STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation of
Article 17 of the New York State Environmental Conservation, Article 12 of the New York State Navigation Law, and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("NYCRR") Parts 612 and 613, and 17 NYCRR Part 32,

by

BROOKLYN RESOURCE RECOVERY, INC.,

Respondent.

RULING OF THE ADMINISTRATIVE LAW JUDGE ON THE MOTION FOR ORDER WITHOUT HEARING AND CROSS MOTION TO DISMISS

DEC Case Nos.
2-20010326-183 and
2-20110520-178

PROCEEDINGS

By notice of motion dated September 20, 2011, staff of the Department of Environmental Conservation (DEC or Department) moved for an order without hearing in lieu of complaint against respondent BROOKLYN RESOURCE RECOVERY, INC. (respondent) alleging violations of Article 17 of the Environmental Conservation Law (ECL) of New York State, Article 12 of the Navigation Law (NL) of New York State, and Titles 6 and 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR). It is alleged by DEC that respondent violated Article 17 of the ECL related to petroleum bulk storage (PBS) tanks and a discharge of petroleum at its scrap metal salvage yard and automobile shredder located at 5811 Preston Court, Brooklyn, NY (Site). A spill was reported by Department staff on June 20, 2007 (spill number 0703292). In support of its motion, DEC submitted an affirmation of Assistant Regional Attorney John K. Urda, Esq. dated September 20, 2011, an affidavit of Brian K. Falvey, Environmental Engineer, sworn to on September 19, 2011, and an affidavit of Raphael Ketani, Engineering Geologist, sworn to on September 20, 2011. Respondent cross-moved for an order dismissing all causes of action by motion dated November 17, 2011. Respondent submitted the following in support of its cross motion: affirmation of Robert Lustberg dated November 17, 2011; affidavit of Robert Rosselli, sworn to on November 15, 2011; and affidavit of Patrick Enochs, sworn to on November 16, 2011. Department staff opposed the cross motion by affirmation of John K. Urda, Esq. dated December 16, 2011, and the affidavits of Raphael Ketani and Brian K. Falvey sworn to on December 16, 2011 and December 14, 2011, respectively.

SUMMARY

Respondent owns and operates a scrap metal salvage yard with an automobile shredder, located at 5811 Preston Court, Brooklyn, New York. The Site has five petroleum storage tanks, a 12,000 gallon aboveground storage tank (AST) storing diesel, one 300-gallon AST storing waste oil or used oil, one 550 gallon AST and two 500-gallon AST tanks. (Falvey affidavit at p. 2). It is alleged by Department staff that there was a spill of petroleum at the site, on an unknown date, that was reported by Department staff on June 20, 2007 (DEC Spill number 0703292). The motion by Department staff alleges three violations of the Environmental Conservation Law and the Navigation Law related to the alleged spill. Additionally, Department staff has alleged seven additional violations related to the tanks maintained on the property. The alleged violations are as follows:

1) Violation of NL section 173 by illegally discharging petroleum at the Site;

2) Violation of NL section 175 and 17 NYCRR 32.3 for failing to report the spill;

3) Violation of NL 176 and 17 NYCRR 32.5 for failing to immediately undertake containment of discharge;

4) Violation of ECL 17-1009(2) and 6 NYCRR 612.2(a)(2) for failing to properly register the tanks (two counts);

5) Violation of 6 NYCRR 612.2(e) for failing to display PBS facility registration certificate at the Site;

6) Violation of 6 NYCRR 613.3(b)(1) for failure to color code a fill port on a 12,000-gallon storage tank;

7) Violation of 6 NYCRR 613.3(c)(3)(i) for failing to equip an AST with a gauge to indicate the level of product in the tank;

8) Violation of 6 NYCRR 613.3(c)(3)(ii) for failing to label the ASTs;

9) Violation of 6 NYCRR 613.6(a) for failing to inspect the ASTs; and

10) Violation of 6 NYCRR 613.3(d) for failing to maintain spill prevention equipment, a secondary containment system for a 12,000-gallon tank.

