STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

---

In the Matter of the Alleged Violations of Article 17 of the New York State Environmental Conservation Law ("ECL"), Article 12 of the New York State Navigation Law and Title 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("17 NYCRR"),

ORDER

DEC File No.
R2-20130905-376

-by-

**AMERICAN AUTO BODY & RECOVERY INC. and SALVATORE S. "SAMMY" ABATE,**

Respondents.

---

This administrative enforcement proceeding addresses charges that American Auto Body & Recovery Inc. and Salvatore S. "Sammy" Abate ("respondents") allegedly violated the New York State Navigation Law as a result of a discharge of petroleum. American Auto Body & Recovery Inc. is an active domestic business corporation engaged in the business of towing and repairing motor vehicles located at 60-05 Flushing Avenue, Maspeth, Queens, New York ("site"). Salvatore S. "Sammy" Abate is the owner, manager and operator of American Auto Body & Recovery Inc.

## Background

Staff of the New York State Department of Environmental Conservation ("Department" or "DEC") served a notice of hearing and complaint upon respondents by certified mail on May 9, 2014.

Department staff's complaint alleges four causes of action related to events that occurred between May 16 and May 22, 2012. According to the complaint, respondents, who have a contract with the New York City Police Department ("NYPD") to tow and store abandoned vehicles, were contacted by the NYPD to remove an abandoned, stolen tractor-trailer[1] from Laurel Hill Boulevard in Queens, New York. Respondents brought it to their facility at 60-05 Flushing Avenue, Maspeth, Queens, on May 16, 2012. The trailer was filled with petroleum product and was visibly leaking that product.

The tractor and the trailer, which were separately owned, were stored at respondents' site from May 16, 2012 to May 18, 2012. On May 18, the owner of the tractor arrived at the facility to take possession of the tractor. Mr. Abate refused to release the tractor without the attached leaking trailer. He told the tractor owner that if he

[1] The trailer is also referred to as a "tanker" in staff's papers (see Affirmation of John K. Urda, Esq., in Support of Amended Motion for a Default Judgment and Order, dated July 23, 2015, ¶ 16).

did not take both units, the tractor owner would be charged additional storage fees. Mr. Abate advised the tractor owner to take the trailer from the site and abandon it on a city street. The tractor owner did so, and the trailer continued to discharge petroleum product.

The four causes of action in staff's complaint are as follows:

- First cause of action: by releasing a trailer leaking petroleum to the owner of the tractor, a party unauthorized to take possession of the trailer, respondents violated ECL 71-2711(3);
- Second cause of action: by allowing the tractor-trailer discharging petroleum to be taken from respondents' site and driven on public highways, respondents violated Navigation Law § 173;
- Third cause of action: by failing to report to the Department as to the petroleum discharge from the trailer, respondents violated Navigation Law § 175, 17 NYCRR 32.3 and ECL 17-1743;[2] and
- Fourth cause of action: by failing to contain or cleanup the petroleum discharge from the leaking trailer, respondents violated Navigation Law § 176 and 17 NYCRR 32.5.

Department staff requested an order: (1) holding respondents liable for the violations alleged in the complaint; and (2) ordering respondents to pay a civil penalty in the amount of $75,000.

Respondents failed to answer the complaint, although their answers were due on or before May 29, 2014, and respondents failed to appear at the scheduled pre-hearing conference on June 4, 2014. By papers dated June 4, 2014, Department staff moved for a default judgment and order.

The matter was assigned to administrative law judge ("ALJ") P. Nicholas Garlick. In a prior ruling in this proceeding, the Commissioner agreed with the ALJ that Department staff was not entitled to a default judgment on the first cause of action. The alleged violation is a class A misdemeanor and the DEC administrative hearing process is not the appropriate forum to try this allegation (see Matter of American Auto Body & Recovery Inc., Ruling of the Commissioner, July 2, 2015, at 4). Accordingly, Department staff's motion for default with respect to the first cause of action was denied and the first cause of action dismissed (see id.). Subsequently, staff filed an amended motion dated July 23, 2015 for a default judgment and order which omitted the request that respondents be found liable for a violation of ECL 71-2711(3) as had been set forth in the original complaint's first cause of action.

ALJ Garlick prepared the attached default summary report, which I hereby adopt as my decision in this matter subject to my comments below.

[2] Department staff, in its amended motion for a default judgment and order dated July 23, 2015, did not request that a violation of ECL 17-1743 be found (see also Matter of American Auto Body & Recovery Inc., Ruling of the Commissioner, July 2, 2015, at 2 n1) and, accordingly, that alleged violation is not addressed here.

**Liability**

--Second, Third and Fourth Causes of Action

The ALJ recommends that Department staff's motion for a default judgment be granted with respect to the second cause of action (discharge of petroleum) and third cause of action (failure to report a discharge of petroleum) alleged in the complaint, which recommendation I accept. However, with respect to the fourth cause of action, which alleged that respondents failed to contain or cleanup the discharge, the ALJ concludes that Department staff has not provided sufficient proof that this violation occurred and, accordingly, is not entitled to a default judgment on this cause of action. I disagree.

