

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

A Demand for Refund of Major Petroleum Facility License Fees Pursuant to Navigation Law
article 12, and Title 17 of the Official Compilation of Codes, Rules and Regulations of the State
of New York (17 NYCRR) Section 30.9

-by-

CHEVRON USA, INC.,

Petitioner.

DEC Case No. 201267325

**DECISION, ORDER AND FINAL DETERMINATION
OF THE COMMISSIONER**

October 30, 2017

DECISION, ORDER AND FINAL DETERMINATION OF THE COMMISSIONER

This proceeding involves a request by Chevron USA, Inc. (Chevron) for a refund of \$474,108.67 in major petroleum facility license (MPFL) fees it paid to the Department of Environmental Conservation (Department) between June 2003 and August 2007. Commissioner Joseph Martens denied the refund request by letter determination dated January 24, 2012.

Currently before me for consideration is a Summary Report and Ruling on Motions for Summary Judgment (Summary Report and Ruling), prepared by Administrative Law Judge (ALJ) Daniel P. O'Connell in response to the cross-motions filed by Chevron and Department staff on administrative appeal from the letter determination pursuant to 17 NYCRR 30.9(g). The Summary Report and Ruling contains findings of fact and conclusions of law, and makes several recommendations.

I adopt the ALJ's findings of fact and, subject to my comments below, I adopt some of the ALJ's conclusions. As discussed in more detail in this decision, I conclude that, under applicable law and the facts of this case, Chevron is not entitled to a refund of the MPFL fees, because Chevron paid the fees voluntarily, without protest, and under a mistake of law. Accordingly, the letter determination is affirmed and Chevron's request for a refund of the MPFL fees is denied.

BACKGROUND

This dispute involves Chevron's petroleum storage facility located at 7 Water Street, Troy, New York known as the Troy Asphalt Plant. Chevron has owned the facility at least since 1978. When it was operational, the Troy Asphalt Plant consisted of 26 aboveground storage tanks, and other structures necessary for mixing, storing, and distributing asphalt. The plant became inactive in 1999, but was not formally closed until 2009 (see Summary Report and Ruling at 12-13, Findings of Fact Nos. 1-10).

Because the facility's storage capacity exceeded 400,000 gallons, it was considered a "major facility" under the New York State Navigation Law and applicable regulations (see Navigation Law § 172[11]; 17 NYCRR 30.2[c]). Navigation Law § 174 prohibits the operation of a major facility without a license issued by the Commissioner, and requires the licensee to pay a license fee and a surcharge based upon the number of barrels of petroleum or petroleum products transferred to the facility (see Navigation Law § 174[1][a]; [4][a], [b]; see also 17 NYCRR 30.9). Chevron's Troy Asphalt Plant facility was assigned MPFL No. 04-1540.

MPFL license fees and surcharge are used to fund the New York Environmental Protection and Spill Compensation Fund (Spill Fund) (see Navigation Law § 179) and the

Hazardous Waste Remedial Fund (see State Finance Law § 97-b). The Spill Fund is used to clean up and remove petroleum contamination, and to compensate businesses and other persons damaged by such discharges (see generally Affidavit of Suzette Baker, March 21, 2013). Surcharges paid into the Hazardous Waste Remedial Fund are used to pay debt service for bonds and notes issued to finance certain hazardous waste remedial work (see State Finance Law § 97-b).

The statute also requires each licensee to
certify to the commissioner on such forms as may be prescribed by the
commissioner the number of barrels of petroleum transferred to the licensee's
major facility during the license fee period.

(Navigation Law § 174[5] [emphasis added]).¹

The monthly report form regarding barrels of petroleum transferred must be certified, containing a sworn statement that the information in the report is accurate (see Navigation Law § 174[5]; 17 NYCRR 30.8[b]). The Department's monthly MPFL fee report forms incorporate this certification requirement (see Affidavit of Robert Schwank, March 22, 2013 [Schwank Aff.], Exhibit [Ex.] A [monthly MPFL fee reports for Chevron's Troy Asphalt Plant, each including the following statement at ¶ 19: "I certify under penalty of perjury, that the information contained in this report is true, complete and correct"]).

Between June 2003 and August 2007, Chevron submitted fifty-one (51) monthly certified MPFL fee reports to the Department's Oil Spill Revenue Unit, reporting that it transferred a total of 3,873,117 barrels (see Summary Report and Ruling at 15, Findings of Fact No. 22). Based upon that number of barrels, Chevron paid a total of \$474,108.67 (see id.). For the period June 2003 to August 2007, the Department's Oil Spill Revenue Unit deposited \$309,621.99 in license fees into the Spill Fund, and \$164,486.68 in surcharges into the Hazardous Waste Remedial Fund (see Schwank Aff. at 2, ¶ 5 and Ex. D).

Notwithstanding Chevron's submission of fifty-one monthly reports in which Chevron certified that a certain number of barrels each month was transferred, no barrels were in fact transferred to the Troy Asphalt Plant during the period June 2003 through August 2007 (see Summary Report and Ruling at 16, Findings of Fact No. 31). Rather, Chevron transferred petroleum products in New York at three other facilities not owned by Chevron (see id., Findings of Fact No. 32). Thus, Chevron reported, calculated, and paid its fees and surcharges based upon

¹ See also 17 NYCRR 30.8(a)(1) (requiring licensee's monthly report to contain "the total number of barrels of petroleum transferred to the licensee's major facility during the previous month" [emphasis added]); 17 NYCRR 30.9(a) (setting a fee for "every barrel of petroleum transferred to the licensee's major facility" [emphasis added]); 17 NYCRR 30.9(d) (requiring each licensee to "maintain adequate records in accordance with accepted accounting practice to substantiate the monthly petroleum transfers to the major facility" [emphasis added]).

all the barrels of petroleum that it transferred Statewide – none of which was transferred to its Troy facility (see id. at 16-17, Findings of Fact Nos. 32, 34).

After it discovered the error, Chevron submitted a cover letter to the Department dated October 19, 2007, attaching amended MPFL fee reports for the Troy facility, MPFL No. 04-1540, for the period September 2004 through August 2007 (see Schwank Aff. Ex. F). In the cover letter, Chevron stated, among other things, that “[t]he original returns reported erroneous throughput and receipt quantities for Chevron’s NY Troy Asphalt plant and paid NY license and surcharge fees on them. This plant was inactive since 1999” (id.). Chevron requested a refund of \$346,505.12 for this period (id.). By letter dated June 24, 2009, Chevron submitted amended MPFL fee reports for the period June 2003 through August 2004, and sought a refund of \$127,603.55 for that period (see Schwank Aff. Ex. G).

On January 24, 2012, Commissioner Joseph Martens issued a letter determination regarding Chevron’s refund requests, concluding that, “[b]ased on the record before me, Chevron’s request for a refund of MPFL fees for the period June 2003 through August 2007 is denied” (Affidavit of Scott Caruso, April 4, 2013, Ex. B [2012 Letter Determination], at 10).² In response to Chevron’s argument that it mistakenly paid the MPFL fees, Commissioner Martens held that Chevron had not made a sufficient factual showing to support its claim that “the payments were mistakenly made or that the barrels of petroleum that the fees were attributable to were paid for elsewhere or were not subject to the fee” (id. at 8). The Commissioner also held that Chevron’s delay in seeking a refund was unreasonable (see id. at 10).

By letter dated February 22, 2012, pursuant to 17 NYCRR 30.9(g), Chevron requested a hearing regarding Commissioner Martens’s letter determination (see Affirmation of David G. Burch, Jr., Esq. in Support of Chevron U.S.A. Inc.’s Motion for Summary Judgment, February 13, 2013, Ex. B). The matter was assigned to ALJ O’Connell and, following the parties’ exchange of discovery, Chevron filed its motion for summary judgment dated February 13, 2013. Department staff opposed Chevron’s motion, and cross-moved to dismiss or for summary judgment.

² The Summary Report and Ruling recounts the procedural history of this matter leading to Commissioner Martens’s letter determination and, ultimately, to the current cross-motions for summary judgment, including Chevron-initiated actions in the New York Court of Claims and New York Supreme Court (see Summary Report and Ruling at 2-5). Chevron appealed from the decisions in both proceedings to the Appellate Division, Third Department, which concluded that administrative remedies pursuant to Navigation Law § 174(6) and 17 NYCRR 30.9(f) and (g) were available to Chevron on its refund request. After remand from the courts, Commissioner Martens issued his January 24, 2012 letter determination.

DISCUSSION

Chevron's motion for summary judgment focuses on what it considers the "unique" character of the MPFL fee, and the lack of clarity of the MPFL report form and the instructions for filling out the form.

With respect to the nature of the MPFL fee, Chevron stated that it

administratively treated the MPFL fee as a "tax" because it requires monthly reporting of business activity to a government agency on a prescribed form, calculation of a payment to the government by applying statutory rates to such activity, and monthly payment

(Memorandum of Law in Support of Chevron U.S.A. Inc.'s Motion for Summary Judgment February 13, 2013 [Chevron Mem.], at 6; see also Affidavit of Diane Eck in Support of Chevron U.S.A. Inc.'s Motion for Summary Judgment, December 28, 2012 [Eck Aff.], at 3, ¶ 10).

Chevron characterized the MPFL fee as "unique" in that it applies to only those transactions within the State that are associated with a specific facility, rather than all transactions that occur within the State (see Eck Aff. at 3, ¶ 10; see also id. at 5, ¶ 18). Chevron also generally describes the process leading to the determination of fees to be paid, including the extraction of relevant data from its accounting systems and the calculation of the appropriate figures to be entered onto government forms. Chevron points out that the process is complex and involves "human judgment," with potential for error (see Chevron Mem. at 6-7; see also Eck Aff. at 2, ¶ 6; id. at 3-4, ¶ 12).

Chevron also cites language in the MPFL report form and the instructions for that form as potential sources of Chevron's error. Diane Eck, a Chevron employee serving as a specialist in federal and state excise tax compliance, submitted a sworn affidavit attaching the MPFL report form and its instructions (see Eck Aff. Ex. F). As Ms. Eck correctly stated, Line 1 of the MPFL report form requests that the licensee report the "Total Quantity Received By You During This Month," and "[n]either Line 1 nor its Instructions limit the 'quantity received' to amounts received at the particular facility in New York State that is the subject of the license" (Eck Aff. ¶¶ 19, 20; see also Eck Aff. Ex. F [MPFL Form and Form Instructions]).

Ms. Eck stated further that "[t]he same individual prepares all returns for the New York taxes discussed above and the MPFL fee" (id. ¶ 21),³ and that "[a] return preparer accustomed to the New York taxes discussed [earlier in Ms. Eck's affidavit] would not necessarily be alerted by this wording to the limited scope of the MPFL Fee compared to the statewide scope of the New York taxes" (id. ¶ 23). Ms. Eck concluded that:

It is a natural mistake for a return preparer to interpret Line 1 of the MPFL Fee report as requesting a New York state-wide figure, not limited to the amount

³ More than one person held this position at Chevron during the relevant time (Eck Aff. at 5, ¶ 21).

passing through the particular facility that is subject to the NYS DEC license. This misinterpretation was the cause of Chevron's erroneous MPFL Fee reporting during the months at issue.

(id. ¶ 22 [emphasis added]; see also Chevron Mem. at 8 [“It is understandable for a return preparer to interpret Line 1 of the MPFL fee report as requesting a New York State-wide figure”]).

In the memorandum of law submitted in support of Chevron’s motion for summary judgment, Chevron repeats Ms. Eck’s conclusion that misinterpretation of the reporting and payment requirements was the cause of Chevron’s error (see Chevron Mem. at 8). Chevron also states that its return preparer based the amount of MPFL fees on the asphalt that was delivered to Chevron’s New York customers either from third-party locations or directly to New York customers from out-of-state (see id.). Chevron concludes by stating:

Because of a reasonable interpretation and an easily understandable mistake – given the ambiguous MPFL report form and instructions and the singularly unusual nature of the fee – Chevron mistakenly paid MPFL fees on product that did not require a fee.

(Chevron Mem. at 13).

Ms. Eck does not assert that any of the employees who prepared the MPFL forms during the relevant period believed that the petroleum was transferred to the Troy Asphalt Plant during that period (see generally Eck Aff. ¶¶ 1-52). Nor did Chevron make this argument in its initial memorandum of law (see generally Chevron Mem. at 1-19).

Department staff argued in response to Chevron’s motion, and in support of Department staff’s cross-motion to dismiss or for summary judgment, that Chevron’s submissions establish that Chevron paid the MPFL fees voluntarily under a mistake of law (see generally Memorandum of Law in Support of Cross-Motion to Dismiss or for Summary Judgment and in Response to Chevron’s Motion for Summary Judgment, dated April 5, 2013 [Staff Mem.], at 26-34). The ALJ agreed, and recommends that I deny Chevron’s motion for summary judgment on that basis (see Summary Report and Ruling at 48-49 [Recommendation No. 5]; see also id. at 42-44 [case law discussion]).

In its initial response to Department staff’s cross-motion, Chevron argued, for the first time, that its payments were made under a mistake of fact, characterizing the mistake as follows: “[T]he tax side of Chevron did not realize that Chevron’s New York business had changed” and that “Chevron’s mistake (made in the California tax department across the country from the local operations in New York) was the assumption that the asphalt passed through the Troy Asphalt plant” (Response Memorandum of Law in Opposition to Department of Environmental

Conservation’s Cross-Motion for Summary Judgment and in Further Support of Chevron’s Motion for Summary Judgment [Chevron Response Mem.], at 6; see also id. at 9 [“Chevron mistakenly paid the MPFL fees believing the product passed through its Troy Asphalt Plant”)].⁴

As the ALJ noted, Chevron did not submit an affidavit of a person who prepared the MPFL report forms at issue, either in support of its initial motion or in response to Department staff’s cross-motion (see Summary Report and Ruling at 41). Indeed, as discussed above, Chevron’s motion, and the sworn testimony of its tax specialist Ms. Eck submitted in support of the motion, is predicated on the theory that Chevron made its payments because it misunderstood its payment obligations based upon the ambiguity of the form and its instructions, and the fact that, unlike other New York taxes, which applied to Statewide activities, the MPFL fee only applied to a subset of State transactions (see discussion above; see also Chevron Mem. at 7 [“With virtually no exception, each taxing jurisdiction imposes its taxes on all movements and sales of taxable products within its territory”]; see id. [identifying New York tax forms that “ask for New York statewide figures” and distinguishing the MPFL fee report because it “applies not to all transactions in the State but only to a subset of transactions in a particular licensed facility”]). Chevron’s legal argument is insufficient to establish a prima facie case. Accordingly, Chevron’s motion for summary judgment is denied.

