals. As discussed more fully below, SMC's response to the allegations in the complaint does not satisfy its burden, on a motion for order without hearing, to raise an issue of fact, and to refute those allegations. Furthermore, SMC's submissions in support of its cross-motion to dismiss fail to

conclusively establish SMC's entitlement to judgment in its favor as a matter of law.

Nevertheless, SMC should be allowed the opportunity to present argument with respect to the penalty amount. Section 622.12(f) of 6 NYCRR provides that "[t]he existence of a triable issue of fact regarding the amount of civil penalties which should be imposed will not bar the granting of a motion for order without hearing. If this issue is the only triable issue of fact presented, the ALJ must immediately convene a hearing to assess the amount of penalties to be recommended to the commissioner." Accordingly, an inquiry should be undertaken to this specific end.

First Cause of Action (Violation No. 1)

Department Staff's complaint alleged that Respondents own and operate the Facilities. Complaint, ¶¶ 3-6. According to the complaint, the East 66th Street Facility has three stationary combustion installation Burnham (Spencer) boilers, each rated at 17.92 mmBtu/hr., and capable of burning #4 fuel oil as well as natural gas. Complaint, ¶ 7. The complaint alleged further that the boilers have a total "potential to emit"[2] of 117.6 tons per year of oxides of nitrogen ("NO_x"). Id. With respect to the East 87th Street Facility, Department Staff's complaint stated that the two stationary combustion installation Federal FLW 3036 boilers have a total potential to emit of 45.6 tons per year of NO_x and are each rated at 10.4 mmBtu/hr. Complaint, ¶ 8. The boilers at this Facility are capable of burning natural gas or #6 fuel oil. Id.

The first cause of action ("Violation No. 1") cited the March 1985 and August 1994 versions of 6 NYCRR Section 201.2(b), which provided, in pertinent part, that no person shall operate an air contamination source without having a valid Department-issued certificate to operate. Complaint, ¶ 9. Department Staff alleged that Respondents were "persons," within the meaning of 6 NYCRR Section 200.1(bk)[sic], and that the boilers at the Facilities constitute "an air contamination source or emission source" pursuant to 6 NYCRR Section 200.1(f). Complaint, ¶ 10.

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[2] "Potential to emit" is defined at 6 NYCRR Section 200.1(bl) as "[t]he maximum capacity of an air contamination source to emit any regulated air pollutant under its physical and operational design."

The complaint went on to state that from September 27, 1992 to June 8, 1997, Respondents owned, operated and/or maintained the three boilers at the East 66th Street Facility without first obtaining a Department certificate to operate. Complaint, ¶ 11. The complaint alleged further that from January 14, 1992 to June 8, 1997, Respondents owned, operated and/or maintained the two boilers at the East 87th Street Facility without a Department certificate to operate. Complaint, ¶ 13. Department Staff asserted that each day that Respondents failed to obtain a certificate to operate the boilers at the Facilities constituted a continuing violation of former Section 201.2(b) of 6 NYCRR and ECL Articles 19 and 71. Complaint, ¶¶ 12 and 14.

According to the Bolt Affidavit, the Department mailed notice letters to the Facilities in late March 1998. Bolt Affidavit, ¶ 10. The Bolt Affidavit indicated that the notice letters explained the compliance options available, and required a reply from Respondents on a "Choice of Option" form included with the notice letters. Id.; Exhibits E and F. The notice letters were sent via certified mail, return receipt requested, and the exhibits to the Bolt Affidavit included copies of the signed return receipts and the notice letters. Bolt Affidavit, Exhibits E and F. The letters were addressed to "Solow Management Corp., Attn: Environmental Manager, 9 West 57th Street, Manhattan, New York, 10019." Id. The Bolt Affidavit stated that Respondents did not reply to the letters. Bolt Affidavit, ¶ 10.

The Bolt Affidavit also stated that on April 22, 2002, the Department's Region 2 Division of Air mailed Notices of Violation ("NOVs") to SMC for both Facilities, as well as a proposed order on consent to resolve the violations. Bolt Affidavit, ¶ 11 and Exhibit G. The NOVs were addressed to "Solow Management, 9 West 57th Street, New York, New York 10019," and indicated that the Facilities were inspected on August 11, 1999. Bolt Affidavit, Exhibit G. The Bolt Affidavit stated that Respondents did not sign and return the order on consent for either Facility. Bolt Affidavit, ¶ 11.