When a respondent fails to answer or otherwise appear in response to a notice of hearing, as is the case here, Department staff may move, either orally or in writing, for a default judgment (see 6 NYCRR 622.15). Where Department staff takes this course, staff will have to satisfy the requirements of 6 NYCRR 622.15(b), which it has done (see Default Summary Report at 2-3). In addition, consistent with the requirements applicable to default judgment motions under the CPLR, staff must submit proof of the facts constituting the claim charged (see Matter of Queen City Recycle Center, Inc., Decision and Order of the Commissioner, Dec. 12, 2013, at 2-3; CPLR 3215[f]; see also Woodson v Mendon Leasing Corp., 100 NY2d 62, 70-71 [2003]). Upon submission of the motion and supporting materials, the record is reviewed to determine whether staff's papers have stated a viable claim, and that staff's penalty request and remedial relief are supported.

In this instance, I conclude that Department staff provided proof of the facts sufficient to support the claim charged in the fourth cause of action.[3] The ALJ acknowledges that the record supports the reasonable inference that during the time that the trailer was at respondents' site it continued to leak (see Default Summary Report at 9). Proof in the record supports staff's allegation that the trailer discharged petroleum while on-site, including the observation by the individual who picked up the trailer at respondents' site on May 18, 2012 that the trailer was leaking (see id.; see also Narrative Report attached to the Affidavit of DEC Investigator 2 Jesse Paluch [sworn to July 16, 2015] as Exhibit A, at 10). In addition, staff submitted proof that the trailer was still leaking onto the street when it was discovered on May 22 (see, e.g., Affidavit of Hasan R. Ahmed, DEC Environmental Engineer, sworn to July 23, 2015, ¶¶ 5-6 [tanker found leaking on city street where it had been abandoned after being taken from respondents' site]). Staff also submitted proof that the spill onto the city street had not been contained (see, e.g., id. ¶ 6 and Exhibit B). Nothing in the record indicates that respondents attempted to stop the leak from the trailer or engage in cleanup activity following their direction that the leaking tanker be removed from their site. Accordingly, the proof

[3] Although the record may not be as developed as when a matter is tried on the merits in absentia, this procedure assures that the record is sufficient to support the Commissioner's order in any subsequent judicial proceedings (see Matter of Queen City Recycle Center, Inc., Decision and Order of the Commissioner, Dec. 12, 2013, at 3).

provided on the motion, together with the allegations of the complaint, which are deemed admitted, are sufficient to support the existence of the fourth cause of action (see Woodson, 100 NY2d at 70-71).

Accordingly, Department staff is entitled to a default judgment and order with respect to liability for the second, third and fourth causes of action.

--Time Period for the Violations

Department staff alleges that, with respect to the discharge of petroleum in violation of Navigation Law § 173 (second cause of action), respondents should be held liable for events starting on May 18, 2012 when the leaking trailer was removed from respondents' site until May 22, 2012 when the abandoned trailer was discovered – a period of four days. With respect to the failure to report the discharge of petroleum to the Department (third cause of action), staff alleges that respondents should be held liable from the time they took custody of the leaking trailer on May 16, 2012 until the abandoned trailer was discovered off-site on May 22, 2012 – a period of six days. Department staff also alleged that respondents were liable for the failure to contain or clean up a discharge of petroleum in violation of Navigation Law § 176 and 17 NYCRR 32.5 (fourth cause of action) for a period of six days (May 16, 2012 to May 22, 2012).

The ALJ concludes however that, for the second cause of action, respondents' liability would only be for May 18, 2012. For the third cause of action, the ALJ would restrict the finding of liability to the period from May 16 to May 18, 2012. The ALJ recommended that no liability be found for the fourth cause of action, but as discussed, I have rejected that recommendation. I address the time periods for the second, third and fourth causes of action below.

Second cause of action: Respondents' actions – demanding that the tractor owner take both the tractor and the leaking trailer and advising that the leaking trailer be abandoned on a city street – allowed for an ongoing discharge of petroleum off-site. By those actions, respondents violated the prohibition against the discharge of petroleum set forth in Navigation Law § 173.[4] Staff is therefore entitled to a civil penalty to include the period from May 18, 2012 (the date the leaking trailer was removed from respondents' site) to May 22, 2012 (when the leaking tanker was discovered discharging petroleum on a city street).

Third and fourth causes of action: Upon review of the record, I agree with Department staff that respondents are liable for the violations that occurred from May 16 extending through May 22, 2012 with respect to their failure to report the discharge (third cause of action) and to contain or clean up a discharge of petroleum (fourth cause of

[4] "Discharge" is defined to mean "any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of petroleum into the waters of the state or onto lands from which it might flow or drain into said waters" (Navigation Law § 172 [8]).

action). Respondents' liability did not terminate on May 18, 2012 when the tractor-trailer was removed from respondents' site.

