

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 12 of the
New York State Navigation Law and Article 17 of
the New York State Environmental Conservation Law,

ORDER

- by -

DEC Case No.
R2-20120409-201

WEST 63 EMPIRE ASSOCIATES LLC,

Respondent.

This administrative enforcement proceeding concerns the failure of respondent West 63 Empire Associates LLC to comply with two terms of consent order R2-20110307-78 that it entered into with the New York State Department of Environmental Conservation (“DEC” or “Department”) and which became effective on February 17, 2012 (“consent order”). The consent order addressed a spill of number six fuel oil from a tank in the boiler room of the Empire Hotel, located at 44 West 63rd Street, New York, New York (“facility”) that occurred in 2010 and had been assigned DEC Spill # 1007405.

The consent order required respondent, among other things, to submit documentation within fifteen (15) days of the effective date of the consent order, that:

- (1) the two tanks at the facility are properly labeled and properly inspected, the fill port for the tank that contains number two fuel oil was properly marked with a green hexagon and the fill port for the tank that contains number six fuel oil is identified as such, and an acceptable secondary containment system has been installed around the tank containing number six fuel oil (see consent order, Article II, ¶ 1); and
- (2) proper cleanup and disposal activities acceptable to Department staff have occurred, including additional power washing and cleaning of the areas affected by the spill (see consent order, Article II, ¶ 2).

By the terms of the consent order, respondent was required to submit the above-referenced documentation by March 5, 2012. In addition, pursuant to the consent order, respondent agreed to pay a civil penalty in the amount of forty-three thousand dollars (\$43,000) (see consent order, Article I).

Department staff commenced this administrative enforcement proceeding by service of a motion for order without hearing in lieu of complaint dated April 11, 2012 on respondent. The motion was served on April 12, 2012 by certified mail, return receipt requested. Respondent received Department staff’s motion on April 13, 2012. Accordingly, service was accomplished

in accordance with section 622.3 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

In its motion for order without hearing, Department staff requests that I find respondent liable for violating paragraphs 1 and 2 of Article II of the consent order.¹ Staff also requests that respondent pay a civil penalty of sixty-two thousand five hundred dollars (\$62,500) for its violation of the consent order and immediately complete the corrective action requirements set forth in Article II of the consent order. Respondent failed to respond to Department staff's motion for order without hearing.

The matter was assigned to Administrative Law Judge ("ALJ") P. Nicholas Garlick, who prepared the attached summary report. ALJ Garlick recommends that Department staff's unopposed motion for order without hearing be granted, and respondent be found to have violated paragraphs 1 and 2 of Article II of the consent order. In addition, the ALJ recommends imposing the staff-requested civil penalty of sixty-two thousand five hundred dollars (\$62,500).

I adopt the ALJ's summary report as my decision in this matter subject to my comments below.

Section 71-1929 of the New York Environmental Conservation Law ("ECL") provides for a civil penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation of titles 1 through 11 inclusive and title 19 of article 17, or the rules or regulations, orders or determinations promulgated thereto. Navigation Law § 192 authorizes a civil penalty of twenty-five thousand dollars (\$25,000) for each day a violation of any duty imposed under Navigation Law article 12 continues. Respondent's failure to comply with the consent order that it previously signed renders it subject to civil penalties under ECL 71-1929 and Navigation Law § 192. Based upon this record, Department staff's penalty request is appropriate and authorized by either the ECL, or the Navigation Law, or both.

Department staff also asks that I order respondent to comply with the terms of the consent order "immediately, pursuant to a Department-approved schedule" (see Affirmation of John K. Urda, Esq., dated April 11, 2012, at 5). Respondent, however, has a continuing obligation to comply with the consent order and, as the ALJ stated, no further order directing compliance with the terms of the consent order is necessary (see ALJ Summary Report, at 6; see also Matter of River Gas, Inc., Order of the Commissioner, April 6, 2009, at 3 [respondents remain responsible to undertake and otherwise implement the remedial actions required by a consent order]).

The ALJ recommends that I impose a payable civil penalty of sixty-two thousand five hundred dollars (\$62,500). In considering the recommended penalty, I note that respondent has paid in full the civil penalty assessed by the consent order, but is overdue in providing the documentation on the corrective measures for the facility. Accordingly, I have determined to suspend forty-two thousand five hundred dollars (\$42,500) of the requested civil penalty of sixty-two thousand five hundred dollars (\$62,500), contingent upon respondent's submission of

¹ Staff stated that respondent had paid the civil penalty of forty-three thousand dollars (\$43,000) (see Affirmation of John K. Urda, Esq., dated April 11, 2012, at 2, ¶ 5).

the documentation required by Article II of the consent order within thirty (30) days of the service of this order upon respondent. The non-suspended portion of the civil penalty (that is, twenty thousand dollars [\$20,000]) shall be due and payable within thirty (30) days of the service of this order on respondent.