Respondent has denied any spill occurred at the Site and has opposed the alleged violations in the first three causes of action in the Department's complaint related to a spill. As to

the violations related to the registration of the PBS tanks (Fourth and Fifth causes of action), respondent admits three violations: (1) failure to renew the facility registration in violation of ECL 17-1009(2) and 6 NYCRR 612.2(a)(2); (2) failure to register the aboveground PBS tanks in violation of ECL 17-1009(2) and 6 NYCRR 612.2(a); and (3) failure to display the facility registration for the period of time that the facility registration was not renewed.

Respondent has also admitted two additional violations (Sixth and Seventh causes of action): (1) failure to properly color code the fill port for the 12,000 gallon tank, in violation of 6 NYCRR 613.3(b)(1); and (2) failure to equip one tank with a gauge to accurately show the level of product in the tank, in violation of 6 NYCRR 613.3(c)(3)(i).

Respondent denies three alleged causes of action: (1) Eighth cause of action which alleged a violation of 6 NYCRR 613.3(c)(3)(ii) for the tanks not being properly labeled -- respondent contends in its opposition papers that the tanks were properly labeled, inspected and approved by New York City representatives (Lustberg affirmation at p. 23, citing Rosselli affidavit); (2) Ninth cause of action which alleged a violation of 6 NYCRR 613.6(a) for failure to inspect the tanks -- respondent contends that the tanks were inspected daily and the records were maintained at the site, although not forwarded to the Department (Lustberg affirmation at p. 23, citing Rosselli affidavit); (3) Tenth cause of action which alleged a violation of 6 NYCRR 613.3(d) in that no proper secondary containment system was maintained for the 12,000 gallon tank -- respondent contends that the secondary containment system was properly maintained and adequate (Lustberg affirmation at p. 23, citing Rosselli affidavit).

DISCUSSION

Section 622.12 of 6 NYCRR provides for an order without hearing when 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. And, "summary judgment is appropriate when no genuine, triable issue of material fact exists between the parties and the movant is entitled to judgment as a matter of law." Matter of Frank Perotta, Commissioner's Partial Summary Order, January 10, 1996, adopting ALJ Summary Report. Section 3212(b) of the CPLR provides that a motion for summary judgment shall be granted, ". . . if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." Once the moving party has put forward a prima facie case, the burden shifts to the non-movant to produce sufficient evidence to establish a triable issue. Matter of Locaparra, Commissioner's Decision and Order, June 16, 2003.

SPILL

Respondent, a New York corporation, owns and operates a scrap metal yard at the Site located in Brooklyn, New York (Complaint at ¶6). Respondent shreds automobiles and other metal products on the site and separates the metal from non-metal contents. The final products

are recycled or disposed of off site (Lustberg ¶4). Respondent estimates that it shreds 300-400 vehicles a day (Rosselli ¶3). The shredded vehicles have had fluids drained before they are brought to the site for shredding with the exception of 8-10 abandoned vehicles per day that are brought to the site by the New York Police Department or others (Rosselli ¶4). On July 26, 2006, an investigator with the Department's Division of Law Enforcement alerted DEC Engineering Geologist Raphael Ketani of "ongoing discharges at the Site… where oil and antifreeze spilled onto the ground, and oil-contaminated shredder 'fluff' in a pile leaking onto the site" (Ketani affidavit ¶3). The investigator is not named in the Ketani affidavit. Mr. Ketani met with investigators with the Department's Division of Law Enforcement regarding the site on June 20, 2007 and reported the discharges via the Department's spill hotline (Ketani ¶4). Mr. Ketani visited the site for the first time on July 17, 2007 when he observed "…continuing petroleum discharges, including exposed piles of contaminated shredder fluff on bare soil, petroleum contaminated soil under a large leaking vehicle known as a grapple, and petroleum contaminated pools of water" (Ketani ¶5). Mr. Ketani stated that he directed site manager John Rosselli to remove all contaminated soil and submit disposal manifests, excavate and sample the subsurface area of concern and submit the analytical results, backfill the excavation with clean fill and cover the area with cement (Ketani ¶6). Mr. Ketani noted in his affidavit that he observed the pool of water, noted above, having a sheen to it that he attributed to petroleum. He also noted the pool smelled of petroleum (Ketani ¶5). Mr. Ketani further supported his conclusions of a spill having occurred at the Site in his December 2011 affidavit wherein he reiterated that the pool of water he observed had "an unmistakable petroleum sheen and a strong petroleum odor," "…soil exhibited gasoline odors" and "piles of petroleum-contaminated automobile shredder fluff exposed on bare soil" (Ketani December 2011 ¶8).