According to the Bolt Affidavit, Respondents have not asserted financial inability to pay the $15,000 penalty for each Facility, which was the amount sought in the Orders on Consent. Id. The Bolt Affidavit cited to a newspaper article indicating that Respondent Sheldon Solow has a net worth of $800 million, as well as a January 22, 2003 Dun & Bradstreet Report indicating

that SMC employs 200 people and has a composite credit rating of "fair." Bolt Affidavit, ¶ 11, Exhibits H and I.

In justification for the penalty sought for Violation No. 1, Department Staff asserted that Respondents operated the Facilities for approximately five years without obtaining the requisite authorizations from the Department. According to Department Staff, the period of violation for the East 66th Street Facility was from September 27, 1992 to June 8, 1997. Department Staff's penalty calculation, after assessing $10,000 for the first day of violation at the Facilities, was based upon a violation of the 1972 version of the statute from September 27, 1992 to August 3, 1993 (310 days), at $5 per day, for a total of $1,550. For the violations of the 1993 statute, in effect from August 4, 1993 to June 8, 1997, Department Staff calculated a penalty of $7,020 based upon 1,404 days of violation at $5 per day. Thus, the amount of penalties for this Facility for the first violation alleged amounted to $10,000, plus $1,550 and $7,020, for a total of $18,570.

The East 87th Street Facility calculations assumed a continuing violation of the 1972 statute from January 14, 1992 to August 3, 1993 (561 days) at $5 per day, for a total of $2,805, and a continuing violation of the 1993 statute from August 4, 1993 to June 8, 1997 (1,404 days) at $5 per day, for a total of $7,020. Again, Department Staff assessed $10,000 for the first day of violation at the Facility. The penalties calculated by Department Staff for this Facility were $10,000, plus $2,805 and $7,020, for a total of $19,825. The total penalty for Violation No. 1 sought by Department Staff for both Facilities was $38,395.

Respondents' cross-motion asserted that because so much time had elapsed between the alleged violations and Department Staff's prosecution of the enforcement action, it is extremely difficult for SMC to defend against Department Staff's first violation. SMC denied that violation, upon information and belief, noting that it "cannot ascertain if the requirements of the repealed versions of Part 201.2(b) were delegated to another agency with which SMC dealt between 1992 and 1997, or whether SMC satisfied its air-certificate obligations in some other manner." Riesel Affirmation, ¶ 17. As a result, SMC contended that the first violation is barred by the doctrine of laches, or, at a minimum, that a hearing should be held to resolve the factual issues surrounding the first violation. SMC also asserted that it was not afforded a hearing within a reasonable time, in violation of

Section 301(1) of the State Administrative Procedure Act ("SAPA").

Department Staff disputed SMC's claim that Respondents were not afforded a hearing within a reasonable time. Both SMC and Department Staff cited to Matter of Cortlandt Nursing Home v. Axelrod, 66 N.Y.2d at 178. Cortlandt articulates a four-part test to be used when a question arises as to whether an agency has violated SAPA. Id. The Court of Appeals in Cortlandt held that the following factors must be weighed by an administrative body in the first instance, and by the judiciary sitting in review, in determining whether a period of delay is reasonable within the meaning of SAPA 301(1): "(1) the nature of the private interest allegedly compromised by the delay; (2) the actual prejudice to the private party; (3) the causal connection between the conduct of the parties and the delay; and (4) the underlying public policy advanced by governmental regulation." Id. Any such determination is made on a case-by-case basis.

As to the first factor, SMC argued that Department Staff seeks improperly to deprive Respondents of their private and personal funds. Department Staff's opposition cited to Hansen v. DEC, 288 A.D.2d 473 (2nd Dept. 2001), in which the court upheld the Commissioner's order dismissing the respondent's SAPA Section 301(1) defense. In Hansen, the respondent was assessed a civil penalty of $60,000 for altering regulated tidal wetlands. 288 A.D.2d at 473. Respondents' arguments on this point are unpersuasive. Respondents have not been deprived of their private and personal funds by any delay; rather, they have operated the Facilities without a permit for a number of years, and without incurring any costs of compliance.