Respondents were aware of and failed to notify the DEC of the discharge of petroleum while the trailer was on their site from May 16 to May 18, 2012 as required by Navigation Law § 175 and 17 NYCRR 32.2. Moreover, even though the leaking trailer was removed by the tractor owner from respondents' site on May 18, 2012, respondents' obligation to notify the Department of the discharge, did not cease at that time. The record indicates that respondents were aware that the trailer was still leaking when it left the site and, thus, were aware of an ongoing discharge. The requirement to report spills, leaks and discharges of petroleum to the Department cannot be avoided simply by the removal of the leaking trailer from the site. Respondents knew of the ongoing discharge, failed to report the ongoing discharge, and were responsible for reporting the ongoing discharge even though the trailer had been removed from respondents' premises.

Similarly, respondents failed to undertake any cleanup of the discharge from the leaking trailer that they directed be removed from their site and then be abandoned on a city street. Respondents cannot avoid responsibility for the containment and cleanup of the discharge by compelling removal of the leaking trailer from their site and by advising that it be abandoned on a city street.

**Civil Penalty**

Navigation Law § 192 provides for a civil penalty of up to twenty-five thousand dollars ($25,000) for violations of Navigation Law Article 12 (Oil Spill Prevention, Control and Compensation) or any rule promulgated thereunder. If the violation is of a continuing nature, as here, "each day during which it continues shall constitute an additional, separate and distinct offense" (id.).

Department staff's civil penalty request is $75,000, which is well within the statutory maximum. In determining the appropriate penalty in this case, Department staff considered the applicable guidance documents and the following factors: (1) the nature of respondents' actions and failure to report the spill; (2) respondents' lack of cooperation in resolving this matter; (3) respondents' relationship with the New York City Police Department; and (4) the need to deter future violations.

Based on this record, I conclude that a $75,000 payable civil penalty for the violations alleged in the complaint in the second, third and fourth causes of action is authorized and appropriate.[5] Respondents shall pay this penalty within thirty (30) days of the service of this order upon respondents.

[5] Even if the period of liability were reduced in accordance with the ALJ's recommendation, assessing a civil penalty of $75,000 would be appropriate on this record.

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

I. Department staff's motion for a default judgment pursuant to 6 NYCRR 622.15 is granted with respect to the second, third and fourth causes of action alleged in the complaint. By failing to answer the complaint in this matter and by failing to appear at the scheduled pre-hearing conference, respondents American Auto Body & Recovery Inc. and Salvatore S. "Sammy" Abate have defaulted and waived their right a hearing. Accordingly, the allegations of the complaint are deemed to have been admitted by respondents.

II. Based upon the allegations of the complaint and the proof in support of the motion, respondents American Auto Body & Recovery Inc. and Salvatore S. "Sammy" Abate are adjudged to have violated:

A. Navigation Law § 173, by allowing a leaking trailer to be taken from its facility and driven on public highways;
B. Navigation Law § 175 and 17 NYCRR 32.3, by failing to report the discharge of petroleum; and
C. Navigation Law § 176 and 17 NYCRR 32.5, by failing to contain and cleanup the discharge of petroleum.

III. Within 30 (thirty) days of the service of this order upon respondents, respondents shall pay a civil penalty in the amount of seventy-five thousand dollars ($75,000). The payment shall be mailed or otherwise delivered to the following address:

John Nehila, Esq.
Acting Regional Attorney
NYS Department of Environmental Conservation
Region 2 Office
One Hunter's Point Plaza
47-40 21st Street
Long Island City, New York 11101-5407

IV. Any questions or other correspondence regarding this order shall also be addressed to John Nehila, Esq. at the address referenced in paragraph III of this order.

V. The provisions, terms and conditions of this order shall bind respondents American Auto Body & Recovery Inc. and Salvatore S. “Sammy” Abate, and their agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By:_____/s/_____
Basil Seggos
Commissioner

Dated: Albany, New York
March 12, 2018

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
----------X

In the Matter of the Alleged Violations of Article 17 of the New York State Environmental Conservation Law, ("ECL"), Article 12 of the New York State Navigation Law and Title 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("17 NYCRR"),

DEFAULT SUMMARY REPORT

DEC File No. R2-20130905-376

-by-

**AMERICAN AUTO BODY & RECOVERY INC. and SALVATORE S. "SAMMY" ABATE,**

Respondents.

---

This summary report addresses an amended motion for default judgment, pursuant to 6 NYCRR 622.15, by staff of the New York State Department of Environmental Conservation ("Department staff") against American Auto Body & Recovery, Inc. and Salvatore S. "Sammy" Abate ("respondents"). Department staff allege that respondents violated the Navigation Law ("NL") for events involving a leaking tanker trailer between May 16, 2012 and May 22, 2012. This report recommends that the Commissioner issue an order finding respondents in partial default and liable for two of the three violations alleged. This report also recommends that the Commissioner impose a payable civil penalty of $50,000 in his order.