On the other hand, Department staff has demonstrated its entitlement to summary judgment on the merits. I agree with the ALJ’s discussion of the relevant case law on refunds of taxes and fees, such as the fees involved here (see generally Summary Report and Ruling at 37-45). In Mercury Mach. Importing Corp. v City of New York (3 NY2d 418 [1956]), the Court of Appeals held that taxpayers who paid taxes voluntarily, without protest and not under duress, under a mistake of law, were not entitled to a refund of their money after the law under which they paid the taxes was held to be unconstitutional. The Court stated that a taxpayer’s protest puts the taxing entity on notice that it may have to refund the payments, and can therefore be prepared to meet that contingency (see id. at 426). Conversely, “[i]f no protest has been lodged, it is generally assumed that taxes paid can be retained to meet authorized public expenditures, and financial provision is not made for contingent refunds” (id.).

⁴ Chevron also argued that Department staff is precluded from raising the mistake of law issue because it was not cited in Commissioner Martens’s 2012 letter determination. Chevron’s argument is rejected. Throughout these proceedings, it was Chevron that initially raised the mistake defense in support of its refund claim. In the 2012 letter determination, Commissioner Martens was unable to reach the merits of Chevron’s mistake defense because the factual record before the Commissioner was inadequately developed (see 2012 Letter Determination at 8). The factual record has been greatly amplified in this proceeding, initiated by Chevron, and Chevron’s mistake defense may now be decided on the merits based upon the whole record. Moreover, I agree with and adopt the ALJ’s analysis on the issue – Chevron has had notice and a full and fair opportunity to address the arguments raised by Department staff in response to Chevron’s mistake defense (see Summary Report and Ruling at 35-37). No legal principle prevents an agency from adopting a correct legal ground for its final agency determination based upon a complete record developed through the administrative hearing process.

Similarly, in Paramount Film Distrib. Corp. v State of New York (30 NY2d 415, 420 [1972], cert denied 414 US 829 [1973]), the Court of Appeals reaffirmed the rationale of Mercury, holding that a motion picture distributor was not entitled to a refund of license fees paid voluntarily, without protest, when, for reasons unrelated to the facts of that case, the statute pursuant to which the fees were imposed was declared null (see also City of Rochester v Chiarella, 58 NY2d 316 [1983] [property owners who, without protest, paid property taxes assessed in excess of tax limitations imposed by State constitution, not entitled to refund]).

I also agree with the ALJ's conclusion that Chevron should have known what its obligations were with respect to payment of the MPFL fees (see Summary Report and Ruling at 43-44). A corporation as large as Chevron can be expected to know what its legal obligations are with respect to fees and taxes; Chevron states that it "complies with transaction-based taxes across the United States, including federal and state fuel taxes, state and local sales taxes, and state and federal environmental taxes" (Eck Aff. at 3, ¶ 11; see Paramount, 30 NY2d at 420 ["Surely one would expect ... a corporation as large as claimant with its staff of lawyers, to protest"]; see also Gimbel Bros. v Brook Shopping Ctrs., Inc., 118 AD2d 532, 536 [2d Dept 1986] [plaintiff not entitled to refund of lease payments paid under a mistake of law where plaintiff "displayed a marked lack of diligence in determining what its contractual rights were"]).

Chevron's sworn certification that the information in the MPFL fee report forms it submitted was accurate, and its sworn affidavit testimony in the present proceeding regarding its misinterpretation of the MPFL requirements, establish that Chevron's mistake was one of law. Chevron paid the MPFL fees voluntarily, without protest, under a mistake of law and, therefore, its request for a refund is denied.⁵

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

- I. The motion for summary judgment filed by Chevron USA, Inc. (Chevron) is denied;
- II. Department staff's cross-motion, insofar as it seeks summary judgment, is granted, and the cross-motion to dismiss is otherwise denied;

⁵ Because I conclude that Chevron is not entitled to a refund based on its voluntary payment under a mistake of law, I do not need to reach the other issues discussed in the parties' papers, the other recommendations offered in the ALJ's Summary Report and Ruling, or Commissioner Martens's holding that Chevron's refund request was unreasonably delayed.

- III. The 2012 letter determination of Commissioner Martens is affirmed; and
- IV. The request by Chevron for a refund of \$474,108.67 in major petroleum facility license fees it paid to the Department between June 2003 and August 2007 is denied.

For the New York State Department of
Environmental Conservation

By: _____/s/_____
Basil Seggos
Commissioner

Dated: October 30, 2017
Albany, New York

NEW YORK STATE:
DEPARTMENT OF ENVIRONMENTAL
CONSERVATION

In the Matter of a Demand for Refund of Major Petroleum Facility License Fees pursuant to Navigation Law article 12, and Title 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York (17 NYCRR) Section 30.9 by

Summary Report and Ruling
on Motions for Summary
Judgment

Chevron USA, Inc.
Petitioner.
Troy Asphalt Plant
7 Water Street
Troy, New York
(MPF License No. 04-1540)

DEC Case No. 201267325

June 30, 2016

Proceedings

With a cover letter dated February 13, 2013, Chevron USA, Inc. (Chevron), by its attorneys, Michael A. Oropallo, Esq. and David G. Burch, Jr., Esq. (Hiscock & Barclay, LLC, Syracuse) filed a motion for summary judgment with supporting papers. In the motion, Chevron stated that from June 2003 to August 2007, it erroneously paid major petroleum facility license (MPFL) fees totaling \$474,108.67 to the New York State Department of Environmental Conservation (the Department) for Chevron's major oil storage facility (MOSF) known as the Troy Asphalt plant located at 7 Water Street, Troy, New York (MPF License No. 04-1540). Chevron requested that the Department refund these fees, in full, because Chevron closed the Troy Asphalt plant in 1999 and, therefore, was not required to pay any MPFL fees after it permanently closed the MOSF.

Department staff, by its attorneys, Michael S. Caruso, Esq., and Scott W. Caruso, Esq., filed papers with a cover letter dated April 5, 2013 opposing Chevron's motion for summary judgment, and cross-moved to dismiss Chevron's request for a refund of MPFL fees. According to Department staff, Chevron is not entitled to the requested refund for various reasons, among them, Chevron did not properly advise the Department that the Troy Asphalt plant was closed until February 3, 2009, and Chevron did not make timely refund requests.

Subsequently, Chevron filed a memorandum of law and supporting papers with a cover letter dated May 6, 2013, opposing Department staff's cross-motion. Department staff filed a reply memorandum of law, dated May 20, 2013 with a cover letter of the same date. The Office of Hearings and Mediation Services (OHMS) received Department staff's May 20, 2013 reply memorandum on May 22, 2013. In a letter dated June 11, 2013, I granted leave and accepted Chevron's sur-reply memorandum of law dated June 7, 2013. Attached to this summary report and ruling, as Appendix A, is a list of the documents filed by the parties.

In its May 6, 2013 cover letter, Chevron requested an opportunity for oral argument. In a letter dated June 4, 2013, I advised the parties that I reserved on this request. Chevron renewed its request for oral argument when it filed the June 7, 2013 sur-reply. In a letter dated June 11, 2013, I advised the parties that I reserved on this request. The documents filed by the parties provide a complete record upon which to decide Chevron's motion and Department staff's cross-motion. Therefore, I deny Chevron's requests for oral argument. Accordingly, I have prepared this summary report and ruling for the Commissioner's consideration.

Each parties' filings include a number of documents, some of which are lengthy. Among the filings, some documents are duplicated. I have developed an Exhibit List, which is attached to this report as Appendix B. Appendix B provides a numbered list of the documents (*e.g.*, SJEx. 1) that I relied upon, a brief description, and references to the parties' papers.

Background

Initially, with a cover letter dated October 19, 2007 from Olga Saegert, Compliance Tax Analyst (Chevron [Concord, California]) to Department staff, Chevron enclosed amended MPFL fee reports for the Troy Asphalt plant from September 2004 to August 2007. In the October 19, 2007 correspondence, Chevron explained that the Troy Asphalt plant had been inactive since 1999, and that the throughput at the plant was erroneously stated in the original MPFL fee reports filed from September 2004 to August 2007. For the period from September 2004 to August 2007, Chevron requested a total refund of \$346,505.12. (*See* SJEx. 1.) Department staff requested additional information from Chevron concerning the October 19, 2007 correspondence, and Chevron responded with a letter dated February 13, 2008 (*see* SJEx. 2).

Subsequently, with a cover letter dated June 24, 2009 from Athena Wang, Compliance Tax Analyst (Chevron [Concord, California]) to Department staff, Chevron enclosed amended MPFL reports for the Troy Asphalt plant filed from June 2003 to August 2004. In the June 24, 2009 correspondence, Chevron explained that the Troy Asphalt plant was inactive since 1999, and that the throughput at the plant was erroneously stated in the original MPFL fee reports. For the period from June 2003 to August 2004, Chevron requested a total refund of \$127,603.55. (*See* SJEx. 3.)

The Department, however, did not issue a written response to Chevron's October 19, 2007 and June 24, 2009 refund requests. Chevron sought relief in the courts. A brief summary of the civil proceedings follows.

I. Court of Claims

Pursuant to Court of Claims Act § 10(6), Chevron moved for late claim relief (*Chevron USA, Inc. v State of New York*, Ct Cl, Feb. 5, 2010, Collins, J., Motion No. M-77154 [SJEx. 4]). In its motion, Chevron sought recovery of \$474,108.67 in MPFL fees mistakenly paid, but not owed, during the period from June 2003 through August 2007 (*see* SJEx. 4 at 2). The

Department opposed the motion and argued that the Court of Claims lacked subject matter jurisdiction (*see* SJEx. 4 at 3). In denying Chevron’s motion, the Court of Claims held that:

Here, the existence of a procedure for administrative appeal and review by way of an [Civil Practice Law and Rules (CPLR)] Article 78 proceeding in the Supreme Court makes clear that this Court lacks subject matter jurisdiction over the claim (SJEx. 4 at 4 [bracketed text provided]).

The court also held that “article 78 relief is available to challenge the State’s actions under the more deferential ‘arbitrary and capricious standard’” (SJEx. 4 at 6).

By a letter dated May 6, 2010, Chevron’s counsel advised the Commissioner that Chevron had requested a refund of MPFL fees based on amended reports for the period from September 2004 to August 2007 (*see* SJEx. 5). Chevron provided the Commissioner with a copy of the February 5, 2010 decision and order from the Court of Claims (*see* SJEx. 4), renewed its request for a refund, and requested a determination pursuant to Navigation Law § 174(6) by May 26, 2010. (*See* SJEx. 5.) When no determination was forthcoming, Chevron filed a petition pursuant to CPLR article 78 in Supreme Court, Albany County (*see* Burch Affirmation [February 13, 2013] ¶¶ 21 and 22).

II. CPLR article 78 – Supreme Court

With a verified petition and complaint dated September 1, 2010, Chevron commenced a CPLR article 78 proceeding and declaratory judgment action (*Matter of Chevron USA, Inc. v Commissioner of the New York State Dept. of Env’tl. Conservation*, 2010 NY Slip Op 33181[U] [Sup Ct, Albany County 2010]). Before answering Chevron’s petition, the Department moved to dismiss the proceeding and action. The court granted the Department’s motion. The court held that the doctrine of laches barred Chevron’s claim. The court held that Chevron knew the facts that would have provided its right to relief in October 2007. Yet, Chevron delayed making its May 6, 2010 demand to the Commissioner (*see* SJEx. 5) by more than two and one half years. (*See Chevron*, 2010 NY Slip Op 33181[U] at 2-5.)

III. Appellate Division

Chevron appealed from the Court of Claims’s February 5, 2010 decision and order (*see Chevron USA, Inc. v State of New York*, 86 AD3d 820), and Supreme Court’s November 15, 2010 judgment (*see Matter of Chevron USA, Inc. v Commissioner of Env’tl. Conservation*, 86 AD3d 838). These two cases are briefly summarized below.

The court affirmed the February 5, 2010 decision and order of the Court of Claims. With reference to Navigation Law § 174(6) and implementing regulations at 17 NYCRR 30.9(f) and (g), the court held that an administrative procedure is available to Chevron to contest the overpayment of fees. The court held further that judicial review of such an administrative determination would be available pursuant to CPLR article 78. (*See Chevron USA, Inc. v State of New York*, 86 AD3d at 820-821.)

With respect to the second matter, the majority limited the review of Supreme Court's November 15, 2010 judgment to a consideration of whether the matter should be remanded to require the Department to answer Chevron's CPLR article 78 petition (*see Matter of Chevron USA, Inc. v Commissioner of Env'tl. Conservation*, 86 AD3d at 839). The majority held that it was not clear whether Chevron initially had an administrative remedy until after the Court of Claims issued the February 5, 2010 decision and order (*see id.* at 841) which, upon review, was affirmed (*see Chevron USA, Inc. v State of New York*, 86 AD3d 820). Subsequent to the Court of Claims's February 5, 2010 decision and order, the majority noted that Chevron filed its May 6, 2010 demand with the Commissioner, which requested an administrative determination by May 26, 2010, and held that Chevron did not unduly delay making this demand (*Matter of Chevron USA, Inc. v Commissioner of Env'tl. Conservation*, 86 AD3d at 841.). The majority determined that the Department inappropriately responded to Chevron's May 6, 2010 demand by ignoring it (*see id.*). The court ordered the matter remitted to Supreme Court (*see id.* at 844).

IV. The Commissioner's January 24, 2012 Determination

With a decision and order dated September 28, 2011 (*see* SJEx. 6), Supreme Court remanded Chevron's May 6, 2010 demand to the Department for an administrative determination. The Commissioner issued a Determination on January 24, 2012 ([January 24, 2012 Determination] SJEx. 7).

In the January 24, 2012 Determination, the Commissioner denied Chevron's May 6, 2010 refund demand on two grounds. First, the Commissioner determined that the documentation Chevron provided to support its claim that the barrels of petroleum initially attributed to the Troy Asphalt plant were transferred at other facilities or transported directly to its customers was not adequate. The Commissioner's January 24, 2012 Determination noted that Chevron did not provide documentation such as shipping records or invoices. (*See* SJEx. 7 at 8.) Second, the Commissioner determined that Chevron unreasonably delayed filing its request for a refund. The Commissioner noted that Chevron offered no explanation for failing to correct the original monthly MPFL fee reports within 30 days of the Department's acceptance of the reports and associated payments. (*See* SJEx. 7 at 9-10.)