Robert Rosselli, President of respondent corporation, was present at the site on July 17, 2007 when Mr. Ketani conducted the site visit. Mr. Rosselli claims that Mr. Ketani was accompanied by Norman Teitler of Metropolitan NY Towing, Auto Body and Salvage Association. According to Mr. Rosselli, Mr. Teitler and Mr. Ketani came on the site without respondent's prior knowledge or invitation. Mr. Teitler introduced Ketani to Mr. Rosselli on July 17, 2007 and later told Mr. Rosselli he and Mr. Ketani were in the vicinity at a nearby site on an unrelated matter and "their purpose for coming over to BRRI's [Brooklyn Resource Recovery, Inc.] facility had nothing to do with any action by BRRI nor involved any complaint against BRRI's operation. Ketani never told me why he was on the site" (Rosselli ¶14,15) Mr. Rosselli states that he did not learn about the 2006 spill report until 2010 when he read Mr. Ketani's affidavit in support of the motion. (Rosselli ¶16)

Mr. Rosselli details in his affidavit why there was no spill present on the site as alleged by Department staff (Rosselli ¶19-26). He dismisses the pool of water as water with rust only present in it, that the water pooled due to soil being so compacted that contamination was not possible and further, respondent installed a sump pump after the visit to drain any further water that collected (Rosselli ¶24, 25). As to the shredder fluff issue, he claims that the fluff was not tested by DEC to verify any contamination, and that any petroleum in the fluff would not escape into the soil and ground water (Rosselli ¶20). Mr. Rosselli explained away each instance of

alleged contamination in his affidavit. Also, respondent submitted the affidavit of Patrick Enochs, President of Chemical Pollution Resources (CPR). CPR was retained by respondent in 2009 to respond to the DEC's allegations. Mr. Enochs states in his affidavit that "I have conducted a complete investigation of all the NY Navigation Law issues raised in the DEC's Motion for Order without hearing …there was no such violation" (Enochs ¶1,2). Mr. Enochs claims that he contacted Mr. Ketani upon being retained to attempt to assist respondent in complying with DEC's request that resulted from the 2007 site visit (Enochs ¶4). In his opinion, after speaking with Mr. Ketani, there was no empirical data or observations to support DEC's conclusion of the spill (Enochs ¶5). Mr. Enochs claims to have had follow up telephone conversations with Mr. Ketani explaining his conclusions after he investigated Mr. Ketani's assertions regarding the spill (Enochs ¶9). He also sent two letters to Mr. Ketani in May 2009 that are attached to the Ketani affidavit (Enochs ¶11). In these letters, CPR offered to conduct soil testing to determine if any contamination was present. Mr. Enochs claims to have never heard from Mr. Ketani in response to these letters (Enochs ¶11).