The second factor requires consideration of actual prejudice. Here, Respondents contended that their ability to defend themselves has been compromised because over time critical documents have been destroyed and key employees and consultants are no longer available to testify on SMC's behalf. In addition, SMC argued that Respondents cannot determine at this point if the requirements of the earlier versions of 6 NYCRR were delegated to another agency, such as the New York City Department of Environmental Protection ("DEP").

In its opposition, Department Staff effectively rebutted these arguments by noting that SMC failed to identify any of the critical documents in question, and that the former employee SMC

mentioned in its opposition was in SMC's employ as recently as October 2002. Department Staff pointed out that SMC offered no details as to any efforts SMC undertook to locate this employee. Moreover, Department Staff stated that it knows of no delegation to another agency. Under the circumstances, Respondents have not shown actual prejudice.

The third factor takes into consideration the causal connection between the conduct of the parties and the delay. Department Staff acknowledged that the length of time that elapsed between the time the violations occurred and the commencement of this proceeding cannot be attributed to Respondents. Department Staff went on to observe, however, that it adjusted its penalty calculations to account for the fact that although the Facilities were responsible for obtaining certificates of operation for the boilers from 1990 through 1997, when the earlier versions of 6 NYCRR Part 201 were in effect, the Facilities were in fact operating pursuant to a delegation agreement between the Department and DEP until 1992.[3] As a result, Department Staff used 1992, rather than an earlier date, to calculate penalties for this violation.

SMC pointed out that it only learned of the alleged first violation upon receipt of Department Staff's complaint, and that the factual basis for that violation was not alleged or referenced in the NOVs. According to SMC, the second violation, which Department Staff sought to settle for $30,000, is the only violation alleged in the NOVs. SMC referred to the Department's Air Pollution Control Enforcement Guidance Memorandum ("EGM"), dated March 21, 1991, which suggests that the Department notify regulated entities of suspected violations by issuing an NOV before commencing an enforcement proceeding. EGM, Appendix IV, § 4. Department Staff, in response, argued that SMC should not benefit by its failure to obtain certificates to operate the Facilities once the DEP renewals expired, and noted that the EGM

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[3] Department Staff noted that a penalty start date of September 27, 1992 was used for the East 66th Street Facility and a starting date of January 14, 1992 was used for the East 87th Street Facility, rather than January 1, 1990, which Department Staff alleged was the actual first day of violation for both Facilities. According to Department Staff, this reflects the fact that Respondents renewed their New York City Department of Environmental Protection ("DEP") Certificate of Operation for three years for both Facilities during calendar year 1989, while a delegation agreement between the Department and DEP was still in effect. The Bolt Affidavit, at Paragraphs 5 and 6, indicated that this delegation agreement lapsed on January 1, 1990.

does not require the Department to negotiate before initiating litigation.

In opposition to Respondents' cross-motion, Department Staff took the position that laches is an affirmative defense that is legal in nature, not factual. Consequently, Department Staff argued that there was no need for a hearing to consider this affirmative defense, and contended further that the passage of time, standing alone, does not constitute substantial prejudice absent some showing of actual injury.

Respondents' assertions with respect to the third factor of the Cortlandt test are not sufficient to establish a SAPA violation, but these arguments are appropriately considered in determining the penalty to be assessed in this case. This is consistent with prior decisions. It is well-settled that laches is an equitable remedy that cannot be used "to prevent the State from enforcing its laws, or an agency from carrying out its duties." Matter of City of Hudson Indus. Dev. Agency, ALJ Ruling, Aug. 24, 1998, at 5-6, 1998 WL 1780962, at *6, citing Matter of Cortlandt Nursing Home v. Axelrod, 66 N.Y.2d 169,177, n. 2 (1985). Nevertheless, "whether or not NYSDEC's actions/inactions warrant consideration in calculating a penalty can be addressed later if liability is found." City of Hudson, at 6, *6, citing Landmark Colony at Oyster Bay v. Bd. of Supervisors of Nassau Cty., 113 A.D.2d 741 (2nd Dept. 1985). This approach should be followed in this case.

The fourth factor does not favor Respondents. The public policy underlying regulation of air contaminant sources and addressing violations of those regulations is more compelling than SMC's concerns with respect to the delay associated with the enforcement action in this case. SMC's argument as to the propriety of Department Staff's actions in seeking penalties for a regulation that is no longer in effect is unpersuasive, and is insufficient to establish that Department Staff's prosecution of the first violation contravenes SAPA.

