NEW YORK STATE: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of the New York State Navigation Law (ECL) article 12, and Title 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) part 32 by	Ruling on Department Staff's Second Motion for Order without Hearing dated March 8, 2005 and Order to Consolidate
	DEC No. R2-20030422-102

Dr. Eli Avila and Elena Avila,
RESPONDENTS.

August 3, 2005

Proceedings

This administrative enforcement action commenced with service of an amended complaint, and a second notice of motion for order without hearing both dated March 8, 2005 upon Eli and Elena Avila (the Avilas), pursuant to 6 NYCRR 622.12. In the amended complaint, Department staff contends that the Avilas own property at 60 Hamilton Terrace, New York, New York 10032. According to the amended complaint, fuel oil was delivered to the Avilas' residence on April 9, 1999, and that during the oil delivery, more than 90 gallons of oil were discharged onto the basement floor. Department staff alleges that the Avilas violated Navigation Law § 175 and 17 NYCRR 32.3 by failing to report the petroleum spill at 60 Hamilton Terrace within two hours of its occurrence. Staff contends that the petroleum spill was not reported until December 10, 2002 some 1340 days (or about 44 months) later. Relying on Navigation Law § 192, Department staff seeks a total civil penalty of $33,500, and requests an order from the Commissioner directing remediation of the property.

To support the motion, Department staff provided: (1) an affirmation by John K. Urda, Esq., Assistant Regional Attorney, dated March 8, 2005; (2) an affidavit by Jeffery Vought sworn to March 7, 2005 (the Vought affidavit); and (3) Exhibit A, which is a copy of the NYSDEC Spill Report Form for spill number 0209311.

With a cover letter dated April 25, 2005, the Avilas filed an answer and reply to Department staff's second motion for order without hearing. In their April 22, 2005 answer, the Avilas admit that they own the property at 60 Hamilton Terrace, and they deny the violation alleged against them (*see* ¶ 2 and ¶ 15 of the April 22, 2005 Answer). In their reply dated April 25, 2005,

which was prepared by their attorney, Michael Caliguiri, Esq., New York, New York (the Caliguiri reply), the Avilas argue that Dr. Avila attempted to report the spill to the Department on April 9, 1999. The Avilas request that the Commissioner dismiss the charges alleged in the amended complaint.

With their April 25, 2005 reply, the Avilas included Exhibits 1-5. Exhibit 1 is an affidavit by Dr. Eli Avila sworn to April 22, 2005 (the Avila affidavit). Exhibit 2 is a list of telephone numbers. Exhibit 3 is an excerpt of Keith Williams' testimony presented at the trial regarding the civil action brought by the Avilas to recover damages from Robani Energy, Incorporated (Robani) and Crystal Transportation Corporation (Crystal). Mr. Williams is an Industrial Waste Investigator for the New York City Department of Environmental Protection (NYC DEP). Exhibit 4 is an excerpt of Neil Peterson's testimony from the previously mentioned trial, and Exhibit 5 is an excerpt of Wayne Jackson Gallway's testimony. Mr. Peterson is a geologist employed by World-Wide Geoscience in Houston, Texas, and testified as an expert witness. Mr. Gallway owned and resided at 60 Hamilton Terrace from January 1996 until January 1999.

Background

The petroleum spill that allegedly occurred at 60 Hamilton Terrace on April 9, 1999 has been the subject of prior administrative enforcement actions initiated by the Department. One action commenced with service of a notice of hearing and complaint dated April 22, 2003 upon the Avilas. With a notice of motion dated April 16, 2004 (the first motion), Department staff moved for an order without hearing, pursuant to 6 NYCRR 622.12. The April 22, 2003 complaint alleged that the Avilas violated 6 NYCRR 613.8, which parallels the notification requirement in the Navigation Law. The Avilas opposed Department staff's April 16, 2004 motion.

After considering the parties' papers, I issued a ruling dated June 28, 2004, which granted Department staff's motion for order without hearing with respect to Eli Avila's liability. Consistent with Department staff's request, the ruling also scheduled a hearing with respect to relief. The June 28, 2004 ruling included findings of fact established as a matter of law pursuant to 6 NYCRR 622.12.