Mr. Enochs performed three soil sample tests at respondent's request, after respondent was served with the motion in September 2011 (Enochs ¶13 and Affidavit Exhibit 1). The samples were taken in the area where Mr. Ketani stated he observed orange water with a sheen. The Enochs affidavit concludes that the testing establishes "beyond any doubt that there is no basis for any further action by DEC under the Navigation Law" (Enochs ¶14). Mr. Enochs addressed Mr. Ketani's claim that oil-contaminated shredder fluff was present at the site and leaking onto the soil. He concludes that after visiting the site and observing the operations and reading Mr. Rosselli's affidavit that details the process of shredding, "… there is simply no physical or scientific basis upon which to conclude that the fluff contains any petroleum product capable of leaching into the groundwater of the State" (Enochs ¶15).

Department staff submitted the affirmation of John K. Urda, Esq. dated December 16, 2011 in opposition to respondent's cross motion to dismiss and an affidavit of Mr. Ketani, sworn to on December 16, 2011. Both the Urda affirmation and the Ketani supplemental affidavit reiterate the observations from the 2007 site visit. Mr. Ketani and Mr. Urda refer to photographs that are attached as exhibits to Mr. Ketani's September 2011 affidavit. The photographs are offered to demonstrate the alleged contamination he observed in 2007. Mr. Ketani notes an oily sheen on the water but it is not readily observable in the photos attached to his September 2011 affidavit. Mr. Ketani again states that he smelled a strong odor of petroleum, he observed "a grapple in the northeast corner of the Site leaking oil directly onto the soil; iii) an upturned car in another area of the Site punctured and drained of fluids, where the underlying soil exhibited gasoline odors; and, iv) piles of petroleum-contaminated automobile shredder fluff exposed on bare soil" (Ketani December 2011 affidavit ¶8). The second Ketani affidavit also addresses the arguments made by Mr. Rosselli in his affidavit. The two Ketani affidavits and the Rosselli affidavit have significantly different statements of the conditions that existed at the site in 2007. Further, the Enochs affidavit offers test results to support the conclusion that no contamination is present at the site. Mr. Ketani's December 2011 affidavit also addresses the arguments made by Mr. Enochs and disputes many of the assertions made by Mr. Enochs, including his claim that he

attempted to resolve this matter with Mr. Ketani but did not hear any response to his May 2009 correspondence (Enochs ¶11). Mr. Ketani also concludes that the test results submitted by respondent with the Enochs affidavit are "inadequate and unacceptable in methodology, scope, result and presentation" (Ketani December 2011 ¶23). Mr. Ketani notes that the Department has technical requirements set out in the Department's Division of Environmental Remediation Program Policy *DER 10-Techincal Guidance for Site Investigation and Remediation* that were not followed by respondent's contractor CPR (Ketani December 2011 ¶24). Mr. Ketani details the flaws he has found in the investigation. Mr. Ketani notes that the investigation "provides no information explaining the sampling conditions, no boring logs, no sampling procedure analysis-in essence, none of the basic elements of the investigation reports the Department may accept" (Ketani December 2011 ¶33).

There are numerous questions of fact that remain regarding the alleged spill violations. The affirmations and affidavits submitted provide extensive detail regarding the site and the conditions that each party claims existed in June 2007. However, the facts differ so greatly and leave questions to be answered to determine the accuracy of the information submitted.

REGISTRATION

Respondent has acknowledged that it failed to renew the facility registration. Brian K. Falvey inspected the facility on December 30, 2010 and determined that the facility failed to renew it's registration that had expired on March 15, 2010 (Falvey ¶5,6). ECL 17-1009(2) and 6 NYCRR 612.2(a)(2) require an owner of a PBS facility having a capacity of over 1,100 gallons to register the facility with the Department, and to renew the registration every five years. Respondent acknowledges that the registration expired on March 15, 2010 and was expired at the time of Mr. Falvey's inspection (Rosselli ¶40). Respondent offers that it had not received a renewal notice from the Department, as it had in the past, and therefore this "oversight" should not result in a penalty being assessed (Rosselli ¶40). Mr. Falvey notes in his December 2011 affidavit that respondent must have received the renewal notice. The pre-filled out renewal form created by DEC, and mailed to respondent, was mailed by respondent to the Department in December 2010 (Falvey ¶8) The registration was renewed after the Falvey inspection (Falvey December 2011 ¶10).