Second Cause of Action (Violation No. 2)

In its second cause of action, Department Staff alleged that Respondents violated the June 1996 version of 6 NYCRR Part 201, which subjected all major stationary sources to federal Title V

permitting requirements.[4] Complaint, ¶ 20. Specifically, Department Staff alleged that the Facilities are located in a severe non-attainment area[5] and have the potential to emit 25 tons per year or more of NO_x. Id. Thus, Department Staff contended that both Facilities are major stationary sources or major sources of air contamination. Id. According to the complaint, Respondents failed to comply with the provisions of the June 1996 version of 6 NYCRR Part 201, which required SMC to submit complete permit or registration applications to the Department on or before June 9, 1997. Complaint, ¶ 23. Department Staff contended that each day subsequent to June 9, 1997 that SMC failed to file a complete permit or registration application was a continuing violation of the regulation and ECL Articles 19 and 71. Id.

Department Staff's penalty calculation for Violation No. 2 at the East 66th Street Facility assumed a 1,870-day continuing violation (from June 9, 1997 to July 24, 2002) of the June 1996 versions of 6 NYCRR Section 201-6.3 and ECL Article 19, as well as the 1993 version of ECL Article 71. Department Staff's Penalty Calculations submission, and paragraph 24 of the complaint, stated that July 24, 2002 was the date Respondents filed a "Choice of Options" form for both Facilities. Department Staff sought a $10,000 penalty for the first day of violation, and $15 for each day the violation continued ($28,050).[6]

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4 Pursuant to 6 NYCRR Section 201-2.1(b)(21)(iii)(*a*), in severe non-attainment areas, a facility is a major stationary source or major source of air contamination subject to the Title V permitting requirements if its potential to emit oxides of nitrogen is 25 tons per year or greater.

5 Section 200.1(av) defines a non-attainment area, in pertinent part, as "[a]ny area of the State not meeting a National Ambient Air Quality Standard (NAAQS) for a specific air contaminant. Nonattainment areas in New York State are as follows: (1) Severe ozone nonattainment area. The area including the New York City metropolitan area . . .."

6 In its penalty calculation, Department Staff pointed out that the penalty sought for Violation No. 1 was $5 per day, while the penalty amount was increased to $15 for Violation Nos. 2 and 3. According to Department Staff, this is because the latter violations are more recent, and Respondents' first violation should have apprised them of their compliance obligations. Department Staff argued further that "Violations #2 and #3 are under the umbrella of the Title V Program of the Clean Air Act. Pursuant to 6 NYCRR Part 200, the Department has been delegated by the United States Environmental Protection Agency ("USEPA") both to issue air permits and to enforce all air permit requirements in New York State, including the requirement for an owner and/or operator to obtain an air permit for all its major sources of air contamination." Penalty Calculations, at 19. It is not clear from Department Staff's statement what bearing, if any, this latter reference has upon the increased penalty amount.

According to Department Staff, the violation at the East 87th Street Facility occurred during the same 1,870-day period, and as a result, the recommended penalty amount is identical, and totals $28,050. The total penalty for both Facilities, including $10,000 for the first day of violation, came to $76,100.

In their opposition, Respondents contended that in 1997, SMC directed its environmental consultant, Environmental Management Services, to file the emission cap election form with the Department for each of the Facilities, and that "[a]t all relevant times, SMC was under the reasonable belief that the Emission Cap election form had been submitted to DEC." Riesel Affirmation, ¶ 6, and Exhibit A. SMC maintained that its management never received the notice letters Department Staff sent in March 1998. Riesel Affirmation, ¶ 8. In their cross-motion, Respondents stated that they were unable to identify the signature on the return receipt cards Department Staff provided as part of its motion, and concluded that if the notice letters were sent, they were not delivered to management. Riesel Affirmation, ¶¶ 8 and 9.

SMC pointed out that once the filing deficiency was brought to its attention, SMC admitted its failure to timely file, and took steps to remedy the situation. Riesel Affirmation, ¶ 18. According to SMC, "an after-the-fact investigation conducted by SMC revealed that this one-time administrative oversight inadvertently was caused by Environmental Management Services, which had been retained specifically to ensure SMC's compliance with all applicable air regulations." Id.; Riesel Affirmation, Exhibit A.