However, I later discovered Department guidance documents outside the record of Staff's April 16, 2004 motion and the Avilas' opposition papers, which related to the applicability of 6 NYCRR part 613 to the Avilas. That information consisted of: (1) *Final Guidance and Responsiveness Summary regarding Petroleum Spill Reporting*, effective May 1, 1996; (2) Section 1.1 of the *Spill Guidance Manual* entitled, "Spill Reporting and Initial Notification Requirements;" and (3) the index for the *Spill Guidance Manual*. Upon review of these guidance documents, I found it necessary to revisit the issue of whether 6 NYCRR part 613 applied to the Avilas.

Subsequently, in a letter dated August 3, 2004, Department staff moved to vacate the June 28, 2004 ruling concerning the April 16, 2004 motion for order without hearing. In addition, Department staff stated that it withdrew the April 16, 2004 motion, and that it would commence a new action against the Avilas concerning alleged violations of Navigation Law article 12. According to Department staff's August 3, 2004 letter, the Avilas agreed to discontinue the action related to the April 16, 2004 motion for order without hearing, and did not object to Department staff commencing a new enforcement action at a later date. The captioned matter, which is the subject of this ruling, is the new action contemplated by Department staff.

I issued a ruling dated August 18, 2004, which granted Department staff's request to vacate the June 28, 2004 ruling concerning the April 16, 2004 motion for order without hearing. Based on the guidance documents identified above, and the applicability criteria at 6 NYCRR 613.1(b), the August 18, 2004 vacatur ruling concludes that the requirements in 6 NYCRR part 613 did not apply to the Avilas. Consequently, the Avilas were not required to report any alleged petroleum spill pursuant to 6 NYCRR 613.8. The August 18, 2004 ruling states further that vacatur means that any findings of fact or conclusions made in the June 28, 2004 ruling would no longer be valid and, therefore, could not be relied upon in any future enforcement action against the Avilas concerning the events that may have occurred at their home on April 9, 1999.

In a related administrative matter, Department staff commenced an enforcement action against Robani and Crystal with service of a notice of hearing and complaint dated January 15, 2003. According to the January 15, 2003 complaint, Robani and Crystal delivered the fuel oil to 60 Hamilton Terrace on April 9,

1999, and in so doing violated various provisions of Navigation Law article 12.

In a notice of motion dated April 21, 2004, however, Department staff moved for an order without hearing against Robani and Crystal for allegedly violating 6 NYCRR 613.8. On June 28, 2004, I issued a ruling that denied Department staff's motion for order without hearing against Robani and Crystal, because the charges in the January 15, 2003 complaint were inconsistent with the charges alleged in the April 21, 2004 motion for order without hearing. With a cover letter dated March 8, 2005, Department staff subsequently served an amended complaint and second notice of motion for order without hearing upon Robani and Crystal. A ruling, which denied Department staff's motion was issued on August 3, 2005.

Discussion

Motion for Order without Hearing

In the second motion dated March 8, 2005, Department staff moves, pursuant to 6 NYCRR 622.12, for an order without hearing against the Avilas. That provision is governed by the same principles that govern summary judgment pursuant to Civil Practice Law and Rules (CPLR) § 3212. Section 622.12(d) provides that a contested motion for order without hearing will be granted if, upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party. The Commissioner has provided extensive direction concerning the showing the parties must make in their respective motions and replies, and how the parties' filings will be evaluated (*see Matter of Richard Locaparra, d/b/a L&L Scrap Metals*, DEC Case No. 3-20000407-39, Final Decision and Order of the Commissioner, June 16, 2003).

Amendment of Pleadings

In its second motion for order without hearing, Department staff moves to amend the April 22, 2003 complaint, pursuant to 6 NYCRR 622.5 (*see* ¶ 9 of the March 8, 2005 amended complaint). The Avilas do not object (*see* ¶ 9 of the April 22, 2005 answer).

