

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

In the Matter

- of -

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

- by -

**BENEDETTO DiCOSTANZO and  
EDKINS SCRAP METAL CORPORATION,**

Respondents.

DEC No. R2-20020924-299

DECISION AND ORDER  
OF THE COMMISSIONER

November 23, 2004

## DECISION AND ORDER OF THE COMMISSIONER

Staff of the New York State Department of Environmental Conservation ("Department" or "DEC") commenced this proceeding against respondents Benedetto DiCostanzo and Edkins Scrap Metal Corporation ("Edkins"), alleging that respondents failed to comply with a stipulation that they had entered into with the Department to cleanup and remove a discharge of petroleum.

The matter was assigned to Administrative Law Judge ("ALJ") P. Nicholas Garlick. In a ruling dated May 21, 2003 ("2003 Ruling") and a hearing report dated January 30, 2004 ("Hearing Report"), the ALJ held respondent Edkins liable and recommended a penalty of \$725,000. The ALJ, in the 2003 Ruling, held that Department staff failed to establish liability with respect to respondent DiCostanzo, individually and in addition to his capacity as president of Edkins.

I hereby affirm the 2003 Ruling and adopt the Hearing Report, to the extent consistent with this decision and order.

### FACTS AND PROCEDURAL BACKGROUND

Pursuant to the stipulation, respondent Edkins agreed to cleanup and remove a discharge of petroleum, which occurred on November 28, 2000, at 2265 Richmond Terrace, Staten Island (the "site"). Furthermore, respondent Edkins agreed to take the steps and follow the conditions set forth in the corrective action plan ("CAP") attached to the stipulation (see Stipulation, ¶ 2). As provided in the CAP, within forty-five days of the effective date of the stipulation (that is, October 4, 2001), respondent Edkins was to submit an investigation plan to the Department that detailed the scope of work proposed to investigate the nature and extent of the contamination caused by the discharge.

The stipulation, which was signed by Benedetto DiCostanzo, as President of Edkins, and the DEC regional engineer for Region 2, became effective on August 20, 2001. The stipulation, by its terms, is equivalent to an order pursuant to section 17-0303 of the Environmental Conservation Law ("ECL") and a direction pursuant to section 176 of the Navigation Law "and is enforceable as such" (Stipulation, ¶ 5).

### 2002 Complaint and Motion for Order Without Hearing

Department staff, in a complaint dated October 1, 2002, alleged that respondents failed to comply with the stipulation in

violation of ECL 17-0303 (first cause of action) and failed to comply with the stipulation in violation of Navigation Law § 176 (second cause of action). The complaint also referenced, as applicable law, ECL 71-1929 and Navigation Law § 192. ECL 71-1929 provides for a civil penalty for violations of titles 1 through 11 and title 19 of ECL article 17 or the rules, regulations, orders or determinations promulgated thereto. Navigation Law § 192 provides that any person who violates any provision of article 12 of the Navigation Law or fails to comply with any duty created by article 12 is subject to a civil penalty.

Simultaneous with the service of the complaint, Department staff served a notice of motion for an order without hearing, together with an affidavit of DEC engineer Steven Sangesland, sworn to September 30, 2002 ("Sangesland affidavit"), in support of the motion. The Sangesland affidavit states that Edkins failed to submit the investigation plan within the time period as required by the CAP (see Sangesland affidavit, ¶ 9).

Respondents, in their verified answer dated October 17, 2002, generally denied the allegations contained in the first and second causes of action. Benedetto DiCostanzo, in his affidavit sworn to October 17, 2002, did not dispute the allegation that Edkins failed to submit the investigation plan within the required time period. However, respondent DiCostanzo stated that certain actions had been taken to address the petroleum contamination at the site.

#### 2003 ALJ Ruling

The ALJ in the 2003 Ruling partially granted Department staff's motion for an order without hearing. The ALJ determined that Edkins's liability was established as a matter of law on the two causes of action alleged against it.

The ALJ, however, denied the motion for an order without hearing with respect to Benedetto DiCostanzo. The ALJ determined that respondent DiCostanzo signed the stipulation only in his capacity as president of Edkins and not in his individual capacity. The ALJ determined that respondent DiCostanzo was not a party to the stipulation and, accordingly, could not be found in violation of its terms.

With respect to penalty, the ALJ determined that issues of fact remained and, consequently, a hearing was required to determine the appropriate civil penalty amount.

## 2004 ALJ Hearing Report

The penalty hearing was held on August 11, 2003. Subsequently, the ALJ issued the Hearing Report in which he recommended that respondent Edkins be held liable for 361 violations of a duty imposed by Navigation Law § 176, and a single violation of a duty imposed pursuant to ECL 17-0303 that continued for 361 days (see Hearing Report, at 8).