## Proceedings

Department staff served a notice of hearing and complaint upon respondents by certified mail on May 9, 2014 (see Urda affirmation dated July 23, 2015, Exh. B). Respondents failed to answer, though such answer was due on or before May 29, 2014, and failed to appear at the scheduled pre-hearing conference on June 4, 2014 at 10:00 a.m. at DEC's Region 2 headquarters, 47-40 21st Street, Long Island City, New York (see Urda affirmation dated July 23, 2015 at 3, ¶ 9).

Department staff's complaint alleged four causes of action related to events that occurred between May 16 and May 22, 2012. Department staff seeks an order of the Commissioner: (1) finding respondents liable for the violations alleged in the complaint; and (2) ordering respondents to pay a civil penalty in the amount of $75,000.

By papers dated June 4, 2014, Department staff moved for a default judgment and order. This motion was personally served on respondents by Environmental Conservation Officer J. Wesley Leubner on June 13, 2014. Department staff's motion papers included: (1) the notice of motion for default judgment and order; (2) the motion

for default judgment and order; and (3) the affirmation of Department staff counsel John K. Urda.

In a default summary report dated September 23, 2014, I recommended the Commissioner deny Department staff's motion for a default judgment and order with respect to the first cause of action and grant the motion with respect to the second, third and fourth causes of action and impose a civil penalty of $75,000.

By ruling dated July 2, 2015, the Commissioner rejected my recommendation with respect to the second, third and fourth causes of action and remanded the matter back to me for further proceedings. The basis for the Commissioner's ruling was his determination that Department staff included no proof of facts sufficient to adequately support those causes of action. With respect to the first cause of action, the Commissioner dismissed the claim on the ground that it pleaded a criminal violation (a class A misdemeanor) and, therefore, was beyond the subject matter jurisdiction of the Department's administrative enforcement proceedings.

By papers dated July 23, 2015, Department staff filed an amended motion for a default judgment and order. In this motion, Department staff withdrew the first cause of action in its entirety and amended its third cause of action to withdraw allegations relating to the Environmental Conservation Law. The papers included with this motion are: (1) a notice of motion; (2) the motion; (3) the affirmation of Department staff counsel John K. Urda with three exhibits attached (described in the attached exhibit chart); (4) the affidavit of Lieutenant Jesse Paluch of the New York State Environmental Conservation Police with one exhibit attached (also described in the attached exhibit chart); and (5) the affidavit of Department staff engineer Hasan R. Ahmed with three exhibits attached (also described in the attached exhibit chart).

With a cover letter dated August 21, 2015, Department staff counsel Urda forwarded to me the affidavits of service executed by Environmental Conservation Officer Bradley Buffa. These two affidavits demonstrate proof of service upon both respondents was accomplished by personal service on August 11, 2015 at 11:35 a.m.

No response has been received from respondents.

## Default Provisions

Subdivision 622.15(a) of 6 NYCRR (default procedures) provides that a respondent's failure to file a timely answer, or other specified failures to respond, constitutes a default and a waiver of a respondent's right to a hearing. Subdivision 622.15(b) of 6 NYCRR states that a motion for default judgment must contain: "(1) proof of service upon the respondent of the notice of hearing and complaint or such other document which commenced the proceeding; (2) proof of the respondent's failure to appear or failure to file a timely answer; and (3) a proposed order." In this case, Department staff counsel Urda has provided: (1) proof of service of the notice of hearing and complaint on respondents by certified mail (see Urda affirmation dated July 23, 2015

at 3 & Exh. B); (2) proof of respondents' failure to appear or timely answer (see Urda affirmation dated July 23, 2015 at 3); and a proposed order (see Urda affirmation dated July 23, 2015, Exh. C). Based on this, the Commissioner should conclude that Department staff has complied with the requirements for a default judgment and order that are set forth in the regulations.

In Matter of Alvin Hunt d/b/a Our Cleaners (Decision and Order of the Commissioner, July 25, 2006), then Commissioner Sheehan set forth the process to be followed by an administrative law judge ("ALJ") in reviewing a default motion. First, an examination of the proof of service of notice of hearing and complaint is required as well as the proof of respondent's failure to appear or file a timely answer. Then, an ALJ must consider whether the complaint states a claim upon which relief may be granted and if so, whether the penalty and any remedial measures sought by staff are warranted and sufficiently supported. In this case, the remaining causes of action set forth in the complaint set forth claims for which relief can be granted. In addition, Department staff counsel Urda has provided a justification for staff's requested penalty (see Urda affirmation dated July 23, 2015 at 5-6).

In Matter of Dudley (Decision and Order of the Commissioner, July 24, 2009), then Commissioner Grannis stated that for default motions brought after the date of the decision, in addition to the requirements set forth above, Department staff would have to serve motions for a default judgement on respondents. In this case, Department staff has provided two affidavits of service demonstrating that on August 11, 2015 Environmental Conservation Officer Bradley Buffa personally served (1) Mr. Salvatore Abate and (2) American Auto Body & Recovery Inc. This service was accomplished by personally delivering the amended default motion papers to Mr. Abate (see Buffa affidavits dated August 20, 2015).