By letter dated February 22, 2012, Chevron's attorneys requested a hearing pursuant to 17 NYCRR 30.9(g) so that Chevron could obtain administrative review of the Commissioner's January 24, 2012 Determination (*see* SJEx. 8). In a letter dated March 19, 2012, the Commissioner acknowledged receipt of Chevron's February 22, 2012 request for a hearing, and directed the Office of Hearings and Mediation Services (OHMS) to assign an administrative law judge (ALJ) to the matter (*see* SJEx. 9). In a letter dated March 22, 2012, Chief Administrative Law Judge James T. McClymonds advised Chevron and Department staff that the captioned matter was assigned to me.

With a letter dated March 26, 2012, I advised the parties that I wanted to schedule a telephone conference call to discuss preliminary matters related to the hearing. I further advised the parties that I was available for the hearing. The first of a series of telephone conference calls took place on April 6, 2012. Subsequently, a schedule for discovery was developed, and the parties served discovery demands and exchanged documents. The parties conferred at regular

intervals in an effort to stipulate to a set of documents that could be presented to me for consideration either at a hearing or through motion practice.

With an email dated February 12, 2013, the parties advised me of a schedule for Chevron to file a motion for summary judgment, Department staff to response, and Chevron to reply. In due course, the papers were filed as noted above, and are identified in Appendix A.

V. Administrative Review

As noted above, Chevron's Troy Asphalt plant is a major oil storage facility (MOSF). A MOSF is defined as a facility that has a combined total storage capacity of 400,000 gallons or more of petroleum (*see* Navigation Law § 172[11]). The delivery of petroleum product to a MOSF is referred to as a "transfer" of petroleum, and is subject to fees. License fees apply upon the point of "first transfer" (*see* Navigation Law § 174[4][a]). Surcharges on the license fees are also assessed (*see* Navigation Law § 174[4][b]). For facilities licensed under Navigation Law article 12, the applicable regulations for license fees are outlined at 17 NYCRR 30.9.

The Department is responsible for licensing MOSFs, and for collecting the license fees and surcharges (*see* Navigation Law §§ 174[1], 172[6]). Upon receipt, the Department deposits the license fees and surcharges into the New York State Environmental Protection and Spill Compensation Fund (the Spill Compensation Fund) (*see* Navigation Law § 172[9]), which is administered by the Office of the State Comptroller. The Spill Compensation Fund provides the Department with resources to quickly respond to petroleum spills and, when necessary, to effectuate prompt cleanup and removal of those spills (*see* Navigation Law § 171).

A monthly license fee and surcharge are assessed on every barrel of petroleum transferred to the licensee's major facility (*see* Navigation Law § 174[4]; 17 NYCRR 30.9[a]). By the 20th day of each month, licensees must submit monthly certifications of the number of barrels of petroleum product transferred during the prior month (*see* Navigation Law §§ 172[10], 174[5]; 17 NYCRR 30.9[b]). Along with each monthly certification, the licensee must also submit full payment of the license fees and surcharges due (*see* Navigation Law § 174[5]; 17 NYCRR 30.9[b]). The licensee must maintain records in accordance with accepted accounting practices to substantiate the monthly petroleum transfers to the MOSF including the source and amount of any transferred petroleum that the licensee claimed was not subject to a fee (*see* 17 NYCRR 30.9[d]). An additional fee will be due for the late payment of the monthly license fee (*see* 17 NYCRR 30.9[e]).

With respect to the requested refunds dated October 19, 2007 and June 24, 2009, Chevron did not distinguish between the license fees and surcharges that it initially paid from June 2003 to August 2007. Chevron requested a refund of the total amount of combined license fees and surcharges reported on the original MPFL fee reports (*see e.g.*, SJEx. 20, Lines 9, 10, and 13). References in this summary report and ruling to MPFL fees include both the license fee and surcharges paid by Chevron, which is reported on Line 13 of the MPFL fee report (*see e.g.*, SJEx. 20).

The Commissioner will determine the amount of the fee when either the monthly report is not filed and the fee is not paid, or the report is incorrect or insufficient, and accompanied by an incorrect or insufficient fee (*see* 17 NYCRR 30.9[f]). For an overpayment, as is asserted here, the Appellate Division held that the Commissioner may determine the fee because an overpayment comes under the category of an “incorrect” amount. (*See Chevron*, 86 AD3d at 820).

Pursuant to 17 NYCRR 30.9(g), the Commissioner’s fee determination shall be final unless the licensee, within 30 days of receipt of the determination, applies to the Commissioner for a hearing. Upon receipt of the hearing request, the Commissioner must appoint an ALJ, and the ALJ must conduct a hearing consistent with the requirements outlined in State Administrative Procedure Act (SAPA) Article 3 (Adjudicatory Proceedings). At the conclusion of the hearing, the ALJ must provide the Commissioner with findings of fact and a recommended determination. (*See* 17 NYCRR 30.9[g].)

Positions of the Parties

I. Chevron’s Motion for Summary Judgment

In its motion for summary judgment, Chevron admitted that it mistakenly paid MPFL fees for the Troy Asphalt plant to the Department. Chevron contended that Department staff knew that no product passed through the Troy Asphalt plant during the period in question and, as a consequence, Chevron did not owe any MPFL fees. Chevron concluded that it is entitled to a full refund, as a matter of law. (*See* Chevron’s February 13, 2013 memorandum of law [Chevron’s memorandum] at 1-2.)

Chevron said that as soon as it discovered the mistake in 2007, Chevron brought the issue to Department staff’s attention and requested a refund. According to Chevron, staff ignored the request, which forced Chevron to seek relief in the courts. Subsequently, the Commissioner issued a determination on January 24, 2012, but only after the court issued an order. According to Chevron, the January 24, 2012 Determination is illogical and unfair, and not based on any statutory or regulatory authority. (*See* Chevron’s memorandum at 2.)

With its motion, Chevron provided documentation to prove that it owned the Troy Asphalt plant, and paid MPFL fees for the transfer of petroleum products through it. According to Chevron, transfers actually occurred until 1999. (*See* Chevron’s memorandum at 2.) Chevron asserted that in 1999, it closed the Troy Asphalt plant, and dismantled it in 2006. Chevron asserted further that staff was aware of the status of the Troy Asphalt plant. (*See* Chevron’s memorandum at 4, 12-13.) Nevertheless, Chevron continued to file monthly MPFL fee reports and pay the associated fees, based on its accounting practices, which are outlined in the motion and supporting papers (*see* Chevron’s memorandum at 5-8).

Chevron argued that the MPFL fee reporting process does not provide a procedure to claim a refund for overpaid fees (*see* Chevron’s memorandum at 3). In the absence of an established procedure, Chevron explained that it filed amended MPFL fee reports for the period in question with its refund requests. The amended MPFL fee reports show that no product was

received at the Troy Asphalt plant. However, Chevron said that Department staff refused to acknowledge the overpayment, and did not respond to Chevron's refund requests. (*See* Chevron's memorandum at 8-9.)

Chevron maintained that its refund requests were timely because it filed them as soon as Chevron discovered the error. In addition, Chevron argued no authority exists for the Commissioner's reliance on the 30-day statute of limitations identified in the January 24, 2012 Determination. In the alternative, Chevron asserted that a general statute of limitations of six years applies, citing *Guaranty Trust Co. v State of New York*, 299 NY 295 (1949); and *Citibank, NA v State of New York*, 103 Misc 2d 348, 351 (1980). Chevron noted that it filed the October 2007 and June 2009 refund requests within six years, and acknowledged that MPFL fees paid from 1999 to May 2003 would be barred by the suggested six-year statute of limitations. Chevron explained that it could not find any case law concerning refunds from the Spill Compensation Fund, but did identify cases involving the recovery of taxes incorrectly paid to the State insurance fund as well as other fees paid in error.¹ (*See* Chevron's memorandum at 13-16.)

Chevron asserted further that the doctrine of laches does not apply to its refund requests. According to Chevron, Department staff did not make the required showing to invoke this defense. Chevron contended that its delay in filing the claim was unknowing and excusable due to the unusual nature of the fee, and ambiguities in the Department's pre-printed form. Chevron concluded that its delay in asserting a claim from the period from June 2003 to August 2007 is excusable. (*See* Chevron's memorandum at 16-17.)

Chevron contended further that it gave staff notice when Chevron filed two sets of amended MPFL fee reports, first, in October 2007 and, subsequently, in June 2009 with written explanations for why refunds were owed. According to Chevron, any delay that occurred after October 2007 and June 2009 was the result of Department staff's inaction. Chevron noted that it never received a determination until after the courts intervened and ordered the Commissioner to make a determination. (*See* Chevron's memorandum at 17-18.)

Finally, Chevron argued that Department staff cannot claim it was prejudiced by Chevron's refund requests. As a result of providing staff with written notices of claim, Chevron said that staff investigated the circumstances, made inquiry, and requested additional information, which Chevron provided in less than two months. Chevron argued further that Department staff had documentation in its possession which proved that staff knew as early as 1999 that the Troy Asphalt plant was closed and was not receiving any petroleum product, which obviated the need to file any MPFL fee reports and to pay any fees. Chevron concluded that Department staff was in at least as good a position as Chevron was to know that the payment of MPLF fees was erroneous. (*See* Chevron's memorandum at 18.)

¹ *See Travelers Indem. Co. v State of New York*, 33 AD2d 127, 128 (3d Dept 1969), *aff'd* 28 NY2d 561 (1971); *Mutual Benefit Health and Accident Assoc. v Holz*, 5 AD2d 388 (3d Dept 1958); *China City Corp. v State of New York*, 51 Misc 2d 429 (Ct Cl 1966); *405 Company v State of New York*, 118 Misc 2d 305 (Ct Cl 1983); and *Loconti v City of Utica*, 61 Misc 2d 855 (Sup Ct, Oneida County 1969).

II. Department Staff's Cross-Motion to Dismiss

Department staff opposed Chevron's motion for summary judgment, and argued that Chevron is not entitled to a refund for the following reasons. First, the request is barred by the statute of limitations. Second, the MPFL fees paid by Chevron are not recoverable because they were paid voluntarily under a mistake of law. Third, the request is barred by the doctrine of laches. In addition, Department staff cross-moved to have Chevron's motion for summary judgment regarding its refund demands dismissed. In the alternative, Department staff cross-moved to have any refund that may be awarded limited to the fee paid with the August 2007 MPFL fee report, which was \$13,736.78. (*See* Department staff's April 5, 2013 response and cross-motion [Staff's response] at 1.)

According to Department staff, Chevron filed an application on January 26, 2000 to renew the major petroleum facility license for the Troy Asphalt plant (*see* SJEx. 10). In the 2000 application, Chevron identified the petroleum bulk storage tanks at the Troy Asphalt plant as temporarily out-of-service. Department staff issued a renewal license (No. 04-1540) on March 28, 2000 (SJEx. 11). By letter dated February 3, 2009, Department staff acknowledged that the tanks at the Troy Asphalt plant were permanently closed (SJEx. 12). (*See* Staff's response at 8.)

Department staff asserted that, pursuant to the Navigation Law and implementing regulations, Chevron was required, among other things, to keep accurate records detailing the number of petroleum barrels transferred to the Troy Asphalt plant throughout the duration of the license period (*i.e.*, March 28, 2000 to February 3, 2009 [*see* SJEx. 11]), and to use those records to complete the monthly MPFL fee reports. According to Department staff, Chevron certified the number of petroleum barrels transferred to the Troy Asphalt plant when it filed the monthly MPFL fee reports and paid any associated fees. Department staff noted that from June 2003 to August 2007, Chevron paid a total of \$474,108.67 based on its certified MPFL fee reports. Staff also noted that from September 2007 to February 2009, Chevron did not pay any fees based on its certified MPFL fee reports. (*See* Staff's response at 8-9.)

Department staff characterized Chevron's claim that the Navigation Law required it to pay license fees on all asphalt entering New York as a mistake of law. Under such circumstances, Department staff argued that Chevron is not entitled to a refund for payments it made voluntarily. Department staff also noted that the Department did not create an error that resulted in its enrichment. (*See* Staff's response at 17.)

Department staff argued that if Chevron had questions about the applicability of the fees to Chevron's petroleum transactions in New York State, it should have asked the Department for clarification. According to Department staff, the case law is clear that the license fee is not imposed on New York transfers where petroleum enters the State. Rather, the focus is on transfers at major oil storage facilities without reference to where the petroleum was produced (*see Long Island Oil Terminals Assoc., Inc. v Commissioner of the New York State Dept. of Transportation*, 70 AD2d 303, 306 [3d Dept 1979]). (*See* Staff's response at 18.)

According to Department staff, Chevron's refund request is barred by a 30-day statute of limitations. With reference to the Commissioner's January 24, 2012 Determination (*see* SJEx. 7

at 9-10), Department staff said that licensees must request a refund within 30 days of making a payment. Department staff noted that Chevron previously availed itself of this refund mechanism in December 2004, which carried an overpayment into January 2005, February 2005, and March 2005. Department staff stated that Chevron's October 19, 2007 refund request for the period from September 2004 to August 2007 (*see* SJEx. 1) was not timely except for the August 2007 MPFL fee report. (*See* Staff's response at 18.)

Department staff asserted that Chevron cannot recover the MPFL fees that it paid voluntarily and not under protest under a "mistake of law" theory, citing *Bellefont Dyeing Corp. v Joseph*, 148 NYS2d 895 (Sup Ct, New York County 1956). Staff asserted further that reimbursement of license fees or taxes paid to a governmental entity are only recoverable if the payments were made involuntarily, or if paid voluntarily, were made under protest (*see Paramount Film Distributing Corp. v State*, 30 NY2d 415, 420 [1972], and *Mercury Machine Importing Corp. v City of New York*, 3 NY2d 418, 428 [1957]). Staff contended that Chevron offered no proof to show that it paid the MPFL fees from June 2003 through August 2007 under protest. Staff noted that the self-reporting nature of the certified payments further supports the notion that Chevron made the payments voluntarily. Staff noted further that the MPFL fees that Chevron paid were not illegal, and that Chevron never gave notice to the Department that Chevron would demand a refund (*see Matter of Trustees of Vil. of Delhi*, 201 NY 408 [1911]; *Berkshire Knitting Mills v City of New York*, 1 Misc 2d 189 [Sup Ct, NY County 1955];² *Video Aid Corp. v Town of Wallkill*, 85 NY2d 663, 667 [1995]). (Staff's response at 26-27.)