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

- I. Pursuant to 6 NYCRR 622.12, Department staff's motion for order without hearing is granted in part and is denied in part.
- II. Respondent West 63 Empire Associates LLC is adjudged to have violated consent order R2-20110307-78 by failing to timely submit documentation that:
 - A. the two tanks at the facility are properly labeled and properly inspected, the fill port for the tank that contains number two fuel oil is properly marked with a green hexagon, the fill port for the tank that contains number six fuel oil is identified as such, and an acceptable secondary containment system has been installed around the tank containing number six fuel oil; and
 - B. proper cleanup and disposal activities acceptable to Department staff have occurred, including additional power washing and cleaning of the areas affected by DEC Spill #1007405.
- III. Respondent is hereby assessed a civil penalty in the amount of sixty-two thousand five hundred dollars (\$62,500). Forty-two thousand five hundred dollars (\$42,500) of the civil penalty shall be suspended contingent upon respondent (a) providing, within thirty (30) days of the service of this order upon respondent, the documentation referenced in subparagraphs A and B of paragraph II of this order, and (b) complying with all other terms and conditions of this order including but not limited to the payment of the non-suspended portion of the civil penalty.
- IV. The non-suspended portion of the civil penalty (that is, twenty thousand dollars [\$20,000]) is due and payable within thirty (30) days after service of this order upon respondent. Payment of the non-suspended portion of the civil penalty shall be by cashier's check, certified check or money order payable to the Environmental Protection and Spill Compensation Fund and mailed or hand-delivered to:

John K. Urda, Esq.
Assistant Regional Attorney
Region 2, NYSDEC
47-40 21st Street
Long Island City, New York 11101

Should respondent fail to submit the documentation within thirty (30) days of the

service of this order upon it, or fail to comply with the other terms and conditions of this order (including but not limited to the payment of the non-suspended portion of the penalty), the suspended portion of the civil penalty shall become immediately due and payable, and shall be submitted in the same form and to the same address as the non-suspended portion of the penalty.

- V. All communications from respondent to the Department concerning this order shall be directed to John K. Urda, Esq., at the address referenced in paragraph IV of this order.
- VI. The provisions, terms and conditions of this order shall bind respondent West 63 Empire Associates LLC, and its agents, successors and assigns, in any and all capacities.

New York State Department of
Environmental Conservation

/s/

By: _____
Joseph J. Martens
Commissioner

DATED: August 9, 2012
Albany, New York

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

In the Matter of the Alleged Violations
of Article 12 of the New York State
Navigation Law and Article 17 of the New York State Environmental Conservation
Law,

-by-

SUMMARY REPORT

DEC File No.
R2-20120409-201

WEST 63 EMPIRE ASSOCIATES LLC,

Respondent.

SUMMARY

This summary report recommends that the Commissioner grant an uncontested motion for order without hearing brought by Staff of the Department of Environmental Conservation (DEC Staff) and find West 63 Empire Associates LLC (respondent) liable for failing to comply with two specific terms of consent order R2-20110307-78 involving the remediation of a 2010 oil spill (DEC Spill #1007405) that occurred in a hotel boiler room. This report also recommends that the Commissioner include in his order a payable civil penalty of \$62,500.

PROCEEDINGS

By papers dated April 11, 2012, DEC Staff filed a motion for order without hearing with DEC's Office of Hearings and Mediation Services (OHMS). DEC Staff's papers consisted of a notice of motion, an affirmation in support of the motion by DEC Staff counsel John K. Urda, a copy of consent order R2-20110307-78, emails from DEC Staff to respondent's counsel, an affidavit by DEC Staff member Brian Falvey, and an affidavit of DEC Staff member Ryan Piper.

With a cover letter dated May 7, 2012, DEC Staff provided proof of service of the motion for order without hearing on respondent and its counsel on April 13, 2012.

On May 9, 2012, this matter was assigned to me.

As of the date of this report, no response has been received from respondent by either DEC Staff or OHMS.