In Matter of Queen City Recycle Center, Inc. (Decision and Order of the Commissioner, December 12, 2013), then Commissioner Martens directed that Department staff must, "consistent with the requirements applicable to default judgment motions under the CPLR … submit proof of the facts constituting the claim charged (see CPLR 3215[f]; see also Woodson v. Mendon Leasing Corp., 100 NY2d 62, 70-71 [2003])" (see Matter of Queen City Recycle Center, at 3). In Woodson, the Court of Appeals held that a verified complaint, attorney affirmation, defendants' answers and an affidavit from one of the defendants, taken together were sufficient as a matter of law to enable the court to determine that a viable cause of action existed and grant the default (see Woodson at 71).

In this matter, Department staff previously moved for a default motion. In my first default summary report, I concluded that the attorney's affirmation provided by Department staff counsel Urda was sufficient proof of the facts constituting the claim charged.

However, then Commissioner Martens disagreed. Specifically, he stated that Mr. Urda's affirmation failed to state that he had personal knowledge of the facts alleged. He

went on to specify that the proof offered by Department staff should include, but not be limited to, one or more affidavits based upon personal knowledge and related documents. In this matter documents such as a spill report form or notice of violation, together with any other appropriate documentation relating to the incident should have also been provided (see Matter of American Auto Body & Recovery Inc. and Salvatore S. "Sammy" Abate, Ruling of the Commissioner, July 2, 2015 at 3-4). Importantly, the Commissioner did not require that staff establish a *prima facie* case, as would be required under 6 NYCRR 622.12 (motion for order without hearing, the administrative equivalent of a motion for summary judgment).

With its amended motion for default in this matter, Department staff has provided more proof than it did with its first default motion including a narrative report prepared by Lt. Fitzpatrick who investigated this matter, the affidavit of a Department staff engineer who responded to the spill, a spill report, and two photographs. As discussed below, Department staff has complied with Commissioner Martens's direction that it submit certain documents to support staff's claim (see Matter of Queen City Recycle Center, at 3).

## Findings of Fact

1. Respondent American Auto Body & Recovery Inc. is an active domestic business corporation (see Urda affirmation dated July 23, 2015, Exh. A).

2. The tractor and tanker trailer discussed throughout this report were stolen separately by an unknown party (see Paluch affidavit dated July 16, 2015, Exh. A at 1). The tractor was stolen on April 25, 2012 (see Paluch affidavit dated July 16, 2015, Exh. A at 6) from the 75th precinct in Brooklyn and the tanker was stolen in Woodbridge, NJ (see Paluch affidavit dated July 16, 2015, Exh. A at 2). The tractor was owned by Flatlands Transport (see Paluch affidavit dated July 16, 2015, Exh. A at 3). The tanker was a milk tanker owned by Tarantino Trucking (see Paluch affidavit dated July 16, 2015, Exh. A at 4).

3. The tractor and tanker were abandoned within the confines of the 108th precinct of the New York City Police Department (NYPD) in Queens, New York (see Paluch affidavit dated July 16, 2015, Exh. A at 1).

4. The tractor and the tanker were recovered on May 16, 2012. At this time, the tanker was leaking oil from the top port and there was staining of oil on the side of the tanker (see Paluch affidavit dated July 16, 2015, Exh. A at 5). The ESU [perhaps the NYPD's Emergency Services Unit] was called to secure the top port (see Paluch affidavit dated July 16, 2015, Exh. A at 5).

5. The NYPD then called a NYPD authorized tow company (see Paluch affidavit dated July 16, 2015, Exh. A at 1). The company was American Auto Body & Recovery, Inc. and Mr. Abate was among the representatives of the company to respond (see Paluch affidavit dated July 16, 2015, Exh. A at 1). The tractor was

hot-wired and driven to the yard of American Auto Body & Recovery, Inc. (see Paluch affidavit dated July 16, 2015, Exh. A at 5 & 8). Mr. Abate observed the oil staining on the side of the tanker (see Paluch affidavit dated July 16, 2015, Exh. A at 5).

6. The NYPD then sent out letters to the registered owners of both vehicles (see Paluch affidavit dated July 16, 2015, Exh. A at 1).

7. On May 18, 2012, David Ayash the owner of Flatlands Transport and his employee, Luis Alberto Gonzalez (see Paluch affidavit dated July 16, 2015, Exh. A at 7) arrived at the yard of American Auto Body & Recovery, Inc. to reclaim the tractor (see Paluch affidavit dated July 16, 2015, Exh. A at 5). Salvatore Abate[1], of the tow company, admitted to ECO Lum that he had the person who came to pick up the tractor also take the tanker attached to it because it was taking up space in his yard. He also stated that he knew the owner of the tractor was not the owner of the tanker (see Paluch affidavit dated July 16, 2015, Exh. A at 2 & 4). Mr. Abate did not want the trailer to sit in his yard taking up space and feared he would eventually have to pay to get rid of it (see Paluch affidavit dated July 16, 2015, Exh. A at 6). The invoice for the storage of the tractor and tanker showed a storage fee of $734.90 for two days paid for by Flatlands Transport (see Paluch affidavit dated July 16, 2015, Exh. A at 6). The individual from the tow company who told Mr. Ayash that he had to take the tanker, also told him that he could drop it in the street once it left the yard (see Paluch affidavit dated July 16, 2015, Exh. A at 10).