At the rate of \$25,000 a day for each of the two violations, the ALJ calculated the maximum penalty for the violations of the ECL to be \$9,025,000 and for the violations of the Navigation Law to be \$9,025,000. Based on a review of the economic benefit Edkins enjoyed by failing to comply with the stipulation, the gravity of the violations, and other relevant penalty considerations, the ALJ recommended a penalty of \$725,000, \$25,000 to be immediately payable and \$700,000 to be suspended upon respondent Edkins's compliance with the stipulation.<sup>1</sup> The ALJ proposed that the suspended amount (\$700,000) be allocated among five stipulation milestones.

### DISCUSSION

#### Liability

In his 2003 Ruling, the ALJ properly granted Department staff partial summary judgment on the issue of respondent Edkins's liability for the first cause of action alleged against it in the complaint and, accordingly, I adopt the ALJ's conclusions on the issue. ECL 17-0303 grants the Department administrative jurisdiction to abate and prevent the pollution of the waters of the State, and authorizes the Commissioner to issue orders to effectuate such abatement. The stipulation entered into by respondent Edkins expressly provides that it was an order pursuant to ECL 17-0303. ECL 71-1929 provides that any person who violates an order of the Commissioner promulgated pursuant to ECL 17-0303 is liable for a civil penalty.

The papers and proof filed on the motion for an order without hearing established as a matter of law that respondent

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<sup>1</sup> At the time that Department staff's motion for order without hearing and the complaint were filed, the penalty amount established by Navigation Law § 192 and ECL 71-1929, respectively, was \$25,000 per day for each violation. Effective May 15, 2003, the maximum penalty amount under ECL 71-1929 was increased from \$25,000 to \$37,500.

Edkins violated the stipulation and, thus, an order issued by the Department pursuant to its authority under ECL 17-0303. Accordingly, Department staff demonstrated its entitlement to summary judgment on the issue of respondent Edkins's liability for a penalty pursuant to ECL 71-1929.

The ALJ also correctly granted Department staff partial summary judgment on the issue of respondent Edkins's liability for the second cause of action alleged against it in the complaint, and I adopt the ALJ's conclusions as to that claim. Navigation Law § 176 authorizes the Department to issue a directive for the voluntary cleanup and removal of petroleum discharges. The stipulation executed by respondent Edkins expressly indicates that it is a directive pursuant to Navigation Law § 176. A directive under section 176 is a duty imposed pursuant to article 12 of the Navigation Law. Navigation Law § 192 provides that any person who fails to comply with a duty imposed under article 12 is liable for a civil penalty. On the motion for an order without hearing, Department staff established as a matter of law that respondent Edkins violated the stipulation and, thus, failed to comply with a duty imposed under article 12. Accordingly, staff demonstrated its entitlement to summary judgment on the issue of respondent Edkin's liability for a penalty pursuant to Navigation Law § 192.

With respect to respondent DiCostanzo, I adopt the ALJ's discussion and conclusion in his 2003 Ruling that Department staff failed to establish respondent DiCostanzo's liability for either cause of action alleged as against him. Accordingly, the first and second causes of action, insofar as asserted against respondent DiCostanzo, should be dismissed.

#### Penalty

I concur in part with the proposed penalty the ALJ recommended in his Hearing Report. The ALJ recommended a civil penalty of \$725,000, which is appropriate based on the record of this proceeding. I also agree that \$700,000 of this penalty should be suspended. However, I conclude that the suspension of the \$700,000 should be tied in its entirety to the completion of the remediation at the site, and not divided among various stipulation milestones. Accordingly, the penalty amount to be suspended (\$700,000) shall be contingent upon respondent complying with the stipulation and implementing in full the remediation required, in addition to complying with the obligations imposed by this decision and order.

## Scope of Remediation

Remediation of the site according to a Department-approved plan was demanded in the Department's complaint. At the hearing, Department staff claimed that tidal wetlands adjacent to the site had been illegally filled with soil, car parts, and construction and demolition debris, and recommended the removal of all of the petroleum contaminated soil, construction and demolition debris, and solid waste at the site to the original pre-filled wetlands boundaries (see, e.g., Hearing Transcript, at 49-50). In its closing brief, Department staff requested that respondent Edkins be directed to remove all soils, fill and debris from the allegedly illegally filled tidal wetland area.

The ALJ stated in his report (see Hearing Report, at 7) that the removal of fill not contaminated by petroleum was a remedy available to the Department in a proceeding under other articles of the ECL. The ALJ concluded that since such relief was not requested in the complaint and no other articles of the ECL were referenced in the stipulation, Staff was now precluded from seeking such relief in this proceeding.

I concur with the ALJ's conclusions. To the extent that any contamination in the tidal wetlands arises from the petroleum discharge which occurred on November 28, 2000, or respondent's failure to remediate the site as agreed, respondent is committed, by the stipulation, to cleanup and remove any contaminated material. To the extent that there may be violations at the site other than those relating to the November 28, 2000 discharge, the stipulation states that it "does not affect the Department's right to pursue any claims that the Department may have against Respondent, including but not limited to, claims for alleged violations of the Navigation Law or the Environmental Conservation Law" (Stipulation, ¶ 3). However, any such violations, other than those relating to or arising from the November 28, 2000 discharge, or respondent's failure to remediate the site as required by the stipulation, were not pleaded and are not before me in this proceeding.