Pursuant to 6 NYCRR 622.5, pleadings may be amended. A party may amend its pleading once without the ALJ's permission at any time before the period for responding expires, or if no

response is required, at least 20 days before the hearing commences (*see* 6 NYCRR 622.5[a]). With the ALJ's permission, a party may amend its pleading at any time prior to the Commissioner's final decision absent prejudice to the ability of any other party to respond, consistent with the CPLR (*see* 6 NYCRR 622.5[b]).

Pursuant to CPLR 3025, pleadings may be amended without leave in a manner similar to what is authorized by 6 NYCRR 622.5(a) (*see* CPLR 3025[a]). They may be amended and supplemented with leave at any time, and leave must be freely given as may be just (*see* CPLR 3025[b]). With leave, pleadings may be amended to conform to the evidence upon such terms as may be just (*see* CPLR 3025[c]).

As summarized above, and as discussed fully in the August 18, 2004 vacatur ruling, Department staff, with the consent of the Avilas, withdrew the first motion for order without hearing dated April 16, 2004 and the related April 22, 2003 complaint. At that time, Department staff stated that it would commence a new administrative enforcement action concerning the events that allegedly occurred on April 9, 1999 at 60 Hamilton Terrace, and the Avilas did not object. Therefore, I do not need to grant leave to amend the complaint. Rather, Department staff has chosen to exercise its prosecutorial discretion by first, withdrawing the April 22, 2003 complaint and related motion dated April 16, 2004 and, second, by serving the March 8, 2005 amended complaint upon the Avilas with notice of a second motion for order without hearing.

Liability

Navigation Law § 173(1) prohibits the discharge of petroleum. A prohibited discharge includes "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]). Also, the "waters" of the state include both surface and groundwaters, whether natural or artificial (*see* Navigation Law § 172[18]).

Courts have taken judicial notice that even when there is "nothing in the record to positively demonstrate" that spilled oil might have flowed through the ground into groundwater, or the

nature and extent of the resulting harm, "judicial notice can be taken of the common knowledge that oil can seep through the ground into surface and groundwater ... and thereby cause ecological damage" (*Merrill Transport Co. v State of New York*, 94 AD2d 39, 42-43 [3d Dept 1983], *lv denied* 60 NY2d 555).

Navigation Law § 175 states that "[a]ny person responsible for causing a discharge shall immediately notify the department pursuant to rules and regulations established by the department, but in no case later than two hours after the discharge." The regulation at 17 NYCRR 32.3 states that "[a]ny person responsible for causing a discharge which is prohibited by Section 173 of the Navigation Law, shall immediately notify the department, but in no case later than two hours after the discharge."

In many instances, the Commissioner has previously determined that persons violated Navigation Law § 175 or 17 NYCRR 32.3 by failing to provide timely notice to the Department about unpermitted petroleum discharges (*see, e.g.*, *Matter of James Alcus*, DEC Case Nos. 1-4857 and 1-5537, Commissioner's Decision and Order, August 22, 1996; *Matter of Mt. Hope Asphalt, Corporation,* DEC Case Nos. 1-4722-01052/00003-0 and 1-4722-01052/00004-0, Commissioner's Decision and Order, September 7, 1995; *Matter of Morgan Oil Terminals Corporation*, DEC Case Nos. R2-3721-91-06, R2-3885-91-90, Commissioner's Order, October 17, 1994; *Matter of Max Kent*, DEC Case No. R9-3320-90-12, Commissioner's Order, December 7, 1992; and *Matter of James Wiese*, DEC Case No. R9-3233-90-09, Commissioner's Decision and Order, May 21, 1992).

None of the above identified cases concerns a home owner and the unpermitted discharge of home heating oil. Nevertheless, the courts have determined that requirements outlined in Navigation Law article 12 apply to residential properties as well as to oil industry enterprises (*see State of New York v Arthur L. Moon, Inc.*, 228 AD2d 862, *lv denied* 89 NY2d 861).

The language in the statute and regulation applies to "any person," and the Department's guidance reflects the broad application of the notification requirement in order to limit and abate unpermitted petroleum discharges (*see Final Guidance and Responsiveness Summary regarding Petroleum Spill Reporting*, effective May 1, 1996). Accordingly, I conclude that the notification requirement in Navigation Law § 175 and 17 NYCRR 32.3 applies to the Avilas, among others.