8. Mr. Gonzalez drove the tractor with the tanker attached from the yard with Mr. Ayash following. Both men knew the tanker was full of oil and the tanker had oil stains on its side (see Paluch affidavit dated July 16, 2015, Exh. A at 9). The tanker was also leaking oil (see Paluch affidavit dated July 16, 2015, Exh. A at 10). Mr. Ayash took the tractor and the tanker because he didn't want to have to pay additional storage fees (see Paluch affidavit dated July 16, 2015, Exh. A at 9 & 10). Once they left the yard, Mr. Ayash directed Mr. Gonzalez to leave the tanker on the street, and afterwards Mr. Gonzalez drove the tractor back to Flatlands (see Paluch affidavit dated July 16, 2015, Exh. A at 9-10).

9. A video recording showed that the tanker was again abandoned on Friday, May 18, 2012 at approximately 5:00 p.m. (see Paluch affidavit dated July 16, 2015, Exh. A at 1). The video shows the tractor trailer pulling over to the side of the road and stopping. Then, two males disconnected the trailer and left in the tractor at approximately 5:18 p.m. (see Paluch affidavit dated July 16, 2015, Exh. A at 3).

10. On May 22, 2012, the Department's spills hotline received a report from the New York City Fire Department that an abandoned tanker trailer full of oil that was actively leaking was found at 56th Road and 49th Street in Maspeth, Queens, New

[1] Lt. Fitzgerald refers to Mr. Abate as the owner of the corporate respondent, however, Mr. Abate denied this to the Lieutenant and said his wife was the owner. r

York. NYSDEC spill number 1201708 was assigned to the spill. (See Ahmed affidavit dated July 23, 2015, ¶5.)

11. The tanker appeared to be filled with #4 oil and samples were taken on May 22, 2012 to characterize the tanker's contents. Also on that date, the spill was cleaned up and a hole in the top of the tanker was closed to prevent rain from entering. (See Paluch affidavit dated July 16, 2015, at 1.) An analysis of the contents of the tanker showed it contained 100% Diesel Range Organic Compounds (see Paluch affidavit dated July 16, 2015, Exh. A at 11).

12. On May 25, 2013, Department staff engineer Ahmed was assigned to the spill. When he arrived at the spill site, he observed that the trailer had a wide black stain down the side, indicative of a large oil discharge and petroleum product had run down the side of the vehicle onto the street below. (See Ahmed affidavit dated July 23, 2015, ¶6.) He also observed that a hole had been cut in the top of the vehicle, apparently to facilitate pumping petroleum into the trailer (see Ahmed affidavit dated July 23, 2015, ¶7). Mr. Ahmed took at least two photographs that day showing the discharge and the hole (see Ahmed affidavit dated July 23, 2015, Exhs. B & C).

13. According to the Department's database of reported spills, neither respondent reported a discharge from the abandoned trailer (see Ahmed affidavit dated July 23, 2015, ¶8).

14. The owner of the trailer, Tarantino Trucking, hired a spill response contractor to pump out some of the oil and plug the open hole. The trailer was removed on May 25, 2012 (see Ahmed affidavit dated July 23, 2015, Exh. A at 2) and the spill was cleaned up (see Ahmed affidavit dated July 23, 2015, ¶9). The spill was closed on May 31, 2012 (see Ahmed affidavit dated July 23, 2015, Exh. A at 3). Over 5,000 gallons of product were recovered from the tanker (see Paluch affidavit dated July 16, 2015, Exh. A at 4).

15. David Ayash, his employee Luis A. Gonzalez and Flatlands Transport LLC resolved the violations related to this incident by Order on Consent, NYSDEC File Nos. R2-20130905-377 and 278 (see Urda affirmation dated July 23, 2015, ¶12).

16. On May 9, 2014, Department staff served respondents with the notice of hearing and the complaint via certified mail. Respondents' time to answer expired on or before May 29, 2014. The notice of hearing scheduled a pre-hearing conference on June 4, 2014 at 10:00 a.m. at DEC's Region 2 headquarters, 47-40 21st Street, Long Island City, New York.

17. Respondents failed to answer the complaint or attend the pre-hearing conference (see Urda affirmation dated July 23, 2015 ¶¶ 9-10).

18. Respondents were served with the amended the motion for a default judgment and order by personal service on August 11, 2015 (see Buffa affidavits dated August 20, 2015).

## Discussion

As discussed above, Department staff has moved for a default judgment against respondents on three causes of action. In addition, staff requests the Commissioner include a payable civil penalty of $75,000 in his order. There is no request for remediation in this matter.

