NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation of Article 17 of the Environmental Conservation Law and Part 612 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York by

RULING

DEC Case No. R3-488666

SUPER A PETROLEUM

Respondent.

The New York State Department of Environmental Conservation (DEC Staff, Department) commenced this action pursuant to Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) 622.12 by service of a motion for summary order and a complaint on or about September 14, 2004 on Super A Petroleum, (respondent) as well as Patrick Moore, Esq., counsel for respondent. DEC Staff submitted the following in support of the motion: affirmation of Scott A. Herron, Esq., Department counsel, and the affidavit of R. Daniel Bendell, environmental engineer for the Department's Bureau of Spill Prevention and Response, dated September 10, 2004. After being granted an extension of time to reply to the motion, respondent opposed the motion by service on October 21, 2004 of an undated affirmation of Patrick F. Moore, Esq., corporate counsel for respondent.

Staff's motion was filed with the Office of Hearings and Mediation Services and was assigned to Administrative Law Judge (ALJ) Molly T. McBride. By letter dated October 25, 2004 I asked DEC Staff to clarify three issues. Attorney Herron responded to that request by letter dated November 12, 2004.

A contested motion for order without hearing shall be granted, if upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant granting summary judgment under the Civil Practice Law and Rules of New York (CPLR) in favor of any party. See 6 NYCRR 622.12(d). CPLR 3212 allows for the granting of summary judgment when no issue of fact remains. The Commissioner has provided extensive direction concerning the showing the parties must make in their respective motions and replies, and how the parties' filings will be evaluated (*see Matter of Richard Locaparra, d/b/a L&L Scrap Metals*, DEC Case No. 3-20000407-39, Final Decision and Order of the Commissioner, June 16, 2003).

Background

Respondent owns a facility located at 238 Route 52, Carmel, New York (facility). The facility had seven underground petroleum bulk storage tanks and one aboveground petroleum bulk storage tank (tanks) at the time that respondent entered into an order on consent on March 24, 2003. The order on consent directed respondent to take certain actions with respect to the petroleum bulk storage facility related to maintaining the tanks, and the records for the tanks. DEC Staff alleges that respondent violated each provision of the order. The order on consent also ordered respondent to submit to the Department for its review and approval a proposed site investigation plan, including investigating any off-site contamination. The order on consent does not refer to any specific contamination at the site. DEC Staff alleged respondent violated this provision of the order as well.

Staff's Position

Department Staff has asked for an order of the Commissioner which finds that respondent violated all provisions of the March 24, 2003 order on consent. ECL 71-1929(1) states that "[a] person who violates any of the provisions of .... The orders or determinations of the commissioner ... shall be liable to a penalty of not to exceed thirty-seven thousand five hundred dollars per day for each violation ...".[1] The order on consent ordered the respondent to take the following actions:

1) immediately maintain inventory records for the facility's underground tanks in accordance with 6 NYCRR 613.4;

2) within 30 days of the effective date of the order, submit a completed application to correct the inaccurate information currently contained in the facility's petroleum bulk storage registration certificate in accordance with 6 NYCRR 612.2(3);

3) immediately upon the effective date of the order, begin

[1]The penalty was $25,000.00/day until May 23, 2003 when the penalty increased to $37,500.00. The statute allows for the penalty for each day that the respondent is in violation of the order. The applicable penalty would be $25,000/day from the initial violation date through May 23,2003 and then $37,500/day for each day thereafter.

monitoring the facility's leak detection system at least weekly, and within thirty days of the effective date of the order submit the most recent four weekly leak detection monitoring records in accordance with 6 NYCRR 613.5(b)(3);

4) within 30 days of the date of the order conduct tank tightness testing on each of the facility's underground tanks and connecting piping systems and submit the results to the department in accordance with 6 NYCRR 613.5, or permanently close the tanks at the facility in accordance with 6 NYCRR 613.9(b),(c), (d) and (e);

5) within 30 days of the effective date of the order, submit verification that overfill prevention equipment for the facility's piping system has been installed, in accordance with 6 NYCRR 614.14(g)(1); and

6) within 30 days of the effective date of this order, submit a proposed site investigation plan for the petroleum contamination at the facility, carry out the investigation and perform any required remedial activities.

Respondent's Position

Respondent's counsel, in his affirmation, does not deny that the order on consent has been violated. He notes that the respondent was unrepresented when he signed the order on consent. He also notes that since the time of the order the tanks have been removed from the property. An accident occurred at the site in the summer of 2004. An oil truck carrying 150,000 gallons of oil crashed and spilled oil on the subject property and neighboring property. Attorney Moore stated, "upon information and belief, the insurer of the owner of the vehicle involved in the accident hired a contractor to clean up that spill and that contractor removed the tanks, without permission."

Respondent's counsel also comments on efforts made by respondent in 2002 in hiring a contractor to develop a site plan and hiring a firm to conduct tank tightness testing. Those took place before the order on consent was signed. No mention is made of any attempts on the part of respondent to comply with the order on consent after its issuance. No mention is made of any remediation at the site.