A review of Department staff's motion papers and the Avilas' reply papers establish that no disputed fact issues about the following are preserved. The Avilas admit that on April 9, 1999, they owned property at 60 Hamilton Terrace (*see* ¶2 of the answer).

Dr. Avila was awakened on the morning of April 9, 1999 by the "strong overwhelming" odor of oil. He went to the basement and saw an unknown quantity of oil on the basement floor. Dr. Avila called Robani. Shortly, personnel from Robani came to 60 Hamilton Terrace and began to clean up the spilled fuel oil. (*See* ¶ 3, 4, 5 and 8 of the Avila affidavit.)

Dr. Avila's newborn son was overcome by the fumes shortly after he discovered the spill on April 9, 1999. Consequently, Dr. Avila and his wife took their son to the hospital for medical treatment. Later, Dr. Avila brought his family to a friend's apartment. (*See* ¶ 9, 11 and 13 of the Avila affidavit.)

Dr. Avila subsequently called the United States Environmental Protection Agency (US EPA) hotline, and the New York City Department of Environmental Protection (NYC DEP) at 718-DEP-HELP (718-337-4357) on April 9, 1999 to report the spill at 60 Hamilton Terrace. (*See* ¶ 13 and 15 of the Avila affidavit.) The Avilas, however, provide no information specifying when Dr. Avila made these telephone calls on April 9, 1999.

The Vought affidavit establishes that Mr. Vought is an Engineering Geologist from the Department's Region 2 office. His duties include investigating petroleum spills and supervising their remediation. (*See* ¶ 1 and 4 of the Vought affidavit.)

Mr. Vought inspected the Avilas' residence at 60 Hamilton Terrace on December 17, 2002, and observed the appearance of petroleum spill impacts in the basement. Also on December 17, 2002, Mr. Vought inspected 58 and 62 Hamilton Terrace, which are properties located on either side of the Avilas' residence. During his inspection of the neighboring properties, Mr. Vought did not detect any petroleum odors or other impacts from the spill at the neighboring properties. (*See* ¶ 10 and 11 of the Vought affidavit.)

Despite the many undisputed facts, which are supported by the evidence provided in the parties' papers, of particular

concern is the absence of any evidence to support Department staff's claim in the March 8, 2005 amended complaint (¶ 3) that "more than 90 gallons of fuel oil" were discharged in the Avilas' basement on April 9, 1999.

Wayne Jackson Gallway testified at the civil action initiated by the Avilas to obtain damages from Robani and Crystal, and an excerpt of Mr. Gallway's testimony is Exhibit 5 to the Caliguiri reply. From January 1996 until January 1999, Mr. Gallway owned and resided at 60 Hamilton Terrace before the Avilas did (*see* p. 755 from Exhibit 5 to the Caliguiri reply).

Mr. Gallway's testimony appears to confirm Mr. Vought's observations concerning the presence of petroleum impacts. Mr. Gallway testified that, when he resided at 60 Hamilton Terrace, there were issues with oil deliveries. Mr. Gallway stated further that the fuel oil tank in the basement was covered with an oil residue, and that the basement floor had oily marks particularly around the fuel oil tank (*see* pp. 756-757 of Exhibit 5 to the Caliguiri reply). Given Mr. Gallway's testimony, it cannot be determined whether the condition that Mr. Vought observed at 60 Hamilton Terrace during his December 17, 2002 inspection was the direct result of the petroleum spill that allegedly occurred on April 9, 1999, or a chronic condition that existed when Mr. Gallway owned the property.

Given these circumstances, I conclude that Department staff did not meet its burden because Staff failed to submit evidence sufficient to demonstrate the absence of any material issues of fact concerning the alleged violation of Navigation Law § 175 (*see Alverez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). In other words, the appearance of oil spill impacts that Mr. Vought observed during his December 17, 2002 inspection may have been the result of either the chronic condition that Mr. Gallway described during his testimony, or a direct result of the petroleum spill that allegedly occurred on April 9, 1999. Accordingly, I deny Department staff's March 8, 2005 second motion for order without hearing.