Respondents noted that although the Facilities have the potential to emit 25 tons per year or more of NO_x, the boilers at the Facilities in fact each emit well under 12.5 tons of NO_x annually. According to Respondents, the Facilities' low emission rate is attributable, in part, to the use of natural gas for fuel. As a result, SMC argued that its failure to file the emission cap election form by June 9, 1997 caused no harm to the environment and did not result in any economic benefit to SMC, because the Facilities' operations would have been the same in any case. Riesel Affirmation, ¶ 20. SMC emphasized that it did not engage in willful misconduct, and did not conceal or

misrepresent its failure to file. Id. In addition, SMC noted that Department Staff has access to and regularly inspects the Facilities, pointing out that the Facilities were inspected on or about August 11, 1999, as noted in the April 22, 2002 Notices of Violation. Riesel Affirmation, ¶ 7. SMC took the position that given the magnitude of the penalty sought, a hearing should be held, particularly since Department Staff sought a considerably smaller sum ($15,000 per Facility) prior to commencing litigation. Riesel Affirmation, ¶ 23.

If a hearing were held, SMC asserted that it would introduce evidence "on the lack of merits of the Complaint," as well as proof that the failure to file was inadvertent, and attributable to a third party; that no environmental harm resulted from this "paperwork" violation; and that SMC did not benefit from the failure to file. Riesel Affirmation, ¶ 24. In addition, SMC proposed to offer evidence that the penalty sought "is not only contrary to the Department's established policies, but is against public policy." Id. In SMC's view, this enforcement action results from retaliatory animus directed at Respondents, after Department Staff terminated settlement discussions, "evidenced by the age, redundancy and inapplicability of the alleged violations, by the inclusion of Solow as a respondent in his individual capacity, by the disproportionate size of the penalties pursued by Staff, and by the pursuit of such relief without an administrative hearing." Riesel Affirmation, ¶ 25.

The arguments advanced by Respondents in connection with the second violation are not sufficient to grant Respondents' motion to dismiss. Pursuant to Section 622.11(b)(3), Respondents bear the burden of proof in this regard. It is undisputed that Respondents did not make timely application for the requisite approvals to operate the boilers at the Facilities. The fact that the emissions from the Facilities during the period in question were below the Title V threshold for a major facility is of no moment, because it is the Facilities' potential to emit that triggers the regulatory requirement to obtain such approvals. See Duquesne Light Co. v. EPA, 698 F.2d 456, 474 (D.C. Cir. 1983)(affirming EPA's definition of the phrase "potential to emit" as reasonable in light of the statute's language and remedial goals; noting that the term itself "is clear indication that Congress did not intend determinations of whether a source is 'major' to be based on actual emissions in day-to-day operations").

The violation is not trivial, as the Department's Civil Penalty Policy makes clear. See Civil Penalty Policy, issued Jan. 20, 1990, at page 8, Paragraph IV.D2(b), which states that "[u]ndertaking any action which requires a DEC permit, without first obtaining the permit, is always a serious matter, not a mere 'technical' or 'paper work' violation, even if the activity is otherwise in compliance. . . . Failure to assess significant penalties for such violations would be unfair to those who voluntarily comply with the law by satisfying the requirements of the permit process." Respondents' cross-motion did not include any documentation concerning the efforts by Respondents' consultants to properly file on SMC's behalf (for example, correspondence), and SMC's assertion that the March 1998 notice letters never reached management does not excuse SMC's failure to comply with the regulation, particularly since SMC does not claim that the notice letters were not sent to SMC's correct address. Respondents' arguments fall short of the evidence necessary to raise a material issue of fact on this motion for order without hearing, or to establish SMC's entitlement to dismissal of the second cause of action.

Nevertheless, Respondents' arguments should be taken into consideration in determining the penalty that should be assessed for this violation. Although the Civil Penalty Policy notes that penalty amounts in adjudicated cases "must, on the average and consistent with consideration of fairness, be significantly higher than the penalty amounts which DEC accepts in consent orders which are entered into voluntarily by respondents," given the circumstances of this case and the magnitude of the penalty sought, SMC should have the opportunity to present argument as to mitigating circumstances. Civil Penalty Policy at 1, ¶ 4, and 2, ¶ 2.