Finally, Department staff contended that Chevron's refund requests are barred by the doctrine of laches (*see Chevron*, 86 AD3d at 840; *Tumminia v Coughlin*, 182 AD2d 885, 886 [3d Dept 1992]; *Connell v Town Bd.*, 113 AD2d 359, 364 [3d Dept 1985], *affd* 67 NY2d 896 [1986]). Department staff asserted that even though Chevron's computerized accounting system showed the contrary, Chevron filed 51 monthly MPFL fee reports for the Troy Asphalt plant and paid the associated fees for petroleum products brought into New York State, even though no petroleum products actually passed through the Troy Asphalt plant. Department staff asserted further that Chevron sat on its rights for years. (*See* Staff's response at 35.) According to Department staff, Chevron failed to account for the delay between its initial payments of MPFL fees, and its first request for a refund in October 2007, as well as its subsequent request in June 2009 concerning an earlier period (*see McKenzie v Comptroller*, 268 AD2d 828 [3d Dept 2000]; *Civil Serv. Empls. Assn. v Board of Educ.*, 239 AD2d 415 [2d Dept 1977]). (*See* Staff's memorandum at 42.)

III. Chevron's Opposition to Department Staff's Cross-Motion

Chevron opposed Department staff's cross-motion, and argued that the Commissioner should grant Chevron's motion for summary judgment. With reference to its original motion papers, Chevron provided a timeline of activities that occurred at, or are related to, the Troy Asphalt plant from 1978 to January 24, 2012 (*See* Chevron's May 6, 2013 response memorandum of law in opposition [Chevron's response memorandum] at 2-5).

² The complete case history is *Berkshire Knitting Mills v City of New York*, 1 Misc 2d 189 (Sup Ct, NY County 1955), *affd* 2 AD2d 839 (1st Dept 1956), *affd sub nom. Mercury Machine Importing Corp. v City of New York*, 3 NY2d 942 (1957).

Chevron observed that Department staff's April 5, 2013 response included an allegation that Chevron's voluntary payments were a "mistake of law" which precluded a refund. Chevron noted that the Commissioner's January 24, 2012 Determination did not identify the "mistake of law" theory as a basis for denying Chevron's refund request. Chevron objected to Department staff making such a claim, and argued that Department staff is precluded from making such a claim now. (*See* Chevron's response memorandum at 5).

Contrary to Department staff's argument, Chevron countered that its "mistake was one of fact – not law" (Chevron's response memorandum at 5). According to the case law identified by Chevron,³ refund claims are proper when payments were initially made under a mistake of fact (*see* Chevron's response memorandum at 5).

Chevron reiterated its position that the statute of limitations did not expire. Chevron acknowledged that when the Commissioner initiates an investigation to determine the proper fee, and subsequently issues a determination, the licensee must request a hearing within 30 days to challenge the Commissioner's determination (*see* Navigation Law § 174[6]). In the absence of a Commissioner-initiated determination, Chevron argued there is no time limit by when a licensee must request the Commissioner to initiate an investigation to determine the appropriate fee. Chevron maintained that the appropriate statute of limitations is six years, and that Chevron filed its refund requests within that period. (*See* Chevron's response memorandum at 7-8.)

Chevron contended that the doctrine of laches does not apply here. According to Chevron, Department staff made none of the required showings to invoke the defense of laches. Rather, Chevron asserted that staff created the delay. Chevron said that its delay in filing the claim was unknowing and excusable because Chevron initially paid the MPFL fees under the mistaken belief that the product passed through the Troy Asphalt plant. Chevron contended further that Department staff had timely notice when Chevron filed its refund request in October 2007 by filing amended MPFL fee reports with a written explanation for why a refund was owed. (*See* Chevron's response memorandum at 8-9.)

IV. Department Staff's Reply

In its reply memorandum, Department staff referenced Chevron's motion for summary judgment, and said that Chevron admitted to making payments because Chevron had misinterpreted the law. Department staff observed that in Chevron's May 6, 2013 response, it had attempted to recast this admission. Department staff maintained, however, that Chevron knew all the underlying facts and law from when the Troy Asphalt plant was first licensed until Chevron permanently closed the Troy Asphalt plant in 2009. (*See* Department staff's May 20, 2013 reply memorandum of law [Staff's reply memorandum] at 2.)

Department staff argued that the Commissioner's January 24, 2012 Determination does not preclude any additional arguments that may serve as a basis for denying Chevron's refund

³ *Adrico Realty Corp. v City of New York*, 250 NY 29 (1928); *Betz v City of New York*, 119 AD 91 (2d Dept 1907); *Loconti v City of Utica*, 61 Misc 2d 855 (Sup Ct, Oneida County 1969); *Browne v City of New York*, 102 Misc 2d 28 (Civ Ct, Queens County 1979).

request. Department staff argued further that Chevron did not cite to any authority that would prohibit staff from asserting any additional bases for denying the refund request not previously identified in the January 24, 2012 Determination. (*See Staff's reply memorandum at 3.*)

Department staff claimed that the record does not support Chevron's "mistake of fact" argument. To support this claim, Department staff pointed to Chevron's supporting papers, which demonstrate that during the period in question, Chevron's accounting system showed that the Troy Asphalt plant received no petroleum transfers despite extensive asphalt sales in New York State. According to Department staff, Chevron's documentary evidence supports Chevron's initial explanation that it misinterpreted the law because Chevron applied the license fee to all asphalt entering New York. (*See Staff's reply memorandum at 4-5.*)

Department staff asserted that a 30-day statute of limitations applies to Chevron's refund requests pursuant to 17 NYCRR 30.9(g). Department staff maintained that Chevron filed certified monthly MPFL fee reports and payments, and that each report constitutes a final and irrevocable determination that the report is accurate and any payment provided was owed. (*See Staff's reply memorandum at 6.*)

Department staff contended that Chevron's position concerning the applicability of laches disregards the fact that Chevron knew that no petroleum products were transferred to the Troy Asphalt plant from 1999 to 2007. Department staff concluded that Chevron knew, or should have known that for each and every month from 1999 to 2007 Chevron made license fee payments when it owned none. (*See Staff's reply memorandum at 6.*)

V. Chevron's Sur-Reply

Chevron requested leave to file a sur-reply because Department staff asserted in its response and cross-motion that Chevron made a "mistake of law" that precluded Chevron's refund request. According to Chevron, Department staff was barred from making such an assertion because the Commissioner's January 24, 2012 Determination identified inadequate documentation and delay as the only two grounds for the denial. (*See Chevron USA Inc.'s June 7, 2013 sur-reply memorandum of law [Chevron's sur-reply] at 1, 4.*)

Chevron noted that the original monthly MPFL fee reports filed from June 2003 to August 2007 erroneously stated that petroleum had passed through the Troy Asphalt plant. According to Chevron, this is a mistake of fact. Chevron argued that refund claims are proper when the payments were initially made under a mistake of fact.⁴ (*See Chevron's sur-reply at 6.*)

If Department staff's theory of mistake of law is considered, Chevron offered the following alternative argument to address it. Chevron noted that this alternative argument relates specifically to the monthly MPFL fee reports filed for June 2003 through September 2004. Chevron stated that it reported a "nonsensical figure as taxable barrels," which resulted in the erroneous reporting of fees on these reports (Chevron's sur-reply at 6). The total amount paid during this period was \$143,247.40, according to Chevron. Chevron explained that the error occurred when the total dollar amount for the sale of the asphalt was divided by 42. According

⁴ *See note 3, supra.*

to Chevron, one barrel equals 42 gallons. However, in order to determine the number of barrels, the total number of gallons, rather than the total sale price, should have been divided by 42. Chevron characterized this as an error of logic and arithmetic, which Chevron maintained is a mistake of fact, because the units of measure were not correctly presented. (*See* Chevron's sur-reply at 6-7.)

Findings of Fact

The findings of fact determinable as a matter of law on this motion, and established for all purposes concerning this matter (*see* SAPA § 302[3]; 17 NYCRR 30.9[g]), are as follows.

I. Troy Asphalt Plant

1. Chevron's Troy Asphalt plant is located along the eastern shore of the Hudson River at 7 Water Street in the City of Troy (Rensselaer County), New York. When operational, the Troy Asphalt plant consisted of 26 aboveground storage tanks, and other ancillary structures necessary for mixing, storing, and distributing asphalt. (*See* SJEx. 13.)
2. Since 1978, Chevron operated the Troy Asphalt plant as a major oil storage facility (MOSF), and held a valid major petroleum facility license (MPFL) for the Troy Asphalt plant (License No. 04-1540) until its permanent closure. (*See* Burch Affirmation [Feb 13, 2013] ¶¶ 5-6.)
3. On July 20, 1998, Edward L. Moore, PE, Environmental Engineer II from the Department's Region 4 office inspected the Troy Asphalt plant. At the time of the inspection, Mike Diamond from Chevron told Mr. Moore that the Troy Asphalt plant would be closing at the end of the 1998 construction season. Mr. Moore advised Mr. Diamond that Chevron would need to file documentation with the Department to demonstrate that the Troy Asphalt plant was either temporarily or permanently closed consistent with the requirements at 6 NYCRR 613.9 in effect at that time. (*See* SJEx. 14.)
4. With a letter dated December 11, 1998, Mr. Moore documented Department staff's July 20, 1998 inspection of the Troy Asphalt plant. In his December 11, 1998 letter, Mr. Moore noted that the MOSF license for the Troy Asphalt plant would expire on March 31, 2000, and enclosed a MOSF renewal application. Mr. Moore recommended that Chevron submit the completed application to Department staff by January 18, 1999. (*See* SJEx. 14.)
5. On October 19, 1999, Mr. Moore inspected the Troy Asphalt plant. In a letter dated October 20, 1999, Mr. Moore noted the following observations he made during the previous day's site inspection. First, the MOSF license for the plant would expire on March 31, 2000. Second, the tanks at the Troy Asphalt plant were temporarily out-of-service. Given their status, Mr. Moore directed that the tanks be labeled as such. (*See* SJEx. 15.)

6. With a cover letter dated January 26, 2000, T.H. Lambert from Chevron (Perth Amboy, New Jersey) filed an application with Department staff to renew the major petroleum facility license for the Troy Asphalt plant. In the renewal application, the status of every tank was listed as temporarily out-of-service. (*See* SJEx. 16.)
7. With a cover letter by Mr. Moore dated March 28, 2000, Department staff issued a major petroleum facility license renewal for the Troy Asphalt plant (No. 04-1540) effective until March 31, 2004. (*See* SJEx. 17.)
8. In a letter by Mr. Moore dated March 8, 2005, Department staff advised Chevron (Robert Lavorerio [Perth Amboy, New Jersey]) that staff had approved the work plan for the site investigation as part of the process to permanently close the Troy Asphalt plant. (*See* SJEx. 13, Appendix A.)
9. With a cover letter dated August 10, 2005, Kenneth Siet, Vice President, TRC Raviv Associates, Inc. (Millburn, New Jersey) filed, with Region 4 Department staff, the *Facility Closure Site Investigation Report* dated August 9, 2005 for the Troy Asphalt plant. (*See* SJEx. 13.)
10. By letter dated February 3, 2009, Daniel Lightsey, PE, Environmental Engineer II, from the Department's Region 4 office, advised Chevron (Kathy Abell [Concord, California]) that Department staff had processed the application concerning the substantial tank modification to permanently close all tanks at the Troy Asphalt plant. Department staff enclosed a copy of the facility information report with the February 3, 2009 letter. The facility information report demonstrates that all the tanks at the Troy Asphalt plant are permanently closed. (*See* SJEx. 12.)

II. Major Petroleum Facility License (MPFL) Fee Reports

A. The Spill Compensation and Remedial Funds

11. The Comptroller manages the New York State Environmental Protection and Spill Compensation Fund (Spill Compensation Fund), and the Hazardous Waste Remedial Fund (Remedial Fund). The purpose of the former is to pay for petroleum spill responses and cleanup costs (*see* Navigation Law § 179.) The purpose of the latter is to pay debt service on bonds and notes issued to finance hazardous waste remedial work, among other things (*see* State Finance Law § 97-b).
12. During State fiscal year 2003/2004 (*i.e.*, April 1, 2003 to March 31, 2004), Department staff deposited MPFL fees totaling \$27.8 million into the Spill Compensation Fund, and \$14.8 million into the Remedial Fund (*see* Farrar Affidavit ¶ 9; SJEx. 18 at 11). For fiscal year 2004/2005, Department staff deposited MPFL fees totaling \$28.5 million into the Spill Compensation Fund, and \$12.5 million into the Remedial Fund (*see* Farrar Affidavit ¶ 9; SJEx. 19 at 13).

B. Forms and Instructions

13. Every MOSF licensee must file a MPFL fee report for the previous month's transfers of petroleum products to the facility, and include payment of the appropriate fee by the 20th day of the following month. Each MPFL fee report must include a sworn statement that the facts stated in the report are true. (*See* Navigation Law §§ 174[4][a], 174[5]; 17 NYCRR 30.8, 30.9[a] and [d].) To facilitate this process, staff from the Department's Division of Management and Budget Services, Oil Spill Revenue Unit sends, by regular mail, at the beginning of every month, a MPFL fee report form and instructions to every licensee. Each MPFL fee report form is pre-printed with the license number for the facility and the date (month and year) of the license fee period. The MPFL fee report form has 19 lines. (*See* Schwank Affidavit ¶ 7; SJEx. 20.)
14. Staff anticipates the receipt of a completed MPFL fee report from every licensee before the 20th day of each month. Every licensee must file a completed MPFL fee report with the Oil Spill Revenue Unit regardless of whether petroleum products were transferred at the MOSF. When no petroleum products have been transferred at the MOSF for a particular month, the licensee is not required to pay a fee with the completed MPFL fee report. (*See* Schwank Affidavit ¶ 9.)
15. Upon receipt of completed MPFL fee reports and any associated payments, Department staff reviews the reports and processes the reports and checks (*see* Schwank Affidavit ¶ 8). Department staff deposits all fees received into the Spill Compensation Fund and the Remedial Fund (*see* Schwank Affidavit ¶ 5).
16. When the Oil Spill Revenue Unit does not receive a completed MPFL fee report from a particular licensee, staff sends a form letter to the licensee. For example, staff sent Chevron such a letter dated April 29, 2009 when the Oil Spill Revenue Unit did not receive Chevron's March 2009 MPFL fee report for the Troy Asphalt plant. (*See* Schwank Affidavit ¶ 9; SJEx. 21.)
17. Staff from the Oil Spill Revenue Unit receives notification of facility closures by way of the monthly MPFL fee reports. The following question appears at line 17 of the MPFL fee report form: "[h]as there been any change of condition with respect to your facility which substantially changes the circumstances under which your license was issued or renewed?" If the response to the question at line 17 is "yes," the monthly MPFL fee report requests the licensee to enter the date of the change and to provide an explanation about the nature of the change. (*See* Schwank Affidavit ¶ 10; SJEx. 20.)
18. Staff from the Oil Spill Revenue Unit receives notification of the transfer of the ownership of a facility by way of the monthly MPFL fee reports. The following question appears at line 18 of the MPFL fee report form: "[h]as ownership changed during the calendar month covered by this report?" If the response to the question at line 18 is "yes," the monthly MPFL fee report requests the licensee to enter the date of the change in ownership and to provide an explanation. (*See* Schwank Affidavit ¶ 10; SJEx. 20.)