**NOW, THEREFORE**, having considered this matter, it is **ORDERED** that:

- I. Respondent Edkins is adjudged to have violated the stipulation effective August 20, 2001, by failing to submit an investigation plan by October 4, 2001, as required by the corrective action plan attached to the stipulation.

- II. The obligation of respondent Edkins to submit the investigation plan is ongoing and continuous and its failure to do so is a violation of a duty imposed pursuant to ECL 17-0303 and a duty imposed pursuant to Navigation Law § 176. Accordingly, respondent Edkins is liable for a civil penalty pursuant to ECL 71-1929 and Navigation Law § 192, respectively.
- III. Respondent Edkins is assessed a civil penalty in the amount of seven hundred and twenty-five thousand dollars (\$725,000). Of this amount, twenty-five thousand dollars (\$25,000) shall be due and payable immediately. Payment of this penalty shall be by cashier's check, certified check or money order drawn to the order of "NYSDEC" and sent by overnight delivery or by certified mail or hand-delivered to the Department's Region 2 Director, NYS DEC Regional Headquarters, 47-30 21<sup>st</sup> Street, Long Island City, New York, 11101-5407. Department staff shall allocate fifty percent of the penalty received to the General Fund and fifty percent to the Environmental Protection and Spill Compensation Fund.
- IV. The payment of the remaining seven hundred thousand dollars (\$700,000) shall be suspended upon the condition that respondent Edkins timely performs, to the satisfaction of Department staff, the remedial activities set forth in the corrective action plan attached to the stipulation. In the event respondent Edkins fails to timely perform, to the satisfaction of Department staff, any of the activities set forth in the corrective action plan or the obligations imposed in this decision and order, the suspended penalty shall immediately become due and payable. Payment shall be made in the manner provided for in paragraph III above.
- V. Respondent Edkins must submit the investigation plan to the Department within sixty (60) days of the date of this order. All other time periods specified in the corrective action plan attached to the stipulation shall apply to the remedial activity, unless modified at the discretion of Department staff.
- VI. Respondent Edkins shall provide Department staff with access to enter and inspect the site to ascertain respondent's compliance with the terms and conditions of this decision and order.

- VII. All communications between respondent Edkins and the Department concerning this decision and order shall be made to the Department's Region 2 Director, 47-40 21st Street, Long Island City, NY 11101-5407.
- VIII. The provisions, terms and conditions of this decision and order shall bind Edkins, its successors and assigns, in any and all capacities.
- IX. The first and second causes of action, insofar as asserted against respondent DiCostanzo, are dismissed.

NEW YORK STATE DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION



By: Erin M. Crotty, Commissioner

Dated: Albany, New York  
November 23, 2004

To: (Via Certified Mail)  
Mr. Benedetto DiCostanzo  
c/o Edkins Scrap Metal Corporation  
2267 Richmond Terrace  
Staten Island, NY 10302-1246

(Via Certified Mail)  
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47-40 21st Street  
Long Island City, NY 11101-5407

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
625 Broadway  
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In the Matter

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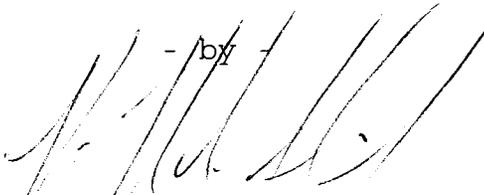
In the Matter of the Alleged Violations of Article 17  
of the New York State Environmental Conservation Law  
and Article 12 of the New York State Navigation Law by

**Benedetto DiCostanzo and  
Edkins Scrap Metal Corporation**

Respondents.

DEC Case # R2-20020924-299

HEARING REPORT

- by -  
  
\_\_\_\_\_  
P. Nicholas Garlick  
Administrative Law Judge

## SUMMARY

This matter involves the clean-up of various petroleum products at an auto scrap yard on Staten Island, immediately adjacent to the Kill Van Kull waterway. Staff of the Department of Environmental Conservation ("DEC Staff") and respondent Edkins Scrap Metal Corporation ("ESMC") entered into a Stipulation to clean up petroleum at the site which became effective on August 20, 2001. The Stipulation did not require the payment of any civil penalty but rather established a series of milestones that respondent ESMC would meet to investigate and remediate the petroleum contamination. Respondent ESMC failed to meet the first milestone, the production of an Investigation Plan, which was due October 5, 2001, and missed all subsequent milestones. Nearly a year later, DEC Staff sought to have the Stipulation enforced through DEC's administrative enforcement hearing process. After finding the respondent ESMC liable and the respondent DiCostanzo not liable for the alleged violations on DEC's summary judgment motion, a hearing on the appropriate penalty amount was held. The ALJ recommends that the Commissioner issue an Order that finds respondent ESMC liable, orders the immediate payment of a \$25,000 civil penalty, and suspends the remaining \$700,000 penalty upon the condition that the milestones in the Stipulation are met in a timely fashion. The ALJ further recommends that the Commissioner reject DEC Staff's request that the Order contain remediation related to alleged violations of laws relating to solid waste and tidal wetlands because DEC Staff did not allege these violation in its Complaint and the respondents were not put on notice of these alleged violations.