Although not included with the Caliguiri reply, the excerpt from Mr. Gallway's testimony that Robani's counsel provided in response to the related administrative case concerning Robani and Crystal (*see* Ruling dated August 3, 2005) includes a statement that the odor was so bad after every oil delivery that Mr.

Gallway had to leave the house when he lived at 60 Hamilton Terrace (*see* p. 761 of Exhibit G to the Foley affirmation).

I note further that in the related administrative case concerning Robani and Crystal (*see* Ruling dated August 3, 2005), Department staff offered excerpts from other witnesses who testified in the civil action initiated by the Avilas. Mr. Pearson, who is the president of Robani, testified that on April 9, 1999, Crystal delivered 90 gallons to 60 Hamilton Terrace, but that only two to three gallons of No. 2 fuel oil were spilled in the Avilas' basement(*see* Exhibit B to the Rawlins affirmation). Mr. Rella, who is the president of Crystal, testified at the civil trial that the amount of oil on the basement floor was "the size of a quarter" (Exhibit C to the Rawlins affirmation).

Under certain circumstances, petroleum spills do not need to be reported. According to Section 1.1-1 of the Department's *Technical Field Guidance*, "Spill Reporting and Initial Notification Requirements," a petroleum spill does not need to be reported if it: (1) is less than five gallons, (2) has been contained and is under the control of the spiller, (3) has not reached the State's water or any land, and (4) has been cleaned up within two hours of discovery. (*Also see Final Guidance and Responsiveness Summary Regarding Petroleum Spill Reporting*, p. 6, Item 7.) All parties received copies of these guidance documents subsequent to the June 28, 2004 ruling concerning the first motion for order without hearing.

In light of the Department's guidance and given the following circumstances, there is a question of whether the Avilas were obliged to report the alleged petroleum discharge to the Department. First, Department staff provides nothing to support its claim in the March 8, 2005 amended complaint that more than 90 gallons of fuel oil were discharged in the basement at 60 Hamilton Terrace. Second, Staff's offer of proof in the related administrative case concerning Robani and Crystal (*see* Ruling dated August 3, 2005) would establish that a substantially smaller volume of fuel oil was discharged.

The papers filed in support of, and in opposition to, the March 8, 2005 second motion for order without hearing do not address the guidance criteria that must be met to obviate the need to report a petroleum spill. Therefore, at hearing, the parties will have the opportunity to develop the record about the applicability of the criteria outlined in Section 1.1-1 of

Technical Field Guidance, "Spill Reporting and Initial Notification Requirements." In addition, if it is determined that the guidance is applicable, the parties will have the opportunity at hearing to develop a factual record about whether the Avilas were exempt from the reporting requirement outlined in Navigation Law § 175.

The Avilas' Motion to Dismiss

The Avilas request, among other things, that the Commissioner dismiss the charges alleged against Elena Avila because Department staff offered no evidence regarding her participation (*see* ¶ 18 and 22 in the Caliguiri reply). I reserve on this request. I note, however, that to date, Department staff has offered no legal argument about why Elena Avila should be held jointly liable for the alleged violation of Navigation Law § 175. At the hearing, the parties will have the opportunity to develop the record with respect to their respective positions.

Relief

1. Civil Penalty

The March 8, 2005 amended complaint alleges that the Avilas violated both Navigation Law § 175 and 17 NYCRR 32.3 (*see* ¶ 15 of March 8, 2005 amended complaint). The Commissioner has previously determined not to assess separate civil penalties when Department staff has demonstrated that a respondent violated both a statutory requirement and an identically worded regulatory requirement. The rationale for this determination is that assessing separate penalties where, as here, the elements of the regulatory prohibition are identical to the elements of a statutory prohibition would inappropriately undermine the prerogatives of the Legislature to establish the level of maximum civil penalties for a particular violation. (*See Matter of Steck*, Commissioner's Order, March 29, 1993, at 5.) Because the notice requirement in Navigation Law § 175 is identical to the one outlined in 17 NYCRR 32.3, the principle stated in *Steck* concerning the civil penalty calculation applies here.