19. The Oil Spill Revenue Unit relies on the responses that licensees provide to the questions on lines 17 and 18 of the monthly MPFL fee reports to learn about changes at facilities or whether the ownership of MOSFs has changed (*see* Schwank Affidavit ¶ 11).
20. From 1978 to 1999, Chevron prepared monthly MPFL fee reports and paid fees to the Department's Oil Spill Revenue Unit for the transfer of asphalt transferred to the Troy Asphalt plant.

C. Chevron's MPFL Fee Reports from June 2003 through August 2007

21. From June 2003 to August 2007, staff at the Oil Spill Revenue Unit processed a total of 20,198 MPFL fee reports. (*See* Schwank Affidavit ¶ 12.)
22. With respect to the Troy Asphalt plant, Chevron filed 51 MPFL fee reports with the Department's Oil Spill Revenue Unit from June 2003 to August 2007. On these 51 MPFL fee reports for the Troy Asphalt plant, Chevron certified that it transferred a total of 3,873,117 petroleum barrels and, therefore, paid \$474,108.67 in total fees. (*See* Schwank Affidavit ¶¶ 13-14; SJEx. 22.)
23. On the MPFL fee report dated August 15, 2005, Chevron did not respond to the questions on lines 17 and 18. (*See* Schwank Affidavit ¶ 17; SJEx. 22, Bates No. 000837.)
24. But for the MPFL fee report dated August 15, 2005, Chevron responded "No" to the questions on lines 17 and 18 on the remaining 50 MPFL fee reports for the Troy Asphalt plant that Chevron filed from June 2003 to August 2007. Accordingly, from month to month during this period, Department staff from the Oil Spill Revenue Unit understood that conditions at the Troy Asphalt plant had not substantially changed, and that Chevron remained the owner of the Troy Asphalt plant. (*See* Schwank Affidavit ¶ 17; SJEx. 22.)
25. For December 2004, Chevron dated the associated MPFL fee report on January 12, 2005. The Department's Oil Spill Revenue Unit received this report on January 25, 2005. (*See* Schwank Affidavit ¶ 21; SJEx. 22, Bates No. 000826)
26. With a cover letter from Charleton Carandang (Concord, California) dated February 11, 2005, which is within 30 days from January 12, 2005, Chevron filed two enclosures. The first enclosure was an amended MPFL fee report for December 2004. The second enclosure was the MPFL fee report for January 2005. In the February 11, 2005 cover letter, Chevron stated that on the original December 2004 MPFL fee report, Chevron had identified an excessive number of barrels of petroleum and, therefore, overpaid the MPFL fee. Chevron corrected the error on the amended December 2004 MPFL fee report (*see* Schwank Affidavit ¶ 21; SJEx. 22, Bates No. 000830), and requested that the fees paid in excess, which totaled \$9,138.50, be credited toward future transfers as reported on subsequent MPFL fee reports (*see* Schwank Affidavit ¶ 21; SJEx. 22, Bates Nos. 000827 and 000830, Line 16).

27. Consistent with Department staff's recommendation, Chevron reported the credited amount (*i.e.*, \$9,138.50) on the MPFL fee report for January 2005 (*see* Schwank Affidavit ¶ 21; SJEx. 22, Bates No. 000831, Line 15). After determining the total license fee and surcharge fee due for January 2005, Chevron reported the balance of the credited amount on the MPFL fee report as of January 2005 (*see* Schwank Affidavit ¶¶ 21-22; SJEx. 22, Bates No. 000831, Line 16). On the January 2005 MPFL fee report, the remaining balance of the credited amount was \$9,044.30 (*see* Schwank Affidavit ¶¶ 21-22; SJEx. 22, Bates No. 000831, Line 16).
28. Based on the number of barrels of petroleum certified by Chevron for February 2005 and March 2005, Chevron subsequently exhausted the remaining credit balance as reflected on the March 2005 MPFL fee report dated April 15, 2005 (*see* Schwank Affidavit ¶ 22; SJEx. 22, Bates Nos. 000832 and 000833).
29. With a cover letter dated October 19, 2007 from Olga Saegert, Compliance Tax Analyst (Chevron [Concord, California]) to Department staff, Chevron enclosed amended MPFL fee reports for the Troy Asphalt plant from September 2004 to August 2007. In the October 19, 2007 correspondence, Chevron explained that the Troy Asphalt plant had been inactive since 1999, and that the throughput at the plant was erroneously stated in the original MPFL fee reports filed from September 2004 to August 2007. For the period from September 2004 to August 2007, Chevron requested a total refund of \$346,505.12. (*See* SJEx. 1; Schwank Affidavit ¶ 23.)
30. With a cover letter dated June 24, 2009 from Athena Wang, Compliance Tax Analyst (Chevron [Concord, California]) to Department staff, Chevron enclosed amended MFPL reports for the Troy Asphalt plant from June 2003 to August 2004. In the June 24, 2009 correspondence, Chevron explained that the Troy Asphalt plant had been inactive since 1999, and that the throughput at the plant was erroneously stated in the original MPFL fee reports filed from June 2003 through August 2004. For this period, Chevron requested a total refund of \$127,603.55. (*See* SJEx. 3; Schwank Affidavit ¶ 24.)

III. Chevron's Petroleum Transfers in New York State from June 2003 to August 2007

31. None of the petroleum products identified in Chevron's MPFL fee reports for the Troy Asphalt plant filed from June 2003 to August 2007 actually passed through the Troy Asphalt plant (*see* Eck Affidavit ¶¶ 7-8).
32. From June 2003 to August 2007, Chevron transferred petroleum products in New York State at the following three facilities: (1) the IPT, LLC facility in Rensselaer, New York; (2) the Gorman Asphalt facility in Rensselaer, New York; and (3) the Castle Oil facility in the Bronx, New York. During this period, Chevron did not own these three facilities. (*See* Eck Affidavit ¶ 9.)
33. Diane Eck is employed by Chevron as a specialist in federal and state excise tax compliance (*see* Eck Affidavit ¶ 2). Ms. Eck's job duties include, among other things,

responding to questions from, and audits by, taxing agencies, as well as supervising Chevron employees who do the same (*see* Eck Affidavit ¶ 39).

34. Exhibit C to Ms. Eck's affidavit (SJEx. 23) is a report documenting the Chevron product transfers in New York State from January 1, 2003 to August 30, 2007 at the IPT, LLC, facility, the Gorman Asphalt facility, and the Castle Oil facility. The information presented in SJEx. 23 is corroborated by the individual invoices issued by Chevron (*see* Caruso Affirmation ¶¶ 10-27, Exhibits H-Y).

IV. Chevron's August 2007 MPFL Fee Report

35. Department staff received Chevron's certified August 2007 fee report for the Troy Asphalt plant on September 24, 2007 with a payment of \$13,736.78 (*see* Schwank Affidavit ¶ 13; SJEx. 22, Bates No. 000862). Subsequently, Department staff received an amended MPFL fee report for August 2007 from Chevron on October 22, 2007, which was 28 days after September 24, 2007 (*see* Schwank Affidavit ¶ 23; SJEx. 1, Bates No. 000864)].⁵
36. According to the amended August 2007 MPFL fee report, Chevron did not transfer any petroleum product at the Troy Asphalt plant during August 2007 (*see* Schwank Affidavit ¶ 23; SJEx. 1, Bates Nos. 000864 and 000866).

V. Laches: Undue Delay and Prejudice

37. Refund requests made within 30 days from filing the original MPFL fee report are necessary to ensure the stability of the Spill Compensation Fund and the Remedial Fund (*see* Baker Affidavit ¶¶ 3, 6, 7, and 8). The Spill Compensation Fund must be adequately maintained to finance the prompt containment and cleanup of petroleum contamination and, as necessary, provide compensation to persons damaged by unlawful petroleum discharges (*see* Baker Affidavit ¶¶ 9-13).
38. Federal and state taxing authorities, such as New York State, generally "have a three-year statute of limitations within which to conduct an audit" (Eck Affidavit ¶ 42). The period, however, may be extended by a written agreement (*see* Eck Affidavit ¶ 42).
39. Publication 131 from the New York State Department of Taxation and Finance is entitled, *Your Rights and Obligations Under the Law*, dated September 2011 (SJEx. 24) (*see* Eck Affidavit ¶ 42).
40. The period at issue with respect to Chevron's October 19, 2007 refund request includes MPFL fee reports that Chevron filed within three years of their respective due dates (*see* SJEx. 24 at 1), except for the September 2004 and October 2004 MPFL fee reports. Nevertheless, Chevron filed the original July 2007 MPFL fee report approximately 60 days prior to its October 19, 2007 refund request.

⁵ Department staff received Chevron's refund request dated October 19, 2007 on October 22, 2007. The October 19, 2007 refund request included, among others, the amended MPFL fee report for August 2007.

41. The period from July 2007 to October 19, 2007 is about 90 days. However, the next amended MPFL fee report concerns June 2007, which is about 120 days prior to the date of the refund request. For each amended MPFL fee report back to September 2004, the period between when Chevron filed the original MPFL fee report and the date of the refund request exceeds 120 days.
42. Chevron did not request an administrative review of the MPFL fees it paid for the period from June 2003 to August 2004 until June 24, 2009. June 24, 2009 is almost 6 years after Chevron was required to file the June 2003 MPFL fee report, and more than 4½ years after Chevron was required to file the August 2004 MPFL fee report.
43. The spill response program is part of the Department's Division of Environmental Remediation. The purpose of the spill response program is to address the environmental and public health hazards associated with unauthorized petroleum discharges. (*See* Farrar Affidavit ¶ 5.)
44. During State fiscal year 2003/2004, the spill response program received 15,618 spill reports to investigate. In the subsequent fiscal year (*i.e.*, 2004/2005), the Spill Response Program received 15,400 spill reports to investigate. A variable number of spill report cases may carry over from year to year because investigations and any necessary remediation may take longer than one year to complete. (*See* Farrar Affidavit ¶¶ 9, 13; SJEx. 18 at 14, and SJEx. 19 at 10.) For example, the total number of cases addressed during the 2003/2004 fiscal year was 20,694 (*see* Farrar Affidavit ¶ 9; SJEx. 18 at 14), and the total number of cases addressed during the following fiscal year was 17,410 (*see* Farrar Affidavit ¶ 9; SJEx. 19 at 10). The number of cases reported to the Department and the disposition of these cases vary from year to year.
45. Suzette Baker is the Executive Director of the Bureau of Financial Reporting and Oil Spill Remediation from the Office of Operations of the Office of the State Comptroller (the Bureau). The Bureau's responsibilities include administering the Spill Compensation Fund, and managing the oil spill program. (*See* Baker Affidavit ¶¶ 1, 2.)
46. The Spill Compensation Fund must be financed in a fiscally reliable manner in order to respond effectively to more than 15,000 unauthorized petroleum discharges that occur every year (*see* Baker Affidavit ¶ 6). The timely payment of monthly MPFL fees, which have remained relatively constant from year to year (*see* Baker Affidavit ¶ 14), provides the required revenue stream (*see* Baker Affidavit ¶ 8). To develop its annual budget, the administrators of the Spill Compensation Fund review the MPFL fees received from prior years to project the expected revenue for the next fiscal year (*see* Baker Affidavit ¶ 14). Sufficient funds must be available to address significant or catastrophic environmental events (*see* Baker Affidavit ¶ 15; Farrar Affidavit ¶ 15).

VI. Mistake

47. With respect to the MPFL reports filed from June 2003 through September 2004, Chevron calculated the number of barrels by dividing the sales price for the total amount of asphalt in dollars by 42, and recorded the resulting quotient as the number of barrels. The calculation resulted in fees totaling \$143,247.40 for the period. The correct method to calculate the number of barrels, however, is to divide the number of gallons by 42 because one barrel includes 42 gallons. (*See* Eck Affidavit ¶¶ 26-27; SJEx. 25, rows 1-16, inclusive.)
48. Chevron pays transaction-based taxes, among others, in New York State. For example, Exhibit D to Ms. Eck's affidavit is a copy of Form PT-103 (New York State Department of Tax and Finance, *Tax on Residual Petroleum Product Businesses* [Tax Law Article 13-A] [SJEx. 26]). On Lines 2 and 3 of Form PT-103, Chevron is required to report the total receipts in New York State in gallons (*see* Eck affidavit ¶ 15).
49. Exhibit E to Ms. Eck's affidavit is a copy of Form ST-809 (New York State Department of Tax and Finance, *New York State and Local Sales and Use Tax Return for Part-Quarterly [Monthly] Filers* [SJEx. 27]). On Line 1 of Form ST-809, Chevron is required to report total gross sales and services (*see* Eck affidavit ¶ 16).
50. Form PT-103 and Form ST-809 require Chevron to report statewide figures. (*See* Eck Affidavit ¶¶ 15-17.)
51. Ms. Eck characterized the New York MPFL fee report as unique because it assesses a fee, which is essentially a tax, on transactions that have taken place at a particular licensed facility, rather than on all transactions in New York State (*see* Eck affidavit ¶ 18). Line 1 on the major petroleum facility license fee report form and the related instructions, requests the "Total Quantity Received By You During This Month" (SJEx. 20). The requested amount is not expressly limited to the number of barrels received at a particular facility in New York State. (*See* Eck affidavit ¶¶ 19-20; SJEx. 20.)
52. By regular mail, Department staff sent the April 2009 MPFL fee report form and instructions to Chevron USA, Inc. at PO Box F, Section No. 610, Concord, CA 94524. Chevron's federal identification number is pre-printed at the top of the form, as well as the license number for the Troy Asphalt plant (License No. 04-1540). (*See* SJEx. 20.)
53. The personnel at Chevron, who review and prepare the various forms, specialize in particular states. In addition, the same individual would prepare all the forms required by New York State, such as Forms PT-103 (*see* SJEx. 26) and ST-809 (*see* SJEx. 27), as well as the MPFL fee report forms (*see e.g.*, SJEx. 20). From June 2003 to August 2007, more than one individual at Chevron was responsible for completing the necessary tax and other required New York State forms. (*See* Eck affidavit ¶ 21.)