## PROCEEDINGS

This enforcement matter was commenced by DEC Staff by the filing of a Complaint and a Notice of Motion for an Order Without Hearing dated October 1, 2002. In the Complaint, DEC Staff alleged that the Respondents, ESMC and Benedetto DiCostanzo, failed to comply with a duly executed Stipulation between ESMC and DEC Staff. This Stipulation, which by its express terms, is equivalent to an order pursuant to ECL §17-0303 and a directive pursuant to NL §176. Specifically, DEC Staff alleges that the Respondents failed to timely submit an Investigation Plan, as required by the Stipulation. In the complaint, DEC Staff seeks a Commissioner's Order finding the respondents in violation of the Stipulation and consequently in violation of a duty imposed by Article 17 of the Environmental Conservation Law ("ECL") and a

duty imposed by Article 12 of the Navigation Law ("NL"). DEC Staff sought a Commissioner's Order levying a penalty of \$4,512,500, and directing respondents to remediate the site according to a plan approved by DEC Staff.

By papers dated October 18, 2002, respondents opposed DEC Staff's motion and submitted an answer. In their answer, the Respondents include a blanket denial to all assertions in the complaint, except an admission that respondent ESMC occupies the site and that respondent DiCostanzo is its President. Respondents sought a ruling denying DEC Staff's motion and asserted that a dispute of material fact existed regarding liability, but did not state what the dispute was. Respondents did not contend that they provided the Investigative Plan required by October 5, 2001 as a condition of the Stipulation.

On May 21, 2003, the ALJ denied DEC Staff's motion with respect to respondent DiCostanzo because DEC Staff has failed to demonstrate its entitlement to judgment as a matter of law and has not shown that Mr. DiCostanzo, individually, is liable for the violations alleged. Mr. DiCostanzo did sign the Stipulation, however, only in his capacity as President of ESMC. With respect to respondent ESMC, the ALJ ruled DEC Staff was entitled to summary judgment, as a matter of law on the issue of liability and found ESMC committed 722 violations: 361 in violations of a duty imposed by Article 12 of the NL; and 361 violations of a duty imposed by Article 17 of the ECL. Specifically, ESMC failed to comply with the terms of a Stipulation between it and DEC Staff. Finally, the ALJ ruled that a hearing was necessary to develop the record regarding an appropriate civil penalty amount.

A hearing was held on August 11, 2003 at DEC's Region 2 Headquarters, 47-40 21<sup>st</sup> Street, Long Island City, New York. At the request of Respondents' counsel, eight weeks were provided prior to the hearing so that he could secure the necessary expert and other witnesses. At the hearing, DEC Staff was represented by David S. Rubinton, Esq. and the respondents were represented by Felix T. Gilroy, Esq. DEC Staff called two staff members as witnesses: Mr. Steven Sangesland, Environmental Engineer 1 and an expert in oil spill remediation; and Mr. George Stadnick, a Marine Resource Specialist and an expert in tidal wetlands. Respondents called one witness, Mr. DiCostanzo. A total of thirteen exhibits were received in evidence, 9 by DEC Staff and 4 by the Respondents.

The transcript of the hearing was not received until September 26, 2003 and a briefing schedule was established. A week before briefs were due, respondents' counsel requested a

delay in the briefing schedule and provided an affirmation of engagement stating he was engaged in a trial in Supreme Court, Kings County. The briefing schedule was adjusted. Closing briefs were timely received from DEC Staff on November 28, 2003 and from respondents on December 1, 2003. A reply brief was timely received from DEC Staff on December 10, 2003. No reply brief was received from respondents and the hearing record closed on December 15, 2003.

#### **DEC Staff's Position**

DEC Staff seeks the maximum monetary penalty be imposed, which by its calculation is \$9,025,000. In addition, DEC Staff seeks the full remediation of the site, which includes removal of all petroleum contaminated soil, construction/demolition debris and solid waste at the site to re-establish tidal wetland boundaries which existed sixteen or more years ago.

#### **Respondents' Position**

Respondents acknowledge that certain cleanup work must be performed at the site. Respondents argue that its failure to comply with the Stipulation was due unforeseen personal financial difficulties experienced by Mr. DiCostanzo and that now he is in a position to begin cleanup at the site and is now in a position to dedicate \$250,000 to the cleanup of the site with a continuing ability to dedicate \$5,000 per month. Respondents ask that any civil penalty be suspended pending the ongoing implementation of respondents' plan to remove contaminants and cleanup the premises.