In this regard, the Commissioner's Decision and Order in Matter of Delford Indus., Inc., 1989 WL 84739 (Apr. 13, 1989) is instructive. In Delford, the ALJ's ruling relied on SAPA in finding "severe prejudice," and recommending dismissal of an opacity violation under 6 NYCRR Section 212.5, where Department Staff delayed ten months before notifying respondent of a violation which was discovered during an inspection. ALJ Ruling at 58-59, 1989 WL 84739, *59. The ruling cited to Air Pollution Variance Bd. of the State of Colorado v. Western Alfalfa Corp., in which the Colorado Supreme Court held that notice of an opacity violation given two weeks after the inspection failed to satisfy due process and fundamental fairness, and went on to

state that basic fairness required delivery of actual notice to a plant manager or officer or agent of the regulated entity within a short time after the inspection took place. 191 Colo. 455, 462, 553 P.2d 811, 816 (1976).

In his Decision and Order in Delford, Commissioner Thomas Jorling agreed that the ten-month delay in notifying the respondent of the opacity violation was unreasonable, but declined to adopt the ALJ's recommendation that the charge be dismissed because, in the Commissioner's view, the prejudice to respondent had not been established, and therefore, SAPA had not been violated. Delford, Commissioner's Decision, at 2-3, *2. Instead, the Commissioner determined that "under no circumstances would a penalty or other relief be appropriate" with respect to the violation. Id., at 2, *2. While Delford is not on all fours with the factual setting of this case, its reasoning supports the conclusion that further inquiry as to the penalty amount for this violation is appropriate.

This is particularly so where, as here, the penalty amount is tied to the length of time the violation continued. The Civil Penalty Policy states that "[i]n an adjudicatory hearing, Department staff should request a specific penalty amount, and should provide an explanation of how that amount was determined, with reference to (1) the potential statutory maximum; (2) this guidance document; (3) any program specific guidance document(s); (4) other similar cases; and (5) if relevant, any aggravating and mitigating circumstances which staff considered." Civil Penalty Policy at 4, ¶ IV. The NOVs indicating that the Facilities were inspected on August 11, 1999 are dated April 22, 2002. Bolt Affirmation, Exhibits G and H; Riesel Affirmation, Exhibit B. Thus, over three years elapsed from the time that the inspection took place to the date Respondents were notified of the violations. In addition, while Department Staff's submission with respect to the penalty calculations undertaken in this matter is coherent and detailed, that submission is devoid of examples of penalties assessed by the Region for similar violations. Such examples would be useful in determining the penalty amount to be recommended to the Commissioner.

Third Cause of Action (Violation No. 3)

The third cause of action set forth in Department Staff's complaint alleged that Respondents operated the boilers at the Facilities without a Department-issued permit or registration for

a period of over five years, from June 9, 1997 to August 19, 2002. Complaint, ¶¶ 27 and 28. Department Staff stated that SMC applied for a registration for the Facilities on July 24, 2002, and the Department issued Air Facility Registration Certificates for the Facilities on August 19, 2002. Id. The complaint alleged that Respondents' operation of the Facilities without the requisite approvals violated the June 1996 version of 6 NYCRR Part 201, specifically, Section 201-6.1(a)(1), as well as ECL Articles 19 and 71. Complaint, ¶ 29.

Department Staff's calculations for Violation No. 3 were based upon its position that from June 9, 1997 to August 19, 2002 (a total of 1,896 days), both Facilities violated the June 1996 version of 6 NYCRR Section 201-6.1(a)(1) and ECL Article 19, in addition to the 1993 version of ECL Article 71. Department Staff sought a $10,000 penalty for both Facilities for the first day of violation, and $15 per day thereafter ($28,440). The total penalty for the two Facilities for this violation amounted to $76,880.

SMC cross-moved to dismiss the third cause of action, arguing that the relief sought was duplicative and excessive. According to SMC, Department Staff's pursuit of penalties for the second violation (the failure to file an emission cap form between June 1997 and July 24, 2002) indicates that Department Staff concedes that SMC did not require a Title V permit for the period of time in question. As a result, SMC argued that the third violation, which involves the same period of time, should be dismissed. SMC asserted that while 6 NYCRR Section 201-6.1(a)(1) provides that certain sources cannot operate without a Title V permit, the regulation does not require that such sources obtain both a Title V permit and an Air Facility Registration Certificate. According to SMC, the second and third violations are based upon the same event: SMC's one-time failure to file the emission cap election form exempting the Facilities from the requirements of Title V. SMC pointed out that there was no evidence that the Facilities' emissions were above the Title V threshold for the period in question.