54. Ms. Eck said that:

[i]t is a natural mistake for a return preparer to interpret Line 1 of the MPFL Fee report as requesting a New York state-wide figure, not limited to the amount passing through the particular facility that is subject to the NYS DEC license. This misinterpretation was the cause of Chevron's erroneous MPFL Fee reporting during the months at issue⁶ (Eck affidavit ¶ 22).

55. Ms. Eck stated further that:

The MPFL Fee Report is addressed to Chevron U.S.A. Inc. Both the report form and the instructions to Line 1 ask for the amount of petroleum products "received by you," without limitation to the licensed facility. A return preparer accustomed to the New York taxes discussed above [*i.e.*, Forms PT-103 and ST-809] would not necessarily be alerted by this wording to the limited scope of the MPFL fee compared to the statewide scope of the New York taxes (Eck affidavit ¶ 23). (Bracketed material supplied.)

56. As a Chevron employee specializing in federal and state excise tax compliance, Ms. Eck had personal knowledge of the matters related to Chevron's requested refunds (*see* Eck Affidavit ¶¶ 1 and 2). Ms. Eck did not expressly state, however, that she prepared any of Chevron's MPFL fee reports from June 2003 to August 2007.

57. Chevron personnel misinterpreted the legal requirements with respect to the information that must be reported on Line 1 of the MPFL fee report form (*see* SJEx. 20).

58. From June 2003 to August 2007, Chevron voluntarily paid MPFL fees without protest.

59. In addition, Chevron showed a lack of diligence to determine what its obligations were with respect to the payment of MPFL fees from June 2003 to August 2007, given the status of the Troy Asphalt plant during this period.

Discussion

The captioned matter is a case of first impression. The Office of Hearings and Mediation Services has never considered a request for a refund of MPFL fees paid pursuant to Navigation Law article 12. The Appellate Division observed the same upon review of Supreme Court's November 15, 2010 judgment (*see Matter of Chevron USA, Inc. v Commissioner of Env'tl. Conservation*, 86 AD3d at 842).

The parties raise a number of issues in their respective motion papers. Some issues include the administrative procedures that may be used to request a refund, and the time by

⁶ In her December 28, 2012 affidavit (¶ 4), Ms. Eck stated that the months at issue in this case were from June 2003 through August 2007, inclusive.

which such requests must be made. These and all other issues raised in the motion papers are addressed below.

I. Procedures

The licensee of a MOSF must file a MPFL fee report for the previous month's transfers of petroleum and include payment of the appropriate fee by the 20th day of the following month. Each MPFL fee report must include a sworn statement that the facts stated in the reports are true. (*See* Navigation Law §§ 174[4][a], 174[5]; 17 NYCRR 30.8, 30.9[a] and [d]). To facilitate this process, staff from the Department's Oil Spill Revenue Unit sends, by regular mail, at the beginning of every month, a MPFL fee report form and instructions to every licensee. Each MPFL fee report form is pre-printed with the license number for the facility and the date (month and year) of the license fee period. The MPLF fee report form has 19 lines. (*See* Schwank Affidavit ¶ 7.)

Upon receipt of completed MPFL fee reports with the associated payments, Department staff reviews the reports and processes them (*see* Schwank Affidavit ¶ 8). Department staff deposits all fees received into the Spill Compensation Fund and the Remedial Fund (*see* Schwank Affidavit ¶ 5). The Comptroller manages these funds. The Spill Compensation Fund is used to pay for petroleum spill responses and cleanup costs. The Remedial Fund is used to pay debt service on bonds and notes issued to finance hazardous waste remedial work, among other things. (*See* Navigation Law § 179 and State Finance Law § 97-b.)

From June 2003 to August 2004 (*i.e.*, the period of Chevron's second refund request [SJEx. 3]), and from September 2004 to August 2007 (*i.e.*, the period of Chevron's first refund request [SJEx. 1]), Chevron filed certified monthly MPFL fee reports. The fees that Chevron paid from June 2003 to August 2007, however, were based on the amount of asphalt that Chevron transferred to contractors located in New York State, but not at the Troy Asphalt plant. (*See* Eck Affidavit ¶¶ 7-9.)

When a monthly MPFL fee report is not filed, or if the Commissioner has reason to believe that the information initially provided by the licensee concerning a particular monthly MPFL fee report is incorrect, the Commissioner, pursuant to Navigation Law § 174(6), is authorized to modify or determine the monthly MPFL fee (*see also* 17 NYCRR 30.9[f]). Under such circumstances, the Commissioner's determination is final and binding unless the licensee appeals the determination within 30 days of notice of the determination (*see* Navigation Law § 174[6]; 17 NYCRR 30.9[g]). According to Department staff (*see* Staff's response at 22), if a licensee does not receive timely notice from the Commissioner about the previous month's fee report, then the Commissioner has accepted the monthly MPFL fee report and associated payment for the previous month (*see* SJEx. 7 at 9).

Chevron asserted that the MPFL fee reporting process does not provide a procedure to claim a refund for overpaid fees (*see* Chevron's memorandum at 3, 13-14). With reference to the Commissioner's January 24, 2012 Determination (*see* SJEx. 7 at 9-10), Department staff countered that licensees must request a refund within 30 days of making a payment. Department staff noted that Chevron previously availed itself of this refund mechanism in December 2004,

which carried an overpayment into January 2005, February 2005 and March 2005. According to Department staff, no other administrative procedure is available to a licensee to correct for an overpayment. (*See* Staff's response at 18.) Nevertheless, given the apparent absence of any procedures similar to those outlined in Navigation Law § 174(6), which appear to be exclusive to the Commissioner, Chevron filed refund claims dated October 19, 2007 and June 24, 2009, and with them included amended monthly MPFL fee reports filed for September 2004 to August 2007, and for June 2003 to August 2004, respectively.

In addition to the procedure that allows licensees to claim an overpayment as a credit balance on the monthly MPFL fee reports, the court held that an administrative remedy is available to licensees who may have overpaid their monthly MPFL fees. The court held that a claim about an overpayment falls within the category identified in Navigation Law § 174(6) and 17 NYCRR 30.9(f) as an "incorrect" amount (*Chevron*, 86 AD3d 821). Based on *Chevron* (86 AD3d 820), the Commissioner reviewed Chevron's October 19, 2007 and June 24, 2009 refund requests and issued the January 24, 2012 Determination (*see also Matter of Chevron USA, Inc. v Commissioner of the New York State Dept. of Env'tl. Conservation*, 2010 NY Slip Op 33181[U] [Sup Ct, Albany County 2010]).

Navigation Law § 174(6) authorizes the administrative review of the Commissioner's January 24, 2012 Determination, and it is the subject of this proceeding. The basic procedures are outlined at 17 NYCRR 30.9(g), and refer to SAPA. Hearing procedures are outlined in SAPA article 3. In addition, SAPA § 301(3) authorizes agencies to adopt rules governing the procedures on adjudicatory proceedings and appeals. The Department has not promulgated rules that otherwise elaborate upon the procedures presented at 17 NYCRR 30.9(g).

Consistent with SAPA § 301(3) and the Environmental Conservation Law (ECL), the Department has promulgated rules for various types of hearings. In their papers, the parties specifically referenced 6 NYCRR part 481 (Program Fees: In General), and 6 NYCRR part 622 (Uniform Enforcement Hearing Procedures). In addition, 6 NYCRR part 624 (Permit Hearing Procedures) applies to the review of environmental permit applications and related matters (*see* 6 NYCRR 624.1).

Part 481 of 6 NYCRR relates to program fees. Pursuant to ECL 72-0201, the Department is authorized to collect annual program fees from all persons required to obtain an environmental permit from the Department. There are six categories of program fees (*see* 6 NYCRR 481.1[b]). The first two categories relate to stationary air emission sources (*see* ECL 72-0302 and 72-0303; 6 NYCRR subpart 482-1 and subpart 482-2). The third category applies to hazardous waste generators and those who operate hazardous waste treatment, storage, and disposal facilities (*see* ECL 72-0402; 6 NYCRR part 483). The fourth category of program fees applies to waste transporters (*see* ECL 72-0502; 6 NYCRR part 484). The fifth category applies to those who hold State Pollutant Discharge Elimination System (SPDES) permits (*see* ECL 72-0602; 6 NYCRR part 485). The final category applies to water transport facilities that withdraw fresh water (*see* ECL 72-0702; 6 NYCRR part 486). Pursuant to ECL article 72, title 10, the Department also collects mined land reclamation program fees.

Persons may dispute the annual program fees and any related penalties assessed by the Department. These disputes may be resolved with an administrative hearing (*see* ECL 72-0201[8]), and the hearing procedures are outlined at 6 NYCRR 481.10.

Although the hearing procedures outlined at 6 NYCRR 481.10 would seem applicable here, they are not for the following reasons. First, the monthly fees that major petroleum facility licensees pay pursuant to Navigation Law § 174(4)(a) and 17 NYCRR 30.9 are different from the annual program fees assessed pursuant to ECL article 72 and 6 NYCRR parts 482-486. For example, MPFL fees and program fees are authorized by different statutes (*compare* Navigation Law § 174[4] *with* ECL 72-0201). In addition, the bases for MPFL fees and program fees are different. On the one hand, MPFL fees are paid every month based on the number of barrels of petroleum transferred to a major oil storage facility. On the other hand, program fees are paid annually based on criteria set forth in ECL article 72, and applicable regulations (*see* 6 NYCRR parts 482-486).⁷ Therefore, the hearing procedures outlined at 6 NYCRR 481.10 do not expressly apply to the review of the Commissioner's January 24, 2012 Determination or other MPFL fee disputes. However, given their detail compared to the procedures outlined at 17 NYCRR 30.9, the procedures outlined at 6 NYCRR 481.10 may provide some useful guidance with respect to this proceeding.

Since this matter has been assigned to me, the parties' representatives and I have participated in several telephone conference calls. Among other things, the parties discussed the exchange and review of documents and disclosure. In addition, the parties agreed that Chevron would file a motion seeking relief in the nature of summary judgment (*see* Civil Practice Law and Rules [CPLR] § 3212). The parties developed a schedule for filing responses. Disclosure and motion practice are contemplated by SAPA (*see generally* §§ 302, 305, 306) as well as, for the purpose of this matter as guidance, in 6 NYCRR 481.10.

II. Statute of Limitations

According to the Commissioner's January 24, 2012 Determination, Chevron unreasonably delayed filing its October 19, 2007 and June 24, 2009 refund requests. The principal reason for the delay, as stated in the January 24, 2012 Determination, was that Chevron did not comply with its statutory obligation to maintain accurate records about the transfer of asphalt through the Troy Asphalt plant during the period in question. Pursuant to Navigation Law § 174(5), the licensee is required to certify the number of barrels of petroleum transferred to its facility during the license fee period. Chevron's failure to discover the error "in a timely manner" demonstrates that Chevron did not keep track of its inventory in an accurate manner, as required by Navigation Law § 174(5). (*See* SJEx. 7 at 9.)

In addition, Department staff relies on the licensee to self-report the information presented in the MPFL fee reports accurately. Due to the self-reporting nature of the information, the acceptance of each report with the associated payment by Department staff

⁷ If a MOSF holds environmental permits related to the categories identified at 6 NYCRR 481.1(b), then such a facility would pay annual program fees pursuant to ECL article 72 in addition to monthly MPFL fees pursuant to Navigation Law § 174(4)(a).

constitutes a final and binding determination that the report is accurate, and any fee that accompanies the report is owing. (*See* SJEx. 7 at 9; Schwank Affidavit ¶ 11.)

The January 24, 2012 Determination noted that when the Commissioner has made a fee determination, it is deemed final unless the licensee objects and requests a hearing within 30 days (*see* Navigation Law § 174[6]; 17 NYCRR 30.9[f] and [g]). In the absence of a fee determination by the Commissioner, the licensee must also make its refund request within 30 days from filing the MPFL fee report for the most recent license fee period. (*See* SJEx. 7 at 9.)

Chevron maintained, however, that it timely filed the October 19, 2007 and June 24, 2009 refund requests because Chevron filed them as soon as it discovered the error. Chevron observed that the Navigation Law is silent about when a fee payer must request a refund, and argued that a general statute of limitations of six years applies running from the date of payment (*see* Chevron's memorandum at 13-15; Chevron's response memorandum at 7-8). With reference to the January 24, 2012 Determination (SJEx. 7 at 9-10), Department staff maintained, however, that any refund request must be filed within 30 days from when the fee was paid (*see* Staff's response at 18).

With respect to the arguments concerning the applicable statute of limitations, I note that Navigation Law § 174(6) sets no limitation by when the Commissioner must commence a fee determination when a particular monthly MPFL fee report is either not filed or, if filed, is incorrect or insufficient. The implementing regulation (*see* 17 NYCRR 30.9[f]), however, expressly requires the Commissioner to determine the fee within 30 days after the due date of the monthly MPFL fee report. The various limitations proposed by the parties are discussed below.

A. Six-Year Statute of Limitations

Chevron's argument concerning the application of a general statute of limitations to its refund requests includes case law which shows that claimants have sued the State and other government subdivisions to recover overpayments of taxes and fees (Chevron's Memorandum at 15). In *Travelers Indem. Co. v State of New York*, 27 Misc 2d 565 (1968), *affd*, 33 AD2d 127 (3d Dept 1969), *affd*, 28 NY2d 561 (1971), an insurance company sought refunds of monies paid to the Motor Vehicle Liability Security Fund (*see* Insurance Law § 333). At issue was what should be included as the basis for the payments made to the fund.

In *Mutual Benefit Health and Accident Assoc. v Holz*, 5 AD2d 388, 390 (3d Dept 1958), refunds were expressly authorized by the Insurance Law, and only in the form of a credit. In *China City Corp. v State of New York*, 51 Misc 2d 429, 433 (Ct Cl 1966), the annual fee for a liquor license must be apportioned for the balance of the year. In *405 Company v State of New York*, 118 Misc 2d 305, 308 (Ct Cl 1983), the initial law authorizing a tax was subsequently repealed retroactive to the date of its enactment.

Finally, in *Loconti v City of Utica*, 61 Misc 2d 855, 858 (Sup Ct, Oneida County 1969), the court held that the city received a tax payment upon a lawful assessment, but the former property owners were not obliged to pay it because the State had acquired the property by

condemnation before the taxes were due. Under these circumstances, the court held that the former property owners paid the taxes by mistake, and they should receive a refund.