### **FINDINGS OF FACT**

1. ESMC operates an active auto scrap yard at 2265 Richmond Terrace, Staten Island, New York (the "site").
2. Benedetto DiCostanzo is the President of the Corporation.
3. According to respondents, the site has been used as an auto scrap yard for fifty years or more.
4. The site is adjacent to the Kill Van Kull waterway.

5. On two visits to the site on September 28, 1987 and October 11, 1988, George Stadnik, a member of DEC Staff, observed soil contaminated with petroleum and other fluids typically found in an auto salvage yard, including gasoline, brake fluid, rear end fluids and coolants.
6. A discharge of petroleum occurred at the site on or about November 28, 2000 (DEC Spill No. 0009768). This discharge was observed by Mr. Steven Sangesland, a member of DEC Staff, on December 1, 2000 when he inspected the site. During this visit, he observed gasoline mixed with mud in many areas of the site. He also observed a large open tank filled with oil which had mixed with rain water and overflowed, creating leachate.
7. Respondent ESMC and DEC Staff negotiated a Stipulation that was signed by Mr. DiCostanzo on March 1, 2001, as President of ESMC.
8. On March 20, 2001, Mr. Sangesland of DEC Staff again inspected the site and observed that the discharge had not been cleaned up, that several large pools of oil remained on the surface and a constant stream of petroleum continued to leach from the site into the Kill Van Kull. He took six photos of the petroleum spills that day (Exh. 2, 3 & 4).
9. On August 20, 2001, DEC Staff signed the Stipulation and it then became effective. By its express terms, the Stipulation is equivalent to an order pursuant to ECL §17-0303 and a directive pursuant to NL §176.
10. Under the terms of the Stipulation, DEC Staff and respondent ESMC agreed that no monetary penalty would be imposed. Rather, the respondent ESMC would clean up and remove the discharge according to a schedule included in a Corrective Action Plan, which was attached to the Stipulation. Specifically, the Corrective Action Plan required respondent ESMC to submit to DEC Staff for approval an Investigation Plan detailing the scope of work proposed to investigate the nature and extent of the contamination within 45 days from the effective date of the Stipulation.
11. Such Investigation Plan was due October 5, 2001.
12. As of the date of this hearing report, respondent ESMC had not submitted an Investigation Plan.
13. Within 30 days of DEC Staff's approval of the Investigation Plan, the Respondent ESMC was required to provide a Corrective Action Plan and submit a report to DEC Staff. The

Corrective Action Plan would describe how respondent ESMC would complete the work described in the Investigation Plan

14. The Corrective Action Plan also required that within 30 days of the completion of the investigation, respondent ESMC was required to submit a Remediation Plan to DEC Staff detailing the work proposed to remediate the contamination caused by the spill.
15. Finally, the Corrective Action Plan required that within 30 days of receipt of DEC Staff's approval of the Remediation Plan, respondent ESMC was to implement such Plan.
16. Respondent ESMC never contacted DEC Staff regarding the missed deadlines.
17. On July 3, 2003, Mr. Sangesland of DEC Staff again inspected the site. He observed a slight improvement in conditions, he estimated that between 15-20% of the problems had been addressed. However, major problems from petroleum contamination continued throughout the entire property, including several acres of open petroleum on the ground and standing puddles of petroleum. He took eight photos (Exh. 5). These photo show: an oil tank that had been cut in half and was used to burn miscellaneous car parts and wooden pallets, piles of junked cars with oil and contaminated soils, oil slicks on top of accumulated rain water on the ground, and areas of fill along the shoreline containing old car parts.
18. On July 3, 2003, Mr. Stadnik also inspected the site and he took sixteen photographs (Exh. 9). These photographs show: areas of supersaturated soil in areas where car parts are stacked, petroleum stains on the ground, leachate adjacent to the shoreline and wetlands area, places where leachate enter the Kill Van Kull and the adjacent wetlands, areas where car parts are immediately adjacent to the Kill Van Kull, and solid waste that was used to as fill.
19. Mr. Sangesland, an expert in petroleum spills remediation, estimates that it would cost between \$50,000-\$100,000 to investigate the contamination on the site. While reluctant to hazard an opinion as to how much remediation would cost, he thought it could be in the range of \$1,000,000.

## APPLICABLE LAW

In a DEC administrative enforcement hearing, DEC Staff bears the burden of proof on all charges (6 NYCRR 622.11[b][1]). DEC Staff must sustain its burden of proof by a preponderance of the evidence (6 NYCRR 622.11[c]).

## DISCUSSION

In its complaint, DEC Staff seek a Commissioner's Order finding the Respondents violated the Stipulation, imposes a civil penalty and requires remediation of the site according to a plan approved by DEC Staff. The complaint alleges two causes of action both arising from the Respondents failure to comply with the Stipulation. The first cause of action alleges this failure is a violation of Article 17 of the ECL, the second alleges this failure is a violation of Article 12 of the NL.