Section 201-6.1(a) of 6 NYCRR provides in relevant part that "[e]xcept as otherwise set forth herein, no person shall operate any of the following stationary sources without obtaining a title V permit. (1) Any major stationary source (as defined under Subpart 201-2 of this Part)." It is undisputed that the Facilities are major stationary sources. There are exceptions to

this requirement, including the option "to accept an emission cap in accordance with Subpart 201-7 of this Part in order to avoid the title V facility permit requirements of this Subpart." 6 NYCRR § 201-6.3(a). The regulation goes on to state that "[o]wners and/or operators of existing facilities subject to title V facility permitting on the effective date of this regulation must submit information indicating whether they will obtain an emission cap or a title V permit in accordance with the transition provisions of section 201-6.2 of this Subpart." Id.

Department Staff's opposition to Respondents' cross-motion to dismiss cited to no authority in support of its position, but rather attempted to draw a distinction between the second and third violations, asserting that the second cause of action alleges a violation of Section 201-6.3 (failure to submit a timely application), while the third cause of action is based upon an alleged violation of Section 201-6.1(a)(1) (operating without a Title V permit or other approval).

This argument does not appear to support Department Staff's entitlement to a penalty for a continuing violation of both provisions, because the regulation expressly contemplates that the owner or operator of an existing facility may apply for either a Title V permit or elect to accept an emission cap, but need not apply for both. Department Staff's interpretation would essentially assess penalties for a continuing violation of the failure to file for a Title V permit, the failure to file for an emission cap pursuant to Section 201-7.3, and the Facilities' unpermitted operation.

SMC's cross-motion to dismiss this cause of action was likewise devoid of citations to specific authority. SMC made reference to the factual circumstances surrounding the alleged violation, including the lack of any evidence of environmental harm as a result of the Facilities' unpermitted operation, and also raised equitable arguments with respect to the size of the penalty Department Staff seeks. This is not sufficient to grant SMC's motion to dismiss this cause of action. Accordingly, both parties will be afforded the opportunity to offer additional arguments, and a final determination is reserved at this point.

This is particularly true with respect to the period between SMC's filing on July 24, 2002 and the issuance of the Air Facility Registration Certificates for the Facilities on August 19, 2002. During that time, Department Staff was engaged in

reviewing SMC's submission. Although that submission was not timely in the first instance, once the application for an emission cap was received, SMC could do nothing more until Department Staff acted on that application. There is no suggestion in the record that the information SMC submitted on July 24, 2002 was deficient in any way. See Matter of McPartlin, Commissioner's Order, at 2, 1994 WL 734537, *2 (Dec. 29, 1994) (timely application for variance from stage II vapor requirement suspended further enforcement action while variance request was pending before the Department).

In Matter of McPartlin, the ALJ considered whether a separate penalty should be assessed for a violation of the provisions of an order on consent, as well as 6 NYCRR Section 230.2(c), requiring respondent to install a stage II vapor recovery system. ALJ Ruling, at 5-6, 1994 WL 734537, *6 (Dec. 29, 1994). The ALJ concluded that the two violations alleged shared the same elements: the requirement that a stage II equipment be installed, and the failure to install such equipment. Id. As a result, the ALJ recommended that only one penalty be imposed, with the violation of the prior order considered as an aggravating factor in connection with the violation of the regulation. Id.

The ruling cited to People v. Horne, 121 Misc.2d 389 (Sup. Ct., Kings Cty., 1983). In that case, the court construed Section 200.20(1) of the New York Criminal Procedure Law in holding that "[i]t thus appears that the charging of the same offense in separate counts of an indictment would violate New York law." 121 Misc.2d at 394. The ALJ reasoned that this principle was applicable to administrative proceedings, "testing whether one cause of action requires proof of a fact that the other does not." Matter of McPartlin, at 6, 1994 WL 734537, *6.