For each violation, Navigation Law § 192 authorizes a maximum civil penalty of $25,000 per day. In the March 8, 2005 amended complaint, Department staff asserts that the violation continued from April 9, 1999, when the petroleum spill occurred,

until December 10, 2002, when Dr. Martin, on behalf of the Avilas, telephoned Mr. Vought.

The basis for Department staff's assertion is as follows. Mr. Vought states, in his March 7, 2005 affidavit, that he telephoned Dr. Avila on December 11, 2002 after he became aware of the spill at 60 Hamilton Terrace. According to Mr. Vought's account of his telephone conversation with Dr. Avila, Dr. Avila reported the spill at 60 Hamilton Terrace to the Department on April 9, 1999, and spoke with Mr. Green. (*See* ¶ 8 of the Vought affidavit.)

Mr. Vought attempted to verify Dr. Avila's statement about reporting the spill to Mr. Green on April 9, 1999. According to Mr. Vought's affidavit, there was no employee named Mr. Green who worked for the Department's spill hotline in April 1999, and that according to the Department's records, the only Spill Report Form for the petroleum spill at 60 Hamilton Terrace is the one dated December 10, 2002. (*See* ¶ 7 and 9 of the Vought affidavit.)

Therefore, Department staff contends that the violation continued for a total of 1340 days, or about 44 months (*see* ¶ 5 of the Vought affidavit). In the March 8, 2005 amended complaint (*see* ¶ 17), Department staff requests a civil penalty of $25 per day. As a result, the total requested civil penalty is $33,500 ($25 per day x 1340 days).

However, a material issue of fact exists about the duration of the alleged violation. In his April 22, 2005 affidavit, Dr. Avila states that he attempted to report the petroleum spill at 60 Hamilton Terrace to the Department on April 9, 1999. Dr. Avila states further that when he telephoned the Department, the Department's operator referred him to the NYC DEP. Dr. Avila does not identify the name of the Department's operator in his April 22, 2005 affidavit. (*See* ¶ 14 of the Avila affidavit.)

The statements in Dr. Avila's April 22, 2005 affidavit relating to when, and to which governmental agencies, he reported the petroleum spill conflict with Mr. Vought's statements in his March 7, 2005 affidavit concerning the Department's records from April 9, 1999 and the personnel working for the spill hotline on that date. Accordingly, a hearing will be necessary to determine the duration of the violation.

Dr. Avila states, in his April 22, 2005 affidavit (*see* ¶ 9 - 11), that his newborn son was overcome by the petroleum fumes and had to be taken to the hospital for medical treatment. I find this urgent health crisis to be a potentially significant mitigating factor relevant to the civil penalty calculation. At hearing, the parties will have an opportunity to present argument about the weight the Commissioner should assign to this factor in determining the appropriate civil penalty.

2. Remediation

In the March 8, 2005 amended complaint, Department staff seeks an order from the Commissioner that directs the Avilas to remediate the property, according to a plan approved by Department staff. As discussed further below, material issues of fact and law exist related to the remediation of 60 Hamilton Terrace.

Mr. Vought inspected 60 Hamilton Terrace on December 17, 2002. During the inspection, Mr. Vought observed impacts from a petroleum spill in the basement. The petroleum spill at 60 Hamilton Terrace had not been remediated, according to Mr. Vought. (*See* ¶ 10 and 12 of the Vought affidavit.)

Mr. Vought also inspected the neighboring properties at 58 and 62 Hamilton Terrace on December 17, 2002 to determine whether petroleum had spread offsite. Mr. Vought found no detectable petroleum odors at 58 and 62 Hamilton Terrace, and determined that the petroleum spill at 60 Hamilton Terrace had not spread to the neighboring properties. (*See* ¶ 11 of the Vought affidavit.)

After Dr. Avila called the NYC DEP on April 9, 1999, Keith Williams from the NYC DEP inspected 60 Hamilton Terrace on April 10, 1999. In the civil action initiated by the Avilas, Mr. Williams testified that the petroleum spill at 60 Hamilton Terrace had been properly cleaned up when he inspected the property on April 10, 2005 (*see* p. 887 of Exhibit 3 to the Caliguiri reply).