In its closing brief, DEC Staff now ask for an Order of the Commissioner that also addresses alleged violations relating to Article 25 (Tidal Wetlands) and Article 27 (Solid Waste) of the ECL. According to DEC Staff, over the past two decades solid waste has been used to fill an area of tidal wetland/and or open water adjacent to the site. DEC Staff now seek removal of this fill in this proceeding. Evidence regarding this alleged illegal filling was presented at the hearing by DEC Staff. The Respondents' counsel objected to its inclusion in the record and I overruled the objection. I now find that this evidence is irrelevant to the case at hand because this evidence goes to violations not alleged in the complaint.

George Stadnik, a DEC expert in tidal wetlands, testified that on September 28, 1987 he visited the site with his supervisor, Charles Hamilton. The purpose of the visit was to investigate reports of illegal filling of tidal wetlands at the site. During this visit he observed recent landfilling at the site into the Kill Van Kull. Much of the fill was in the form of solid waste and crushed, bulldozed car parts. Before his visit, Mr. Stadnik consulted the official Tidal Wetlands map for the area in which the site is located, map #572-498, designated on August 20, 1977. A photocopy of the portion of the map depicting the shoreline of the Kill Van Kull and the site was introduced at the hearing (Exh. 7). Mr. Stadnik did not report seeing any petroleum residue at the site during this visit.

On October 11, 1988, Mr. Stadnik returned to the site with Environmental Conservation Officer ("ECO") Edward Moore to investigate another complaint of additional landfilling at the site. During this visit measurements of the amount of fill were taken. Mr. Stadnik provided a sketch of where the landfilling occurred on a copy of the Tidal Wetlands map (Exh. 8). Apparently, in after the 1988 visit, the ECO issued an administrative ticket and notice of violation. There is nothing in the record regarding the disposition of these. During this visit, Mr. Stadnik testified that he observed leachate and dark stains in the soil.

Mr. Stadnik returned to the site on July 3, 2003 with Mr. Sangesland and observed a significant change in the shoreline due to filling that had occurred since 1988. In addition, he observed concrete backwash poured on top of the fill, solid waste along the shoreline and concrete block installed landward to contain leachate from the site. He also observed continuing leaching of petroleum and other fluids from the site.

Mr. Stadnik testified that DEC Staff was seeking to have a survey done of the site to determine the official Tidal Wetlands boundary and that all fill beyond that line would have to be removed. Then the shoreline would have to be stabilized which could be done using a steel bulkhead, concrete wall, natural quarry stone or other material.

In its closing brief, DEC Staff argues that the only sound approach to addressing the many environmental problems at the site is to remove all of the petroleum contaminated soil, construction/demolition debris and solid waste at the site so as to restore the original, pre-fill tidal wetlands boundaries. Logically and scientifically this may be true, however, legally this case is not the vehicle to achieve such a result. The violations alleged in this matter all arise from the Respondent's failure to comply with a Stipulation executed pursuant to Article 17 of the ECL and Article 12 of the NL. The removal of uncontaminated solid waste and the removal of uncontaminated fill, illegally placed in a tidal wetland are remedies available for violations of other articles of the ECL. However, in this case, no such violations were addressed in the Stipulation nor are any alleged in the complaint and the Respondent has not been put on notice regarding these alleged violations. If DEC Staff seeks these remedies it must do so in a separate enforcement action.

Accordingly, the only remedies available to DEC Staff at this time are those requested in the complaint: the imposition of

a civil penalty for failure to comply with the Stipulation and an order directing compliance with the Stipulation. DEC Staff was free when it drafted its Complaint to allege violations relating to tidal wetlands, solid waste or other violations related to petroleum. Paragraph 3 of the Stipulation is explicit in that it "does not affect the Department's right to pursue any claims that the Department may have against Respondent, including but not limited to, claims for the alleged violations of the Navigation Law or the Environmental Conservation Law. This Stipulation does not affect any defenses that Respondent may have to any such claims". For whatever reason, DEC Staff chose only to allege a violation of the Stipulation, which by its caption is limited only ECL article 17 and NL article 12. In the instant proceeding, DEC Staff is now limited to the relief sought in the complaint.

### ***Number of Violations and Maximum Penalty Calculation***

In my Ruling on Motion for Order Without Hearing released on May 21, 2003, I determined the respondent ESMC failed to comply with the terms of a Stipulation between it and DEC Staff. I calculated the Respondent had committed 722 violations: 361 in violations of a duty imposed by Article 12 of the Navigation Law ("NL"); and 361 violations of a duty imposed by Article 17 of the Environmental Conservation Law ("ECL").