Department staff also alleges that three aboveground storage tanks were not registered at the time of Mr. Falvey's December 2010 inspection (Urda ¶30-32). The tanks were installed in December 2009 (Falvey Exhibit A). Mr. Rosselli admits that the tanks were not registered in December 2010, claiming that since they were installed and owned by a separate company that supplies the product that goes into the tanks, respondent was not aware that it was responsible for registering the tanks (Rosselli ¶47). The three tanks in question had not been previously registered and the Department became aware of them through the Falvey inspection in December 2010 (Falvey ¶5). The tanks were registered in January 2011 (Falvey December 2011 ¶12).

The third registration violation alleges that respondent violated 6 NYCRR 612.2(e) by failing to display the registration certificate. Respondent has admitted the failure to register the tanks in question and, therefore, the failure to display is not in question.

EQUIPMENT VIOLATIONS

Respondent has admitted its violation of 6 NYCRR 613.3(b)(1), failure to color code a fill port on the 12,000 gallon diesel storage tank (Rosselli ¶42).

Respondent admits its violation of 6 NYCRR 613.3(c)(3)(i), failure to equip one of the unregistered tanks with a gauge to show the level of product in the tank (Rosselli ¶44).

Respondent is alleged to have failed to label the five tanks on the site as required under 6 NYCRR 613.3(c)(3)(ii). Respondent argues that the tanks "were labeled and have been inspected numerous times by NYC" (Rosselli ¶45). Mr. Falvey has stated that the tanks were not labeled at his December 2010 inspection (Falvey ¶6), and photographs subsequently forwarded by respondent did not demonstrate proper labeling (Falvey December 2011 ¶17). Mr. Falvey has identified the failures he observed in the labeling used by respondent, the labeling was not properly affixed on the tanks and did not include all required information (Falvey December 2011 ¶17). Section 613.3(c)(3)(ii) of 6 NYCRR requires the following information on the tank: design capacity, working capacity and identification number of the tank must be clearly marked on the tank and at the gauge. After Mr. Falvey's December 2010 inspection, respondent did submit photographs of the labels that appear to be attached to the tanks with tape (Falvey September 2011 affidavit, Exhibit E). The labels do not contain the information required in the regulations.

Section 613.6(a) of 6 NYCRR requires aboveground storage tank owners/operators to inspect the tanks at least monthly and the reports must be retained and made available to the Department upon request for a period of ten years. Section 613.6 has detailed requirements of what is required with regard to the inspection. Mr. Falvey indicated in his December 2011 affidavit that respondent has still not furnished proper inspection reports to the Department (Falvey ¶18). Respondent contends that the tanks were inspected but reports had just not been filled out at the time of the inspection (Rosselli ¶46). Respondent claims that data has been furnished to DEC staff after Mr. Falvey's inspection (Rosselli ¶46). Preparing the reports after being notified by Department staff of the violation does not negate the violation. Further, DEC Staff claims that the information supplied in the reports after the DEC inspection was not sufficient (Falvey ¶18).

Respondent is alleged to have violated 6 NYCRR 613.3(d) by failing to maintain a secondary containment system for the 12,000 gallon tank on site (Urda ¶49). The tank has an 18,000 gallon concrete containment area. Mr. Falvey observed that the secondary containment system in place on the site had snow accumulated in it "…rendering any spill at the bottom of the vessel invisible" and preventing inspection for cracks in the bottom that could result in a discharge (Falvey December 2011¶19). Respondent has submitted photos of the containment

system that are claimed to demonstrate that it is properly maintained (Rosselli ¶43). Mr. Rosselli also claims that the containment system has no chips or cracks, is coated with an impermeable epoxy and is 18" to 24" thick with 18,000 gallon capacity for a 12,000 gallon tank (Rosselli ¶43). The information provided by the parties is inconclusive for this violation.