FINDINGS OF FACT

1. Respondent West 63 Empire Associates LLC owns the property located at 44 West 63rd Street, New York (New York County Block 1115, lot 57) including the Empire Hotel. The site includes a petroleum bulk storage (PBS) facility #2-606133. The facility includes one 20,000 gallon aboveground tank storing number six fuel oil and one 350 gallon aboveground tank storing number two fuel oil.
2. On October 11, 2010, a petroleum tank cleaning and repair contractor reported a discharge of approximately 100 gallons of number six fuel oil at the facility (DEC Spill #1007405). At the time of the discharge, the facility's registration was invalid, having expired on June 27, 2006. Numerous attempts to get respondent to clean up the spill and respond to DEC Staff's inquiries were unsuccessful.
3. DEC Staff and respondent entered into consent order 20110307-78, effective February 17, 2012, to resolve numerous violations at the facility. Under the terms of the consent order, respondent agreed to pay a \$43,000 civil penalty and undertake certain corrective actions (consent order ¶ I).
4. Specifically, respondent was required within 15 days of the effective date of the order to submit documentation: (1) that the tanks at the facility are properly labeled and properly inspected; (2) that the unmarked number two oil fill port is properly marked with a green hexagon and that the number six fill port is identified as such; and (3) that an acceptable secondary containment system has been installed around the 20,000 gallon tank (consent order ¶ II, 1). Respondent failed to comply with consent order ¶ II, 1.
5. Respondent was also required within 15 days of the effective date of the order to submit documentation establishing proper cleanup and disposal activities including additional power washing and cleaning of the affected areas for NYSDEC spill number 1007405 (consent order ¶ II, 2). Respondent failed to comply with consent order ¶ II, 2.
6. Since the execution of the consent order, respondent has not communicated with DEC Staff.

DISCUSSION

In its motion for order without hearing, DEC Staff requests that the Commissioner issue an order finding respondent liable for two violations of consent order R2-20110307-78. Specifically, DEC Staff alleges respondent: (1) failed to timely submit documentation that the tanks at the facility are properly labeled and properly inspected, properly mark the number two oil fill port with a green hexagon and identify the number six fill port, and install an acceptable secondary containment system around the 20,000 gallon tank; and (2) failed to timely submit documentation establishing that proper cleanup and disposal activities had occurred, including additional power washing and cleaning of the affected areas for DEC Spill #1007405. DEC Staff also seeks a payable civil penalty of \$62,500 and requests that the Commissioner require the respondent to comply with the terms of the consent order.

LIABILITY

In this case, DEC Staff has moved for an order without hearing. Motions for order without hearing pursuant to 6 NYCRR 622.12 are the equivalent of summary judgment, and are governed by the standards and principles applicable to CPLR 3212 motions (see 6 NYCRR 622.12[d]). On the motion, Department staff bears the burden of establishing its entitlement to judgment as a matter of law on the violation charged (see Matter of Locaparra, Final Decision and Order of the Commissioner, June 16, 2003, at 4 [and cases cited therein]). Department staff carries its burden by producing evidence sufficient to demonstrate the absence of any material issue of fact with respect to each element of the causes of action that are the subject of the motion (see id.).

In this case, respondent has not appeared or in any way contested DEC Staff's motion. The record contains a copy of consent order R2-20110307-78 (Urda affirmation, Exh A). Paragraph II, 1 of the consent order required respondent, within 15 days of the effective date of the order, to submit documentation that the tanks at the facility are properly labeled and properly inspected, properly mark the number two oil fill port with a green hexagon and identify the number six fill port, and install an acceptable secondary containment system around the 20,000 gallon tank. These requirements are part of DEC's PBS program, established by Article 17 of the ECL and 6 NYCRR 613. DEC Staff member Falvey states in his affidavit that

the required documentation has not been submitted nor has respondent communicated with him about the matter (Affidavit of Brian Falvey dated April 1, 2012, ¶ 5). Based on this, the Commissioner should conclude that DEC Staff has met its burden of proof with respect to proving the first violation.

Regarding the second alleged violation, paragraph II, 2 of consent order R2-20110307-78 required respondent, within 15 days of the effective date of the order, to submit documentation establishing that proper cleanup and disposal activities had occurred, including additional power washing and cleaning of the affected areas for DEC Spill #1007405 (consent order ¶ II, 2). These requirements are part of DEC's oil spill response program established pursuant to Article 12 of the Navigation Law. DEC Staff member Piper states in his affidavit that the required documentation has not been submitted nor has respondent communicated with him about the matter (Affidavit of Ryan Piper, dated April 11, 2012, ¶ 6). Based on this, the Commissioner should conclude that DEC Staff has met its burden of proof with respect to proving the second violation.

Based on the above discussion, the Commissioner should conclude that respondent is liable for the two violations of the consent order alleged.