The Commissioner's order in McPartlin adopted this reasoning, but found that the two violations did not share identical elements of proof. Order at 1, 1994 WL 734537,*1. According to the Commissioner, the consent order contained a provision that required a showing that a transfer of gasoline without the stage II vapor recovery equipment occurred more than sixty days after the effective date of the order. Id. The Commissioner's order pointed out that this provision was not part of Section 230.2(c). Id.

McPartlin is factually distinguishable, but the rationale may be applicable to this proceeding. In this case, Department Staff sought penalties for a continuing violation as a result of both Respondents' failure to file pursuant to 6 NYCRR Section 201-6.3, and a violation of Section 201-6.1(a)(1) because the Facilities operated for some time without a Title V permit or other approval. Both the second and third violations are based upon Respondents' failure to apply for either a Title V permit or an emissions cap.

As was the case in McPartlin, Department Staff may argue that there is a distinction between the failure to notify the Department as to Respondents' election to seek an emissions cap and the failure to obtain that approval, but this may not be enough to establish a continuing violation of both provisions. See Matter of QP Service Station Corp., Commissioner's Decision and Order, at 4, 2004 WL 2384332, *2 (Oct. 20, 2004) (finding that "nothing in the plain language, structure, or purpose of the respective Parts [612 and 613] justifies treating the violation of section 613.9(c) [imposing a reporting requirement upon tank closure] as a distinct violation, subject to a separate penalty, from a violation of section 612.2(d)" [requiring notification to the Department when a facility is substantially modified].) An appropriate penalty should be determined based upon further argument by the parties.

RULING AND RECOMMENDATION

The motion for order without hearing is granted as to SMC's liability for the violations alleged in Department Staff's complaint. The parties will be afforded the opportunity to make further arguments as to the penalty amount to be recommended to the Commissioner. Specifically, such arguments are to address the number of violations and the application of the Department's Civil Penalty Policy to those violations.

ORDER ESTABLISHING UNCONTROVERTED FACTS

The following facts are uncontroverted. Pursuant to 6 NYCRR Section 622.12(e), these facts are established for all purposes in this proceeding, and any facts not so specified were not supported by the proof submitted and therefore will not be considered further:

1. Respondent SMC owns and operates a residential building, located at 265 East 66th Street, New York, New York (the "East 66th Street Facility"), and owns and operates a residential building located at 501 East 87th Street, New York, New York (the "East 87th Street Facility").

2. The East 66th Street Facility has three stationary combustion installation Burnham (Spencer) boilers, each rated at 17.92 mmBtu/hr. The boilers can burn natural gas as well as No. 4 fuel oil, and have a total annual potential to emit of 117.6 tons of oxides of nitrogen (NO_x).

3. The East 87th Street Facility has two stationary combustion installation Federal FLW 3036 boilers, each rated at 10.4 mmBtu/hr. The boilers are capable of burning natural gas as well as No. 6 fuel oil, and have a total annual potential to emit of 45.6 tons of NO_x.

4. Respondents failed to obtain certificates to operate the boilers at the Facilities, in violation of the versions of 6 NYCRR Section 201.2(b) and ECL Article 19 in effect from 1992 to 1997.

5. Respondents failed to timely file a complete Title V permit application by June 9, 1997, or alternatively, to elect to accept an emissions cap to avoid Title V permit requirements at both Facilities. From 1997 to 2002, Respondents operated the boilers at the Facilities without a Title V permit or an Air Facility Registration Certificate.

6. On April 22, 2002, the Department's Region 2 Division of Air mailed Notices of Violation to Respondent SMC for both Facilities. A proposed order on consent was attached to each of the Notices, which sought a $15,000 penalty for each Facility.

7. Respondent did not enter into an order on consent with respect to either Facility.

8. SMC completed and submitted a Choice of Option form for a Registration for each Facility on July 24, 2002. On August 19, 2002, the Department's Region 2 Division of Air issued Air Facility Registration Certificates for the Facilities.

SCHEDULING ORDER

Within fifteen days of receipt of this ruling, counsel for Department Staff shall identify for me in writing the dates on which SMC and Department Staff are available for a conference call to discuss further proceedings in this matter, including the possibility of oral argument pursuant to 6 NYCRR Section 622.10(b)(1)(viii).

/s/
Maria E. Villa
Administrative Law Judge

Dated: Albany, New York
February 23, 2005

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