Section 192 of the NL provides a maximum penalty of \$25,000 per violation and states that "if the violation is of a continuing nature each day during which it continues shall constitute an additional, separate and distinct offense". The Investigation Plan was due on October 5, 2001, as required by the Stipulation and DEC Staff made its motion on October 1, 2002. Thus, a total of 361 days elapsed and a total of 361 violations occurred, at \$25,000 per day the maximum penalty for violations of the Navigation Law is \$9,025,000.

Section 71-1929 of the ECL provides a maximum penalty of \$25,000 per day for each violation. However, unlike NL section 192, it does not provide that each day of violation is a separate violation. Therefore, in the May 21, 2003 Ruling when I found 361 violations of the ECL, I more accurately should have made a finding that a single violation occurred and continued for 361 days. Thus, the maximum penalty for violations of the ECL is also \$9,025,000.

### ***Benefit Component***

Estimating the economic benefit enjoyed by respondent ESMC due to its delayed compliance with the Stipulation can be done by multiplying an appropriate estimate of the time value of money, the amount of the cost delayed, and the length of time of the delay. In this case, the length of time of delay is approximately one year, the time between when the Investigation Report was due and the time DEC Staff filed its complaint. The only estimates of the cost of cleanup in the record is in the form of testimony by both DEC Staff witnesses who estimated clean-up could be as much as \$1,000,000. The time value of money can be estimated by using the inflation rate, which for this period was approximately 1.6%. The product of \$16,000 is a reasonable estimate of the economic benefit enjoyed by respondent ESMC and the civil penalty imposed in this matter should not be less than this amount.

### ***Gravity Component***

There are two factors to consider when evaluating the gravity of a violation: 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. As a general proposition, the longer a violation continues uncorrected or unremediated, the greater the risk of harm and the loss of benefit from the natural resource and, correspondingly, the greater the size of the gravity component. In this case, while the violations alleged in the complaint occurred for approximately one year, DEC Staff testified that it had been aware of the contamination at the site since at least September 1987. At the hearing, DEC Staff did not introduce any evidence regarding: amounts or toxicity of releases at the site, amount and degree of actual or potential damage to natural resources, or the sensitivity of the area of the environment affected. This type of violation, compliance with Orders of the Department is very important to the regulatory scheme. Therefore, the gravity of these violations should tend to increase the severity of the penalty in this case.

### ***Penalty Adjustments***

There is no question that respondent ESMC has a high degree of culpability for the violations because production of the Investigation Report was solely its responsibility and failure to take steps to ensure the production of the report would obviously be a violation of the Stipulation. Respondent ESMC has not

cooperated in this matter and no effort was made to contact DEC Staff when the violation was imminent or was occurring. There is nothing conclusive in the record regarding any history of non-compliance. DEC Staff did testify that several violations were charged in 1987 but there is nothing in the record regarding the disposition of these alleged violations.

Mr. DiCostanzo testified that ESMC had taken steps toward remediating the conditions at the site. First, he testified he had put "millings" (recycled asphalt from streets) down on the ground in an attempt to absorb some of the leachate. However, these millings did not work as well as he had hoped. Second, Mr. DiCostanzo testified that he had bought a "gas buggy" (a self contained fuel/solvent transfer unit) to recycle some of the petroleum products in the junked cars. However, at the time of the hearing, this equipment was not yet in use, though it was anticipated to be used in the near future. Third, Mr. DiCostanzo testified that in response to an inspection by DEC Officers in 1999 or 2000, that he had installed cement blocks approximately ten feet from the shore and taken other steps to address the problems of leachate entering the Kill Van Kull. According to Mr. DiCostanzo, about two weeks after this work was done, these officers apparently returned and complimented him on the work. In addition, Mr. DiCostanzo testified that members of the Coast Guard approached the site while these steps were being taken and also complimented him on his efforts. No evidence, other than his testimony was offered on this point. Fourth, Mr. DiCostanzo presented a copy of a contract he had entered into on August 8, 2003 with the Whitman Companies to begin cleanup at the site. He also produced a cancelled check for \$2,500 to retain the Whitman Companies. Since the contract was entered only three days before the hearing, the work had apparently not begun. None of these steps taken indicate that respondent ESMC was cooperating with DEC Staff to address the violation of the Stipulation and accordingly, no adjustment in penalty is appropriate.

Regarding respondent's ability to pay, Mr. DiCostanzo, President of the Respondent ESMC, testified that he had signed the Stipulation in good faith but that unforeseen financial difficulties had made it impossible for him to accumulate the financial resources necessary to fulfill his commitments under the Stipulations. He testified that he was in the process of selling some property to raise funds and had difficulty securing a buyer and paying the taxes on the property, which forced him to refinance his home. The Respondent ESMC did not offer any other evidence regarding its inability to pay the costs of compliance with the Stipulation. As of November 1, 2002, Mr. DiCostanzo testified that he had entered into a lease/purchase arrangement

on this property which alleviated this difficulty and now had the resources to go forward with remediation. Throughout his testimony, Mr. DiCostanzo made little attempt to differentiate between his personal finances and those of the corporation.