These cases show that, under limited circumstances, the courts have directed the State or other governmental subdivisions to refund excess payments of taxes and other fees. These cases, however, do not support Chevron's argument that a general statute of limitations should apply to its refund requests.

According to Chevron, a general, six-year statute of limitations (*see e.g.*, CPLR 213) running from the dates of payment should be applied to its refund requests. To support its argument, Chevron cites *Guaranty Trust Co. v State of New York*, 299 NY 295 (1949), and *Citibank* (103 Misc 2d 348). (*See* Chevron's Memorandum at 15-16).

In *Guaranty Trust Co.* (299 NY at 300, 301), the Court held, among other things, that the Court of Claims correctly applied the statute of limitations, pursuant to Court of Claims Act § 10.4 and, thereby, found that the claim filed by the Guaranty Trust Co. was untimely filed. Pursuant to Court of Claims Act § 10.4, the statute of limitations is six months after the claim accrued, or within two years after the claim accrued provided the claimant files a written notice of intention to file a claim. The statute of limitations set forth in Court of Claims Act § 10.4 is substantially shorter than the six-year limitation proposed by Chevron. In *Citibank* (103 Misc 2d at 350), the court applied *Guaranty Trust* (299 NY 295), and held that a claim for a tax refund accrues upon payment of the tax.

Chevron's argument that the six-year statute of limitations as provided by CPLR 213 should apply to its refund requests is not persuasive. Chevron has not identified any authority for applying the six-year statute of limitations to its refund requests. The additional cases identified by Chevron involving the recovery of taxes and fees incorrectly paid or otherwise paid in error are distinguishable from the captioned matter.

B. Thirty-Day Limitation

To support its position that a licensee must request a refund within 30 days from filing the MPFL fee report, Department staff referred to the regulations at 17 NYCRR 30.9 (*see* Staff's response at 17-21; Staff's reply memorandum at 6). Section 30.9 requires every licensee to file MPFL fee reports by the 20th day of the following month (*see* 17 NYCRR 30.9[b]), based on records maintained by the licensee (*see* 17 NYCRR 30.9[d]). If a licensee does not file the monthly report and pay the required fee, or if the licensee files an incorrect or insufficient monthly report, 17 NYCRR 30.9(f) authorizes the Commissioner to determine the fee owed. If the Commissioner chooses to determine the fee, then 17 NYCRR 30.9(f) requires the Commissioner to notify the licensee within 30 days after the due date of the missing, incorrect, or insufficient monthly report.

I conclude that the requirement at 17 NYCRR 30.9(f), which requires the Commissioner to act within 30 days, supports Department staff's position that a licensee must request a refund within the same period from filing the original MPFL fee report. The 30-day limitation supports the statutory purpose of the Spill Compensation Fund (*see* Baker Affidavit ¶ 3) by providing a

reliable source of capital (*see* Baker Affidavit ¶¶ 6, 7, and 8) to ensure the stability of the Spill Compensation Fund. Under such circumstances, sufficient funds are in place to finance the prompt containment and cleanup of petroleum contamination and, as necessary, provide compensation to persons damaged by unlawful petroleum discharges (*see* Baker Affidavit ¶¶ 9-13). Because the Commissioner must act within 30 days, I recommend that licensees should also be required to request refunds within 30 days from filing the MPFL fee report in order to ensure the stability of the Spill Compensation Fund.

C. Chevron's August 2007 MPFL Fee Report

Department staff acknowledged that Chevron filed an amended MPFL fee report for August 2007 within 30 days from when staff initially received the original report. Staff concludes that Chevron is entitled to a refund limited to \$13,736.78 (*see* Staff's response at 25). The factual circumstances are as follows.

Department staff received the original, certified August 2007 MPFL fee report for the Troy Asphalt plant on September 24, 2007 with a payment of \$13,736.78 (*see* Schwank Affidavit ¶ 13; SJEx. 22, Bates No. 000862]). Department staff subsequently received an amended MPFL fee report for August 2007 from Chevron on October 22, 2007, which was 28 days after September 24, 2007 (*see* Schwank Affidavit ¶ 23; SJEx. 1, Bates No. 000864).

According to the amended August 2007 MPFL fee report, Chevron did not transfer any petroleum product at the Troy Asphalt plant during August 2007 (*see* Schwank Affidavit ¶ 23; SJEx. 22, Bates No. 000864]). Department staff conceded that Chevron is entitled to a refund of the \$13,736.78 fee that Chevron initially submitted with the August 2007 MPFL fee report for the Troy Asphalt plant. Staff received the amended August 2007 MPFL fee report within 30 days from receipt of the original. Department staff maintained, however, that the remainder of Chevron's reimbursement request was not timely filed, and should be denied. (*See* Staff's response at 25.)

Chevron did not address Department staff's acknowledgement with respect to the amended August 2007 MPFL fee report in either the response memorandum (May 6, 2013) or the sur-reply (June 7, 2013). Rather, Chevron maintained that it is entitled to the full amount it requested, which is \$474,108.67 (*see* Chevron's response memorandum at 7 and 12; Chevron's sur-reply at 9).

If the Commissioner adopts the 30-day limitation as discussed above, I recommend that the Commissioner grant Chevron a refund for the amount of \$13,736.78 based on the amended August 2007 MPFL fee report for the Troy Asphalt plant. The evidence filed with the parties' papers shows that Chevron filed the amended August 2007 MPFL fee report with Department staff under cover of letter dated October 19, 2007, which Department staff received within 30 days from when Chevron filed the August 2007 MPFL fee report. This recommendation is conditioned, however, upon the Commissioner's determination with respect to whether Chevron paid MPFL fees from June 2003 through August 2007 under either a mistake of fact, or a mistake of law (*see* **Discussion** at § IV).

D. Application of the 30-day Limitation

Assuming that the Commissioner adopts the 30-day limitation, the question becomes whether the limitation should be applied to the remainder of Chevron's refund requests (*i.e.*, \$460,371.89). Chevron noted that neither the pre-printed, monthly MPFL fee report, which Department staff sends by regular mail to every licensee, nor the associated instructions (*see* SJEx. 20) provide notice that refunds must be requested within 30 days. Chevron noted further that any overpayment of license fees and surcharges from previous MPFL fee reports is reported on line 15 of the monthly MPFL fee report. According to Chevron, the instructions are silent about whether a licensee can use line 15 to request a refund other than as a credit toward future payments particularly when, as here, overpayments have been made, and the MPFL facility is closed. (*See* Chevron's response memorandum at 8.)

Department staff's papers did not specifically respond to Chevron's concerns about the lack of notice that refunds must be requested within 30 days, and whether a licensee can use line 15 of the pre-printed, monthly MPFL fee report to request a refund in the form of a credit toward future payments.

Chevron's concern that the MPFL fee report form and associated instructions do not provide any notice about refund requests, however, does not preclude the application of the 30-day limitation. Rather, the evidence submitted with the parties' papers shows that with a cover letter dated February 11, 2005, Chevron actually applied the 30-day limitation, as recommended above, when it filed an amended December 2004 MPFL fee report filed on January 12, 2005. With the amended December 2004 MPFL fee report Chevron showed an overpayment of \$9,138.50 on line 16. Chevron subsequently reported this amount (*i.e.*, \$9,138.50) as an overpayment on line 15 of the January 2005 MPFL fee report. The overpayment, recorded as a credit balance, was exhausted after Chevron filed the February 2005 and March 2005 MPFL fee reports. (*See* Schwank Affidavit ¶¶ 21-22; SJEx. 22, Bates Nos. 000827, 000830-000833.) As previously noted, the courts have determined that a credit, rather than a refund, is an acceptable way to offset future payments (*see Mutual Benefit Health and Accident Assoc.*, 5 AD2d at 391).

If the Commissioner decides to apply the 30-day limitation to the remainder of Chevron's refund requests, all other issues raised in the parties' papers would not need to be considered further. As discussed above, the only refund potentially available to Chevron would be the fee associated with the amended August 2007 MPFL fee report.

Assuming that the 30-day limitation will be applied in the future, outside the context of this matter, I recommend that the Commissioner direct Department staff to amend the pre-printed, monthly MPFL fee report form and associated instructions to provide notice to licensees that refunds must be requested within 30 days from the due date of the monthly MPFL fee report, and that licensees may record requests for credits on line 15 of any subsequently filed MPFL fee reports for this purpose. The instructions may recommend that licensees provide additional documentation, as appropriate, to support any requests for credits associated with previously filed overpayments.

If, however, the Commissioner chooses not to accept the recommendation to adopt the 30-day limitation for the remainder of Chevron's refund requests, the remaining issues raised in the parties' motion papers need to be addressed. Therefore, for completeness, they are discussed and considered below.

III. Laches

The civil judicial proceedings commenced by Chevron prior to the Commissioner's January 24, 2012 Determination confirm that licensees have an administrative remedy to request a review of the MPFL fees paid to the Department pursuant to Navigation Law § 174 and implementing regulations (*see Chevron*, 86 AD3d at 821). The issues discussed in this section of the summary report and ruling are whether the Commissioner may consider a period longer than 30 days given Chevron's contention about the lack of clarity concerning the administrative review process that existed prior to the judicial determinations in the related civil proceedings and, if so, how long that period may be.

Other than the requested refund associated with Chevron's amended August 2007 MPFL fee report, Department staff argued that the Chevron's requests dated October 19, 2007 and June 24, 2009, which seek additional refunds totaling \$460,371.89, are barred by the doctrine of laches because the refund requests were untimely filed (*see Staff's response* at 34-43; *Staff's reply memorandum* at 6). Chevron asserted, however, that Department staff has the burden to prove the elements of laches, and argued that staff failed to do so (*see Chevron's response memorandum* at 8-9; *Chevron's sur-reply* at 1).

To support its position, Department staff cited the case law referenced in the Appellate Division's review (*see Matter of Chevron USA, Inc. v Commissioner of Env'tl. Conservation*, 86 AD3d 840) of Supreme Court's decision (*see Matter of Chevron USA, Inc. v Commissioner of the New York State Dept. of Env'tl. Conservation*, 2010 NY Slip Op 33181[U]) concerning the Chevron's CPLR article 78 petition. Department staff argued that the State should reasonably expect Chevron, a large oil company, to know the status of its facilities, to keep track of its inventory, to understand the applicable laws of New York State, and to protest, in a timely manner, when it mistakenly pays any license fees (*see Paramount Film*, 30 NY2d at 420). Department staff noted that Chevron certified each monthly MPFL fee report from June 2003 to August 2007 as required by 17 NYCRR 30.8(b) (*see Schwank Affidavit* ¶¶ 11, 13, and 15; *SJEx. 22*). Department staff argued further that the Navigation Law, its implementing regulations, and the MPFL monthly fee report form impose the license fee and surcharge on the petroleum barrels transferred to a facility, rather than on the petroleum barrels transferred to New York State (*see Long Island Oil Terminals*, 70 AD2d at 306). (*See Staff's response* at 36-37.)

To establish laches, Chevron argued that Department staff must demonstrate the following elements. First, Chevron delayed filing its refund requests, despite the opportunity to file them sooner. Second, Chevron did not notify Department staff that it would assert its claim for relief. Finally, Chevron's delay in filing its refund demands either injured or prejudiced the Department. Chevron cited *Cohen v Krantz* (227 AD2d 581, 582 [2d Dept 1996]) and *Vickery v Village of Saugerties* (106 AD2d 721, 723 [3d Dept 1984], *affd*, 64 NY2d 1161 [1985]) to

support its argument that Department staff did not make the required showing with respect to laches. (See Chevron's response memorandum at 8-9).

Chevron contended that any delay in filing its refund demands should be excused due to lack of knowledge because Chevron mistakenly paid the MPFL fees believing the product passed through the Troy Asphalt plant. Chevron contended further that the Department received notice when Chevron filed its October 19, 2007 and June 24, 2009 refund demands, which included a written explanation for the requested refunds, as well as amended MPFL fee reports for June 2003 to August 2007. According to Chevron, Department staff contributed to the delay by ignoring Chevron's October 19, 2007 refund demand for more than four years. (See Chevron's response memorandum at 9.)

The doctrine of laches may apply when, as here, an allegedly aggrieved party does not proceed promptly to make a formal demand for the relief available to it (see *Matter of Westchester County and the Village of Scarsdale*, ALJ Ruling on the Board's Motion to Dismiss the County's Petitions, January 13, 2006 at 9; *Matter of Agoado v Board of Educ.*, 282 AD2d 602, 603 [2001]; *Matter of Civil Serv. Empls. Assn. v Board of Educ.*, 239 AD2d 415, 416 [2d Dept 1997]; *Austin v Board of Higher Educ.*, 5 NY2d 430, 442 [1959]). To bar Chevron from commencing a proceeding to request refunds based on the doctrine of laches, Department staff must show that the undue delay has resulted in prejudice (see *Feldman v Metropolitan Life Ins. Co.*, 259 AD 123, 125 [1st Dept 1940]).

Because Chevron filed two separate refund requests, two periods are at issue. The first refund request, dated October 19, 2007, concerns the period from September 2004 to August 2007. The second refund request is dated June 24, 2009, and concerns the period from June 2003 to August 2004.

A. Chevron's Refund request dated June 24, 2009

Chevron's second refund request dated June 24, 2009, concerns MPFL fee reports from June 2003 to August 2004.⁸ From June 2003 to August 2004, Chevron filed 15 MPFL reports and paid fees totaling \$127,603.55 (see SJEx. 3).

1. Undue Delay

In her December 28, 2012 affidavit, Diane Eck said that she is employed by Chevron as a specialist in federal and state excise tax compliance (see Eck Affidavit ¶ 2). Ms. Eck's job duties include, among other things, responding to questions from, and audits by, taxing agencies, as well as supervising Chevron employees who do the same (see Eck Affidavit ¶ 39). Ms. Eck explained that federal and state taxing authorities, such as New York State, generally "have a three-year statute of limitations within which to conduct an audit" (Eck Affidavit ¶ 42). Ms. Eck explained further that the period may be extended by a written agreement (SJEx. 24). According to Ms. Eck, Chevron's audits often take two or more years to complete, and involve one or more field visits by agency auditors. Given the number and complexity of Chevron's transactions,

⁸ Chevron asserted it made a mathematical error with respect to these MPFL fee reports. Chevron's assertion is addressed below in the **Discussion** at §§ IV.C and D.