Discussion

DEC Staff had not indicated in its motion that the tanks had

been removed. As noted above, I sent a letter to attorney Herron asking for clarification on three questions raised by respondent's opposing papers: (1) the number of tanks at the site, (2) whether the tanks were still on the site, and (3) if statements made by respondent's counsel about tank tightness testing and closure resolved any of the issues. Attorney Herron addressed all three issues and confirmed that the tanks had all been removed after an accident near the site in the summer of 2004. The Department contends that the tanks were removed at the Department's request as part of the remediation of the petroleum contamination at the site. Mr. Herron's letter does not identify if the remediation at the facility was related to the 2004 spill or was intended to address contamination that existed prior to the order on consent. However, Mr. Herron does note that significant levels of contamination existed at the site prior to the 2004 accident. His letter states that groundwater and soil sampling at the facility site in 1998 show "gross petroleum contamination at the property". Mr. Moore alleges "there is no evidence of contamination that is attributable to the respondent's act." The order on consent does not have a finding of contamination at the site and there is no admission by the respondent that the site is contaminated.

The remaining two questions I posed were sufficiently answered by Mr. Herron.

Findings of Fact

After a review of the pleadings and papers submitted herein by the parties, I find that the following facts are established as a matter of law:

1. Respondent owns the facility located at 238 Route 50, Carmel, New York.

2. An order on consent was issued by the Department and executed by the respondent on March 24, 2003 ordering respondent to take certain actions immediately and certain other actions within 30 days of the order with respect to the facility.

3. Respondent violated all provisions of the order on consent.

Conclusions of Law

1. Department Staff is entitled to a judgment as a matter of law on the issue of respondent's liability for violating the order on consent.

2. ECL 71-1929(1) allows for a penalty not to exceed $37,500.00 per day for each violation of an order of the

Commissioner.

Penalty

Staff has requested a penalty of twenty-five thousand dollars ($25,000) for respondent's failure to comply with the order on consent. DEC Staff is requesting that respondent submit to the Department for approval a remedial action plan to address the petroleum contamination at the facility within 30 days of the effective date of the order. Also, DEC Staff is asking that upon Department approval, respondent shall carry out the remediation plan in accordance with the requirements and timetables contained therein. Finally, the Department is seeking a penalty of $25,000 per day for each day that the respondent does not comply with the new order.

The Department has a Civil Penalty Policy that serves as guidance in calculating a penalty in an enforcement case. The policy states that "[T]he penalty should equal the gravity component, plus the benefit component, plus or minus any adjustments." The benefit component is defined as the economic benefit that results from a failure to comply with the law. The gravity component is intended to reflect the seriousness of the violation and is to ensure that the enforcement deters respondent as well as others from future violations of a similar nature.

Department Staff has not addressed this policy in its penalty request. No explanation was provided by DEC staff for the penalty amount requested. I have no information before me that would allow me to evaluate the penalty requested.

The Department has an Enforcement Guidance Memorandum (EGM) DEE-22, dated May 21, 2003 entitled, *PBS Inspection Enforcement Policy (*an attached civil penalty schedule would not be applicable in this case as it applies to matters that have settled and not matters where the Department has commenced an enforcement proceeding). Depending on the type of violation, EGM DEE-22 recommends assessing civil penalties either on a per tank basis or for the entire facility. In this case, the penalty sought is for violating the order on consent but that order addressed petroleum bulk storage regulations violations. This EGM may be applicable in determining the penalty in this matter. DEC Staff should address this EGM as well as the Civil Penalty Policy.

Ruling

The liability issue is resolved and I am able to make a recommendation to the Commissioner that the order on consent was violated by respondent. However, I can not recommend what, if any, penalty should be assessed against the respondent based upon the limited information provided with the motion. The parties

shall submit additional legal argument on the issue of penalties within 30 days of the date of this Ruling. The submissions should be in the form of affidavit(s)/affirmation(s). If those submissions are not sufficient to resolve all issues of fact with respect to the penalty requested by DEC Staff, then I will recommend that a hearing be convened to assess the amount of penalties to be recommended to the Commissioner, pursuant to 6 NYCRR 622.12(f).

I can not make a recommendation on the request by DEC Staff that respondent submit a remedial action plan for the clean up and removal of petroleum contamination at the facility and carry out the plan. The Department's motion does not present any evidence of contamination at the site. Mr. Herron's November 10, 2004 letter claims that contamination existed before the 2004 accident and encloses some sampling summaries from 1998. However, this is not sufficient to find that contamination exists at the site now. Both parties acknowledge that there was a clean up at the site in 2004. I do not know how extensive that clean up was. Also, if contamination is found at the site now, there may be a question as to the source of that contamination due to the 2004 spill at the site. This issue has many remaining questions and needs to be explored further. I would like the parties to submit additional legal argument on the issue of contamination and remediation in writing within 30 days of the date of this Ruling. The submissions should be in the form of affidavit(s)/affirmation(s). If those submissions are not sufficient to resolve this issue, I will recommend that a hearing be convened on this issue.

Once the parties have made their submissions on the issue of penalties and the Department's request regarding remediation, I will make a recommendation to the Commissioner on those issues.

_____/s/_____
Molly T. McBride
Administrative Law Judge

Dated: February 16, 2005
Albany, New York

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