The Avilas did not prevail in their civil action before Supreme Court, New York County, and appealed. Upon review, the Appellate Division determined, among other things, that "[t]he evidence, fairly interpreted, permitted the jury to reach a verdict in favor of Crystal Transportation." The court held further that "the jury fairly concluded that the subject oil

spill was promptly cleaned up and that any damages plaintiffs [*i.e.*, the Avilas] may have incurred from oil spillage was caused by prior spills and not by the oil delivery at issue." (*Eli Avila v Robani Energy Inc.*, 12 AD3d 223 [1st Dept 2004].)

Based on the foregoing discussion, a factual dispute is preserved about whether 60 Hamilton Terrace has been adequately remediated. In addition, a legal issue exists about whether the Commissioner is bound by the judicial determination in *Eli Avila v Robani Energy Inc.* (12 AD3d 223 [1st Dept 2004]) concerning the status of the petroleum cleanup at 60 Hamilton Terrace. At hearing, the parties will have an opportunity to develop a full record about these factual and legal issues.

Findings of Fact

Based on the foregoing discussion, the facts established as a matter of law are:

1. On April 9, 1999, Eli and Elena Avila owned property at 60 Hamilton Terrace, New York, New York 10032, and in the basement was a fuel oil tank with a capacity of about 275 gallons.

2. On April 9, 1999, the Avilas awoke to a strong, overwhelming odor of fuel oil. As a result of these odors, Dr. Avila inspected the basement and observed an unknown quantity of fuel oil on the basement floor.

3. On April 9, 1999, Dr. Avila telephoned Robani Energy, Inc. (Robani) about the fuel oil in his basement, and personnel from Robani came to 60 Hamilton Terrace to clean up the petroleum spill.

4. Shortly after discovering the petroleum spill on April 9, 1999, the Avilas' newborn son was overcome by the fumes and had to be taken to the hospital for medical treatment.

5. After settling his family at a friend's apartment, Dr. Avila attempted to report the spill to the US EPA. The US EPA referred Dr. Avila to the Department. Dr. Avila telephoned the New York City Department of Environmental Protection (NYC DEP).

6. On April 10, 1999, Keith Williams from the NYC DEP inspected the property located at 60 Hamilton Terrace.

7. Jeffery Vought, Engineering Geologist I, from the Department's Region 2 office, inspected the Avilas' residence at 60 Hamilton Terrace on December 17, 2002, and observed the appearance of petroleum spill impacts in the basement.

8. On December 17, 2002, Mr. Vought also inspected 58 and 62 Hamilton Terrace. These properties are located on either side of the Avilas' residence. During his inspection of the neighboring properties, Mr. Vought did not detect any petroleum odors or other impacts from the spill at the neighboring properties.

Conclusions

1. The reporting requirement prescribed in Navigation Law § 175 and 17 NYCRR 32.3 applies to the Avilas.

2. Department staff failed to established a prima facie entitlement to judgment as a matter of law that the Avilas violated Navigation Law § 175 and 17 NYCRR 32.3. Accordingly, Department staff's second notice of motion for order without hearing should be denied, and a hearing should be convened to resolve material factual and legal issues.

Ruling

I deny Department staff's second motion for order without hearing dated March 8, 2005.

Consolidation and Further Proceedings

A hearing shall be convened as soon as possible. Common questions of fact exist between the captioned matter and the administrative enforcement action against Robani and Crystal. Accordingly, the two matters will be consolidated (*see* 6 NYCRR 622.10[e][1]).

I would like to initiate a telephone conference call at 10:00 a.m. on August 23, 2005 to discuss the hearing schedule. Counsel shall advise me by August 17, 2005 whether they are available on August 23, 2005, or identify alternative dates when

they will be available for the telephone conference call. I will accept notification via e-mail. My address is provided below.

Upon receipt of this ruling, Mr. Urda shall provide Messrs. Foley and Stapleton with copies of Department staff's second motion for order without hearing concerning the captioned matter. Mr. Caliguiri shall provide Messrs. Foley and Stapleton with copies of the Avilas' pleadings.

/s/

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