### ***Penalty Recommendation***

As is often the case in DEC enforcement cases, the range of penalty for the alleged violations is enormous, from a minimum of \$16,000 to over \$9 million. In this case, I believe the clean-up of the site is paramount and given the photographs of the extent of the contamination, the estimates of remediation cost of \$1 million do not seem unreasonable. The amount of payable civil penalty should be enough to eliminate any economic benefit, while recognizing the gravity of the violations, and not divert unnecessarily financial resources of the respondent so that it cannot continue remediation efforts at the site. Also, it must be remembered that in the initial enforcement case resulting in the Stipulation, DEC Staff received no civil penalty. Weighing these considerations, I recommend the Commissioner impose a civil penalty of \$25,000 that shall be payable immediately.

As the record demonstrates, the petroleum discharge at the site needs to be remediated promptly. In its complaint, DEC Staff allege violations of the Stipulation and therefore it is appropriate the relevant terms, conditions and milestones be incorporated into the Commissioner's Order. However, given the fact that the respondent ESMC failed to comply with the Stipulation, it is appropriate to include suspended penalties to assure compliance with the Commissioner's Order. I have identified five important milestones in the Stipulation, which it is appropriate for the Commissioner to attach significant suspended penalties. I recommend that a total of \$700,000 in suspended penalties be imposed subject to the respondent ESMC meeting the five significant Stipulation milestones included in the Order.

The first \$100,000 should be suspended if, within 45 days of this Order, respondent ESMC submits in acceptable form an Investigation Plan to DEC Staff for its approval. Such Investigation Plan shall detail the scope of work proposed to investigate the nature and extent of the contamination at the site.

A second \$100,000 should be suspended if, within 30 days of the approval of DEC Staff of the Investigation Plan, respondent ESMC conducts the work detailed in the Investigation Plan and submits a report based on the information gathered through the Investigation Plan.

A third \$100,000 should be suspended if: (1) within 30 days of the completion of the investigation, respondent ESMC submits a Remediation Plan to DEC Staff detailing the work proposed to remediate the contamination at the site and including deadlines which DEC Staff shall either approve or disapprove in writing; and (2) if the submittal is disapproved, DEC Staff shall specify any deficiencies and the required modifications and within 30 days of receipt of DEC Staff's disapproval notice, respondent ESMC shall submit a revised Remediation Plan which addresses DEC Staff's comments, correcting all deficiencies identified in the disapproval notice.

A fourth \$100,000 should be suspended if, within 30 days of receipt of DEC Staff's notice of approval of the Remediation Plan, respondent ESMC implements such plan.

The final \$300,000 should be suspended if all actions called for in the Remediation Plan approved by DEC Staff are completed within the timeframe set forth in the plan.

These suspended penalties should provide adequate incentive for the respondent ESMC to comply this time. As to the other remedies sought by DEC Staff, a finding of liability against Mr. DiCostanzo, personally and remediation at the site for violations related solely to solid waste and tidal wetlands, this case is not the vehicle by which this relief can be granted.

### **CONCLUSION**

DEC Staff has met its burden of showing that respondent ESMC violated the terms of a Stipulation, and have failed to show respondent Benedetto DiCostanzo is liable for the violations. The payment of an appropriate civil penalty and remediation of the site should be required.

### **RECOMMENDATION**

The Commissioner should issue an Order which:

1. Finds respondent ESMC liable for 361 violations of a duty imposed by article 12 of the Navigation Law and for a single violation of a duty imposed by article 17 of the ECL which continued for 361 days,
2. Finds, based upon the record of this proceeding, respondent Benedetto DiConstanzo not liable for any of the alleged violations,

3. Imposes a civil penalty of \$25,000 immediately payable, and
4. Imposes a suspended civil penalty of \$700,000 conditioned upon the respondent ESMC's meeting five milestones contained in the Stipulation and incorporated in the Commissioner's Proposed Order.

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## APPENDIX A

### LIST OF EXHIBITS

Exhibit #	Description
1	Resume of Steven Sangesland
2	Two photos of site taken 3/20/01 by Mr. Sangesland
3	Two photos of site taken 3/20/01 by Mr. Sangesland
4	Two photos of site taken 3/20/01 by Mr. Sangesland
5	Eight photos taken 7/3/03 by Mr. Sangesland
6	Resume of George Stadnik
7	Photocopy of portion of Tidal Wetlands Map #572-498
8	Exhibit 7, with cross-hatched area indicating fill
9	Sixteen photos taken 7/3/03 by Mr. Stadnik
10	Six page Proposal (#17418) from The Whitman Companies, Inc. to commence investigation and cleanup at the site, dated August 5, 2003
11	Three page contract for professional environmental services between ESMC and The Whitman Companies executed August 8, 2003.
12	Cancelled check from ESMC to Whitman Companies, down payment for services.
13	Instruction and Operations Manual for "Gas Buggy"