As a preliminary matter, the proof provided by Department staff with its papers is limited. One document provides information regarding the alleged violations, specifically the narrative report of the investigation of this matter authored by Lt. John Fitzpatrick of the NYSDEC's Environmental Conservation Police. This report is attached to the affidavit of Lt. Jesse Paluch, who supervises the Department's Bureau of Environmental Crimes Investigation ("BECI") in NYSDEC's Region 2. Lt. Paluch explains in his affidavit that Lt. Fitzpatrick was formerly the BECI supervisor for Region 2, but died on May 7, 2014. The narrative report is part of the Department's law enforcement files and was made in the regular course of the Department's investigation of this matter. It is the regular practice of the Department to record such investigations in narrative reports. Another document, a spill report, discusses events after the tanker was discovered on May 22, 2012 (the time Department staff assert in their papers that the violations ended). There are also two photographs of the tanker in question taken on May 25, 2012.

This evidence leaves many questions unanswered. For example, why wasn't the Department notified on May 16, 2012 when the tanker was first discovered abandoned and leaking oil. Lt. Fitzgerald spoke to Sergeant Osso of the 108th Precinct who saw the tanker was leaking from the top port and that ESU (presumably NYPD's Emergency Services Unit) was called to secure the port (see Paluch affidavit dated July 16, 2015, Exh A. at 5). The leak was also observed by Police Officer Crooks (see Paluch affidavit dated July 16, 2015, Exh. A at 8). There is nothing in the record to indicate that the spill was reported to the Department at this time and photos taken of the tanker on May 25, 2012 show a hole in the tanker (see Ahmed affidavit dated July 23, 2015, Exh. C) indicating the port was likely not secured.

**Respondents**

In its complaint, Department staff names two respondents: American Auto Body & Recovery Inc. and Salvatore S. "Sammy" Abate. With respect to the corporate respondent, Department staff have provided information from the New York State Department of State's Division of Corporations showing that it is an active domestic business corporation. In addition, Lt. Fitzpatrick's narrative report refers to the corporate respondent as the tow company that recovered the leaking tanker on May 16, 2012 and stored it until it was released on May 18, 2012. With respect to Salvatore "Sammy"

Abate, the narrative report refers to him as the owner of the corporate respondent, although he denied this to investigators and said his wife was the owner. The report does detail Mr. Abate's involvement in this matter and from his actions it is reasonable to infer that he has some management responsibility for the corporate respondent.

**Liability**

As discussed above, in its complaint Department staff originally alleged four causes of action against respondents. In its amended motion for default judgment and order, Department staff withdrew the first cause of action in its entirety and withdrew a portion of its third cause of action. Each remaining cause of action is discussed below.

Department staff alleges that respondents should be held liable for events occurring between May 16, 2012 and May 22, 2012. The evidence in the record shows that Mr. Abate arrived at the scene of the abandoned tanker on May 16, 2012, hot wired the tractor to which it was attached and drove, or had it driven to the tow yard. The tanker and tractor were released from the tow yard by Mr. Abate on May 18, 2012 to David Ayash, who paid the bill for storage.

Department staff does not provide any argument as to why respondents should be held liable for the violations at times when they did not have control over the tanker. Department staff does state in its complaint that Mr. Abate's actions of insisting that the tractor owner also take the leaking tanker, even though it was not owned by him, not insured, and not registered, were illegal. But staff does not offer any theory as to why the respondents should be held liable for the actions of Mr. Ayash after he took custody and control of the tanker on May 18, 2012. Because of this, the Commissioner should reject Department staff's assertion that the violations alleged in this matter continued past May 18, 2012.

*Second Cause of Action*

In its second cause of action, Department staff alleges that respondents, by allowing a tanker truck discharging petroleum to be taken from its yard and driven on the public highways, violated Navigation Law § 173. Section 173 of the NL states that the discharge of petroleum is prohibited. Department staff calculates that this violation began on May 18, 2012 and ended when the tanker was discovered on May 22, 2012. As stated above, respondents have not appeared in this proceeding.

As discussed above, the facts of this matter do not support finding liability for respondents for any date later than May 18, 2012, so Department staff's allegations for May 19-22, 2012 are not proven on this record. With respect to Department staff's allegation that respondents caused a discharge of petroleum on May 18, 2012, there is evidence in the record to support this claim. Specifically, Mr. Ayash stated to Lt. Fitzgerald that when he picked up the tanker on May 18, 2012, it was leaking. Based on this evidence, Department staff is entitled to a finding of liability on this cause of action for May 18, 2012 before Mr. Ayash took control of the tanker.

*Third Cause of Action*

In its amended third cause of action, Department staff alleges that respondents failed to report a petroleum discharge to the Department in violation of Navigation Law § 175 and 17 NYCRR 32.3. Section 175 of the Navigation Law requires any person responsible for causing a discharge to immediately notify the Department. Department staff calculates that this violation began on May 16, 2012, when respondents took custody of the tanker, and ended when the tanker was discovered on May 22, 2012. As stated above, the respondents have not appeared in this proceeding.