CIVIL PENALTY

In addition to a finding of liability, DEC Staff seeks a civil penalty of \$62,500. DEC Staff supports its request by citing ECL 71-1929 and Navigation Law § 192, which are applicable in this case. DEC Staff states that the first violation is a violation of the consent order relating to violations of Article 17 of the ECL and the second violation is a violation of Article 12 of the Navigation Law. ECL 71-1929 and Navigation Law § 192 authorize a civil penalty not to exceed thirty seven thousand five hundred dollars (\$37,500) and twenty five thousand dollars (\$25,000), respectively, for each violation, and an additional penalty per day that a violation continues.

DEC Staff also cites the Department's Civil Penalty Policy (DEE 1, issued June 20, 1990). DEC's Civil Penalty Policy sets forth a framework for calculating the appropriate amount of the civil penalty. The starting point of this calculation is the statutory maximum. In his affirmation, DEC Staff counsel Urda states that 40 days elapsed from the time respondent agreed to provide the required documentation to DEC Staff and the filing

of the instant motion and during this time, the violations continued. Based on this calculation, the total potential statutory maximum for the first violation is \$1.5 million and for the second violation \$1 million.

The next step set forth in the Department's Civil Penalty Policy is an analysis of the benefit component or an estimate of the economic benefit enjoyed by respondent as a result of delayed compliance. The Civil Penalty Policy states that every effort should be made to calculate and recover the economic benefit of non-compliance (Civil Penalty Policy, § IV.3). DEC Staff offers nothing in its papers regarding respondent's economic benefit from the alleged violation. While it is likely that respondent did enjoy some economic benefit from its failure to comply with the consent order, it is impossible to quantify this amount based on this record.

The next step required is an analysis of the gravity component, which reflects the seriousness of the violation. Two factors are identified as relevant to this analysis: (1) the potential harm and actual damage caused by the violation; and (2) the relative importance of the type of violation in the regulatory scheme (Civil Penalty Policy, § IV.4). With respect to the first violation, DEC Staff member Falvey states that the violation relating to DEC's PBS program are grave and important to DEC's regulatory framework (Falvey affidavit, ¶ 6). With respect to the second violation, DEC Staff member Piper states that the original spill was not properly contained and requires a proper cleanup without delay (Piper affidavit, ¶ 7).

Once the economic benefit and gravity components of a potential civil penalty are analyzed, the civil penalty amount should be adjusted using the following five factors: (1) the respondent's culpability; (2) violator cooperation; (3) history of non-compliance; (4) ability to pay; and (5) any unique factors that exist. In this case, only the violator's failure to cooperate is addressed in DEC Staff's papers. According to DEC Staff, respondent has failed to communicate with DEC Staff since the execution of the consent order, despite repeated attempts by DEC Staff members to reach respondent.

Based on the information in the record of this proceeding, the Commissioner should impose a payable civil penalty of \$62,500.

SITE REMEDIATION

In addition to a finding of liability and the imposition of a civil penalty, DEC Staff also asks the Commissioner to require respondent to comply with the terms of the consent order. This relief is unnecessary because the requirements in the consent order remain in effect and respondent is obligated to comply with the consent order.

CONCLUSIONS OF LAW

1. Respondent West 63 Empire Associates LLC violated paragraph II, 1 of consent order R2-20110307-78 by failing to submit documentation, within 15 days of the effective date of the order, that the tanks at the facility are properly labeled and properly inspected, that the unmarked number two oil fill port is properly marked with a green hexagon and that the number six fill port is identified as such, and that an acceptable secondary containment system has been installed around the 20,000 gallon tank.
2. Respondent West 63 Empire Associates LLC violated paragraph II, 2 of consent order R2-20110307-78 by failing to submit, within 15 days of the effective date of the order, documentation establishing proper cleanup and disposal activities including additional power washing and cleaning of the affected areas for DEC Spill #1007405.

RECOMMENDATION

Based on the record in this matter and the analysis above, the Commissioner should issue an order that finds that respondent West 63 Empire Associates LLC violated paragraphs II, 1 and II, 2 of consent order R2-20110307-78. The order should also impose a payable civil penalty of sixty-two thousand five hundred dollars (\$62,500).

/s/

Albany, New York
July 23, 2012

P. Nicholas Garlick
Administrative Law Judge

Exhibit List

Notice of Motion for an Order Without Hearing

Attached to Mr. Urda's affirmation:

Exh. A - Order on Consent #R2-20110307-78

Exh. B - Email from Urda to respondent's counsel 2/24/12

Email from Urda to respondent's counsel 3/14/12

Affidavit of Brian Falvey

Affidavit of Ryan Piper

Affidavit of service by Regina Seetahal