CROSS MOTION

STATUTE OF LIMITATIONS

Respondent has moved to dismiss the first three causes of action that are spill related alleging that they are time barred. No statute of limitations is applicable to an administrative enforcement proceeding. Rather, the determinative factor is whether the Department has brought the action within a reasonable time (see State Administrative Procedure Act [SAPA] § 301[1] [stating that, "[i]n an adjudicatory proceeding, all parties shall be afforded an opportunity for hearing within reasonable time"]). In 1985, the Court of Appeals elaborated on this standard, holding that the determination of "whether a period of delay is reasonable within the meaning of State Administrative Procedure Act § 301(1), an administrative body in the first instance, and the judiciary sitting in review, must weigh certain factors, including (1) the nature of the private interest allegedly compromised by the delay; (2) the actual prejudice to the private party; (3) the causal connection between the conduct of the parties and the delay; and (4) the underlying public policy advanced by governmental regulation" (Matter of Gramercy Wrecking and Environmental Contractors, Inc., ALJ Ruling, Jan. 14, 2008, citing Matter of Cortlandt Nursing Home v Axelrod, 66 NY2d 169, 178). Respondent has not raised any of these factors outlined by the Court of Appeals in Cortlandt to support its motion to dismiss. DEC Staff has shown its continuing efforts to investigate and remedy the alleged violations (Ketani, Falvey affidavits and Urda affirmations). The alleged spills were first discovered in 2006 and a spill report was called in and a spill number opened. Numerous site visits took place from 2006-2010. In addition, correspondence was being exchanged between Department staff and the respondent and its representatives, as acknowledged by both parties multiple times in the motion papers, during those years. Accordingly, the cross motion to dismiss on statute of limitations grounds should be denied.

CONSTITUTIONAL ISSUES

Respondent has alleged in its cross motion that granting DEC staff's motion would violate the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and comparable provisions of the New York State Constitution. Respondent contends that granting the motion would violate the noted constitutional amendments due to the following:

a) DEC's excessive reliance on hearsay evidence;

b) lack of empirical evidence of a discharge of petroleum on the site;

c) credibility issues which absolutely preclude summary resolution and mandate the opportunity to cross examine;

d) DEC's failure to identify or make available the DEC personnel who allegedly made a site visit in 2006.

e) Deprivation of property without the right to confront witnesses and cross examine them;

f) Arbitrariness and excessiveness of the penalties;

g) The facts involving the non- party Norman Teitler.

Hearsay evidence is acceptable evidence in an administrative proceeding. It is defined at 6 NYCRR 622.2(i): "Hearsay means a statement, other than one made by a witness testifying at the hearing, offered into evidence to prove the truth of the matter asserted." Section 622.11(a)(3) allows for hearsay evidence: "The rules of evidence need not be strictly applied; provided, however, the ALJ will exclude irrelevant, immaterial or unduly repetitious evidence and must give effect to the rules of privilege recognized by New York State law." Hearsay evidence is admissible in an administrative adjudicatory proceeding and can be the basis of an administrative enforcement determination (see SAPA § 306[1][agencies need not observe the rules of evidence observed by courts, but shall give effect to the rules of privilege recognized by law]; Matter of Tractor Supply Company, Commissioner Decision and Order, August 8, 2008, citing Matter of Gray v Adduci, 73 NY2d 741, 742 [1988]; People ex rel. Vega v Smith, 66 NY2d 130, 139 [1985]; Matter of Concerned Citizens Against Crossgates v Flacke, 89 AD2d 759, 760 [3d Dept 1982], affd for reasons stated below 58 NY2d 919 [1983]). As to the remaining constitutional issues raised by respondent, those objections are resolved by requiring a hearing on the causes of action related to the spill.

FINDINGS

Findings of fact, determinable as a matter of law on this motion for order without hearing, and therefore deemed established for all purposes in the hearing, are as follows (see 6 NYCRR 622.12[e]).