As discussed above, the facts of this matter do not support finding liability for the respondents for any date later than May 18, 2012, so Department staff allegations for May 19-22, 2012 are not proven on this record. Proof in the record supports Department staff's allegation that respondents were responsible for a discharge from May 16-18, 2012 and failed to immediately notify the Department. Two police officers as well as Mr. Abate reported seeing the tanker leaking when it was recovered on May 16, 2012, when respondents took custody and control of it. Mr. Ayash reported that the tanker was leaking when he took it on May 18, 2012. So it is a reasonable inference that the tanker was leaking during this period. Department staff engineer Ahmed states that at no time did either respondent report a petroleum discharge from the tanker (see Ahmed affidavit dated July 23, 2015, ¶8). Based on this evidence, Department staff is entitled to a finding of liability on this cause of action for May 16–18, 2012.

*Fourth Cause of Action*

In its fourth cause of action, Department staff alleges that respondents failed to contain or clean up the petroleum discharge from the leaking tanker in violation of Navigation Law § 176 and 17 NYCRR 32.5. Section 176 of the Navigation Law and 17 NYCRR 32.5 require any person discharging petroleum in a prohibited manner to undertake to contain the discharge immediately. Department staff calculates that this violation began on May 16, 2012, when respondents took custody of the tanker, and ended when the tanker was discovered on May 22, 2012. As stated above, respondents have not appeared in this proceeding.

As discussed above, the facts of this matter do not support finding liability for the respondents for any date later than May 18, 2012, so Department staff allegations for May 19-22, 2012 are not proven on this record. Further, there is no evidence in the record regarding respondents' efforts to contain the discharge. There are no statements or photographs regarding respondents' actions after taking control of the tanker on May 16, 2012 through the time it left the tow yard on May 18, 2012. It is a reasonable inference that during this time the tanker continued to leak, but there is nothing in the record regarding containment or the lack thereof. Therefore, Department staff has not provided sufficient proof that this violation occurred and is not entitled to a default judgment on this cause of action.

**Civil Penalty**

According to the affirmation of Department staff counsel John K. Urda the requested penalty of $75,000 for the three remaining causes of action is reasonable and appropriate. In his affirmation, Mr. Urda states that consideration was given to the Department's Civil Penalty Policy (DEE-1, issued June 20, 1990). Mr. Urda notes that the statutory maximum civil penalty is $25,000 per day, as authorized by Navigation Law §192 for the second, third and fourth causes of action. In determining the appropriate requested penalty in this case, Department staff considered the following factors: (1) the nature of respondents' actions and failure to report the spill; (2) respondents' lack of cooperation in resolving this matter; (3) respondents' relationship with the New York City Police Department; and (4) the need to deter future violations.

Department staff has demonstrated that it is entitled to a default on the two remaining causes of action alleged, which relate to a single, egregious series of actions undertaken by respondents. These violations occurred over four days and the statutory maximum pursuant to Navigation Law § 192 is $100,000. Given the circumstances of these violations and the factors cited by Department staff, listed above, a $50,000 payable civil penalty is authorized and appropriate.

## Conclusions

1. Respondents violated Navigation Law § 173 by discharging petroleum on May 18, 2012.

2. Respondents violated Navigation Law § 175 and Section 32.3 of 17 NYCRR, by failing to report the discharge of petroleum between May 16, 2012 and May 18, 2012, inclusive.

3. A $50,000 payable civil penalty is authorized and warranted on this record.

## Recommendation

Based upon the foregoing, I recommend that the Commissioner issue an order:

1. granting Department staff's motion for default, finding respondents in default pursuant to the provisions of 6 NYCRR 622.15 for failing to appear at the prehearing conference and to answer the complaint;

2. finding respondents in violation of: (1) Navigation Law § 173 by allowing the leaking trailer to discharge petroleum on May 18, 2012 and (2) Navigation Law § 175 and Section 32.3 of 17 NYCRR, by failing to report the discharge of petroleum between May 16, 2012 and May 18, 2012, inclusive; and

3. directing respondents to pay a total civil penalty in the amount of $50,000 (fifty thousand dollars).

_____/s/_____
P. Nicholas Garlick
Administrative Law Judge

Dated: Albany, New York

# Exhibit List

**Matter of AMERICAN AUTO BODY & RECOVERY INC.**
**and SALVATORE S. "SAMMY" ABATE**

**DEC #R2-20130905-376**

Attached to Affirmation of Department staff counsel John K. Urda dated July 23, 2015:

**Exh. A.** – Print out from New York State Department of State's Division of Corporations.

**Exh. B.** – USPS tracking receipt and signed receipts for notice of hearing and complaint.

**Exh. C.** – Proposed order

Attached to the Affidavit of Lt. Jesse Paluch dated July 16, 2015

**Exh. A.** – Narrative Report of Lt. Fitzpatrick

Attached to the Affidavit of Department staff engineer Hasan R. Ahmed dated July 23, 2015

**Exh. A.** – NYSDEC Spill Report Form for spill #1201708

**Exh. B.** – Photo of tanker

**Exh. C.** – Photo of tanker