1. On or about September 20, 2011 Department Staff served a notice of motion for order without hearing on respondent Brooklyn Resource Recovery, Inc.

2. Respondent opposed the motion and cross-moved for an order to dismiss the complaint by motion dated November 17, 2011.

3. Department staff opposed the motion by affidavits of Brian K. Falvey and Raphael Ketani sworn to on December 14, 2011 and December 16, 2011 respectively, and affirmation of John K. Urda, dated December 16, 2011.

4. Respondent owns and operates a scrap metal salvage yard with an automobile shredder, located at 5811 Preston Court, Brooklyn, New York (Site) (Urda ¶6).

5. Respondent has five aboveground petroleum bulk storage tanks (AST) on the Site (Falvey ¶5).

6. DEC engineering geologist Raphael Ketani reported a discharge of petroleum at the Site on June 20, 2007 and NYSDEC spill number 0703292 was opened (Ketani ¶4).

7. Mr. Ketani conducted a site visit on July 17, 2007 and observed what he identified as continuing petroleum discharges at the Site (Ketani ¶5).

8. DEC environmental engineer Brian K. Falvey conducted a site visit at the Site on December 30, 2010 (Falvey ¶5). He observed the following violations that are not in dispute:

   (a) five unregistered aboveground storage tanks;
   (b) a facility registration certificate was not on display;
   (c) a diesel fill port that was not color coded;
   (d) one unregistered tank that was not equipped with a gauge or an equivalent device;
   (e) five tanks not properly labeled (Falvey ¶5).

CONCLUSIONS OF LAW

1. Respondent committed the following violations at the Site:

   (a) five unregistered aboveground storage tanks in violation of ECL 17-1009(2) and 6 NYCRR 612.2(a)(2);
   (b) facility registration certificate was not on display in violation of 6 NYCRR 612.2(e);
   (c) diesel fill port that was not color coded in violation of 6 NYCRR 613.3(b)(1);
   (d) one unregistered tank that was not equipped with a gauge or an equivalent device in violation of 6 NYCRR 613.3(c)(3)(i); and
   (e) five tanks not properly labeled in violation of 6 NYCRR 613.3(c)(3)(ii).

2. The parties have provided detailed affidavits regarding the alleged spill and conditions at the Site at the time of the alleged 2006 spill and the July 2007 Site visit and questions of fact remain.

3. The parties have each provided detailed affidavits regarding the secondary containment system at the site and a question of fact remains as to whether the containment system was in compliance with 6 NYCRR 613.3(d).

4. The Ninth cause of action alleges a violation of 6 NYCRR 613.6(a), failure to inspect the tanks. A question of fact remains as respondent purports to have inspected the tanks daily.

RULING

Department staff has established the five violations alleged in the motion for order without hearing noted above. Both parties have raised multiple issues and questions that can not be adequately resolved by the pleadings submitted. A motion for summary judgment is not the forum to determine issues in dispute, but rather for finding the issues that are not in dispute (see Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957] [holding that "[t]his drastic remedy should not be granted where there is any doubt as to the existence" of material issues of fact]). As the Court noted in Sillman, when determining a motion for summary judgment, it is "'issue-finding, rather than issue-determination, [that] is the key to the procedure'" (id. at 404 [quoting Esteve v Abad, 271 AD 725, 727 (1st Dept 1947)]). Questions of fact remain regarding the remaining causes of action.

Accordingly, Department staff's motion for order without hearing is granted in part, as detailed herein. Respondent's cross motion to dismiss is denied in its entirety. A conference call will be held with the parties on September 10, 2013 at 10:00 a.m. to discuss scheduling a hearing on the remaining causes of action. As to the question of penalties, that issue can not be addressed until all causes of action have been ruled upon.

/s/

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Molly T. McBride
Administrative Law Judge

Dated: Albany, New York
August 16, 2013