Chevron has frequently had to respond to numerous requests for additional information during the course of past audit reviews. (See Eck Affidavit ¶ 44.) Based on her experiences with tax audits, Ms. Eck said that she never participated in a “tax audit that began and ended within 30 days of the due date of the tax return” (Eck Affidavit ¶ 50).

The amount of time that a taxing agency may take to complete an audit after the audit has commenced is immaterial to the question of laches. Rather, the issue rests with when an audit must commence. Publication 131 (see SJEx. 24 at 1) states that the New York State Department of Taxation and Finance must give notice to the taxpayer and subsequently commence an audit within three years after receiving the return or returns that would be the subject of the audit. Similarly, a licensee must file any MPFL refund request with the Department within a reasonable time.

Regardless of whether the three-year limit outlined in Publication 131 (see SJEx. 24 at 1) is relied upon as guidance for when to request refunds, Chevron did not request an administrative review of the MPFL fees it paid for the period from June 2003 to August 2004 until June 24, 2009. This is almost 6 years after Chevron was required to file the June 2003 MPFL fee report, and more than 4½ years after Chevron was required to file the August 2004 MPFL fee report. For the reasons outlined above, Chevron’s arguments concerning the application of a general, six-year statute of limitations to its June 24, 2009 refund request were not persuasive.

Moreover, for the reasons outlined above, I have recommended implementation of the 30-day limitation. Chevron did not request an administrative review of the MPFL fees it paid from June 2003 to August 2004 until June 24, 2009, which far exceeds the 30-day limitation. I, therefore, conclude that Chevron unduly delayed filing the June 24, 2009 refund request for MPFL fees paid from June 2003 to August 2004.

2. Prejudice

The second element of laches is whether the undue delay has resulted in prejudice. According to Department staff, a refund would prejudice the State by detrimentally impacting the availability of funds in the Spill Compensation Fund (see *Paramount Film*, 30 NY2d at 420). (See Staff’s response at 42.)

Chevron asserted, however, that Department staff cannot claim any prejudice from Chevron’s failure to file its refund demands in a more timely manner. As noted above, Chevron argued that it was not required to pay any MPFL fees because Chevron closed the Troy Asphalt plant in 1999 and, therefore, did not transfer any petroleum products at the Troy Asphalt plant since then. Given these circumstances, Chevron concluded that the Department was not entitled to any MPFL fees paid in relation to the Troy Asphalt plant. Accordingly, Chevron contended that a refund would not prejudice the Department. (See Chevron’s response memorandum at 10.)

Staff from the Department’s Oil Spill Revenue Unit received and reviewed more than twenty thousand MPFL fee reports from June 2003 to August 2007 (see Schwank Affidavit ¶ 12). Upon receipt, the Department’s Oil Spill Revenue Unit deposited the fees paid by Chevron,

and the other licensees, in the Spill Compensation Fund as well as in the Remedial Fund (*see* Schwank Affidavit ¶¶ 5, 13, and 14; SJEx. 22 and 28). (*See* Staff's response at 42.)

During State fiscal year 2003/2004 (*i.e.*, April 1, 2003 to March 31, 2004), Department staff deposited MPFL fees totaling \$27.8 million into the Spill Compensation Fund, and \$14.8 million into the Remedial Fund (*see* Farrar Affidavit ¶ 9; SJEx. 18 at 11). For fiscal year 2004/2005, Department staff deposited MPFL fees totaling \$28.5 million into the Spill Compensation Fund, and \$12.5 million into the Remedial Fund (*see* Farrar Affidavit ¶ 9; SJEx. 19 at 13).

The Spill Response Program is part of the Department's Division of Environmental Remediation. The purpose of the program is to address the environmental and public health hazards associated with unauthorized petroleum discharges. (*See* Farrar Affidavit ¶ 5.) Staff from the Spill Response Program, as well as its contractors, manage the spill hotline and respond to unauthorized petroleum discharges (*see* Farrar Affidavit ¶¶ 6, 7; Baker Affidavit ¶ 3). Disbursements from the Spill Compensation Fund pay the operating expenses of the Spill Response Program (*see* Farrar Affidavit ¶¶ 6, 5; Baker Affidavit ¶ 10). In addition, when an unauthorized spill response requires remediation, and the discharger is unknown, unwilling, or unable to undertake the remediation, the expenses associated with the remediation are paid from the Spill Compensation Fund (*see* Farrar Affidavit ¶ 8; Baker Affidavit ¶¶ 5, 10).

During State fiscal year 2003/2004, the Spill Response Program received 15,618 spill reports to investigate. For fiscal year 2004/2005, the Spill Response Program received 15,400 spill reports to investigate. Because it may take longer than one year to investigate, complete any necessary remediation and, subsequently, close each spill investigation, a variable number of cases may carry over from year to year. (*See* Farrar Affidavit ¶¶ 9 and 13; SJEx. 18 at 14 and SJEx. 19 at 10.) For example, the total number of cases addressed during the 2003/2004 fiscal year was 20,694 (*see* Farrar Affidavit ¶ 9; SJEx. 18 at 14), and the total number of cases addressed during the following fiscal year was 17,410 (*see* Farrar Affidavit ¶ 9; SJEx. 19 at 10). The number of cases reported to the Department and the disposition of each case vary from year to year.

Suzette Baker is the Executive Director of the Bureau of Financial Reporting and Oil Spill Remediation within the Office of Operations of the Office of the State Comptroller (the Bureau). The Bureau's responsibilities include administering the Spill Compensation Fund, and the oil spill program. (*See* Baker Affidavit ¶¶ 1, 2.) Ms. Baker said that the Spill Compensation Fund must be financed in a fiscally reliable manner in order to respond effectively to the more than 15,000 unauthorized petroleum discharges that occur every year (*see* Baker Affidavit ¶ 6). Payments of monthly MPFL fees, which have remained relatively constant from year to year (*see* Baker Affidavit ¶ 14), provide the required revenue stream (*see* Baker Affidavit ¶ 8). To develop its annual budget, the administrator of the Spill Compensation Fund reviews the MPFL fees received from prior years to project the expected revenue for the next fiscal year (*see* Baker Affidavit ¶ 14). Ms. Baker also noted that funds must be available to address significant or catastrophic environmental events (*see* Baker Affidavit ¶ 15; Farrar Affidavit ¶ 15).

With its May 6, 2013 response memorandum, Chevron included a second affirmation by Mr. Burch also dated May 6, 2013 with two exhibits. Exhibit A to Mr. Burch's May 6, 2013 affirmation is a copy of the New York State Comptroller's *Annual Financial Report and Other Supplemental Information* for the Spill Compensation Fund for fiscal year ended March 31, 2013 (SJEx. 29). Exhibit B is a copy of the Comptroller's *Annual Financial Report and Other Supplemental Information* for the Spill Compensation Fund for fiscal year ended March 31, 2008 (SJEx. 30). Chevron offered this information to refute Department staff's claim that the requested refund would prejudice the State.

Chevron noted that it first asserted its refund claim during fiscal year 2007/2008. With reference to the March 31, 2008 financial report (*see* SJEx. 30 at 2), Chevron stated that the balance of the Spill Compensation Fund on March 31, 2008 was \$148,139,095. Chevron stated further that its total refund request of \$474,108.67 would be less than 0.3% of the balance of the Spill Compensation Fund on March 31, 2008. Chevron concluded that a refund of about 0.3% would have a *de minimis* impact on spill responses. (*See* Chevron's response memorandum at 6-7.)

Department staff maintained, however, that Chevron has not requested a *de minimis* refund from the Spill Compensation Fund. Department staff noted that the Spill Compensation Fund's actual cash balance on March 31, 2008 was \$2.1 million. According to Department staff, Chevron's \$474,108 refund request would, therefore, be 23% of the March 31, 2008 fund balance. Department staff argued that refunding almost a quarter of the March 31, 2008 fund balance would be inequitable. (*See* Staff's reply memorandum at 5.)

A calculation to determine Chevron's contribution to the Spill Compensation Fund as a percentage of either the Spill Compensation Fund's balance or its cash balance, on March 31 of any particular fiscal year, does not address the question of whether Chevron's delay in requesting a refund would result in a prejudice. Although the Department's remedial programs annual reports (*see* Farrar Affidavit ¶ 9; SJExs. 18, 19, and 31) identify the total number of oil spill incidents the Department receives during each fiscal year, staff receives incident reports 24 hours a day, seven days a week, 365 days a year. When and how many incident reports Department staff receives during any particular fiscal year is not predictable. Moreover, Department staff receives some spill incident reports at the beginning of the fiscal year and may close some of those incident reports within the same fiscal year. Staff, however, receives others toward the middle and the end of the fiscal year. The responses to those spill incident reports, with their associated costs, may extend into the next fiscal year.

In a similar manner, the Comptroller's annual reports (*see* SJExs. 29 and 30) account for the total revenue and expenditures associated with a particular fiscal year. Revenue for the Spill Compensation Fund is generally stable and reliable (*see* Baker Affidavit ¶ 7). Reimbursements to the Spill Compensation Fund, however, may vary during any particular year, and from year to year. Some disbursements from the Spill Compensation Fund are associated with administrative expenses, and will not be reimbursed to the Spill Compensation Fund. In addition, the Spill Compensation Fund is not reimbursed when responsible parties cannot be identified, or when defaults occur. Finally, the Spill Compensation Fund is available to compensate spill victims.

The number of victims, who require compensation, and the amount of compensation awarded vary from year to year.

For the reasons outlined above, the Spill Compensation Fund must be a non-lapsing, revolving fund (*see* Baker Affidavit ¶ 3). Consequently, cash reserves must be available for timely and comprehensive responses to any unauthorized oil spill. A reimbursement of Chevron's MPFL fees paid from June 2003 to August 2004 totaling \$127,603.55 would prejudice the State given the revolving nature of the fund. Therefore, I conclude that Chevron's refund request dated June 24, 2009 concerning MPFL fee reports from June 2003 to August 2004 is barred based on the doctrine of laches. Accordingly, the Commissioner should conclude the same, and deny Chevron's June 24, 2009 refund request.

B. Chevron's Refund request dated October 19, 2007

Chevron's refund request dated October 19, 2007 concerns MPFL fee reports from September 2004 to August 2007. For the reasons outlined above, Chevron filed its refund request with respect to the amended August 2007 MPFL fee report in a timely manner. Therefore, laches does not apply to the amended August 2007 MPFL fee report.

The remainder of Chevron's October 19, 2007 refund request concerns the 34 MPFL fee reports that Chevron filed for the period from September 2004 to July 2007. From September 2004 to July 2007, Chevron paid MPFL fees totaling \$332,768.34 (*see* SJEx. 1).

1. Undue Delay

Unlike the period considered in Chevron's June 24, 2009 refund request, the 34-month period referenced in Chevron's October 19, 2007 refund request from September 2004 to July 2007 concerns MPFL fee reports filed within 6 years or less from the date of the refund request. In addition, the period at issue with respect to Chevron's October 19, 2007 refund request includes MPFL fee reports that Chevron filed within three years of their respective due dates, except for the September 2004 and October 2004 MPFL fee reports. For the reasons outlined in detail above, however, Chevron's arguments about the applicability of the six-year and three-year limits to file refund requests are without merit.

I conclude that Chevron unduly delayed filing the October 19, 2007 refund request for MPFL fees paid from September 2004 to July 2007. The basis for this conclusion is that Chevron filed the July 2007 MPFL fee report approximately 60 days prior to its October 19, 2007 refund request. Consequently, the period from when Chevron certified that it transferred petroleum at the Troy Asphalt plant in July 2007 to when Chevron filed the amended July 2007 MPFL fee report with the October 19, 2007 was about 90 days. The next amended MPFL fee report concerns transfers in June 2007, which was about 120 days prior to the date of the refund request. This sequence continued with respect to each amended MPFL fee report back to September 2004. As a result, the delay became excessive, and therefore undue, particularly with respect to the earlier MPFL fee reports, such as those from September 2004 and October 2004.

2. Prejudice

The second element of laches is whether the undue delay has resulted in a prejudice. With respect to Chevron's October 19, 2007 refund request, I adopt the rationale outlined above concerning Chevron's June 24, 2009 refund request. The Spill Compensation Fund must be a non-lapsing revolving fund. Consequently, cash reserves must be available for timely and comprehensive responses to any unauthorized oil spill. A reimbursement of Chevron's MPFL fees paid from September 2004 to July 2007 totaling \$332,768.34 would prejudice the State given the revolving nature of the Spill Compensation Fund. Therefore, I conclude that Chevron's refund request dated October 19, 2007 concerning MPFL fee reports filed from September 2004 to July 2007 is barred based on the doctrine of laches. Accordingly, the Commissioner should conclude the same, and deny Chevron's October 19, 2007 refund request.

IV. Mistake

Pursuant to CPLR 3005, relief from a mistake cannot be denied simply because the mistake was one of law rather than one of fact. Although the parties did not reference CPLR 3005 in their respective motion papers, Department staff argued that Chevron cannot obtain a refund due to a mistake of law. In contrast, Chevron maintained that its mistake was one of fact, which may be forgiven. The details of these arguments are discussed and considered below.

In the April 5, 2013 response, Department staff claimed that Chevron cannot obtain a refund of the MPFL fees paid from June 2003 to August 2007 because Chevron voluntarily paid the fees under a mistake of law. Staff noted that Chevron admitted that the fees paid with the original MPFL reports filed from June 2003 to August 2007 were associated with asphalt products that were sent to New York, but not expressly transferred at Chevron's Troy Asphalt plant. Staff noted further that Chevron provided each payment without protest. To support the claim that Chevron mistakenly applied the law when it voluntarily paid MPFL fees without protest, Department staff cited *Bellefont Dyeing Corp. v Joseph*, 148 NYS 2d 895 (Sup Ct, NY County 1956). (*See* Staff's response at 26.)

However, in the May 6, 2013 response, Chevron raised a procedural objection to Department staff's claim that the refund requests are barred by a mistake of law. First, Chevron argued that Department staff's claim is untimely asserted because the Commissioner's January 24, 2012 Determination never alleged a mistake of law as a basis for denying Chevron's May 6, 2010 refund request. Rather, Chevron noted that the Commissioner identified the following two grounds as the bases for denial:

1. The documentation that Chevron provided was not adequate to show that the barrels of petroleum initially attributed to the Troy Asphalt plant were transferred at other facilities or transported directly to its customers (*see* SJEx. 7 at 8); and
2. Chevron unreasonably delayed filing its May 6, 2010 refund request (*see* SJEx. 7 at 9-10).

According to Chevron, the second reason for its objection to Department staff's claim is that Chevron characterized its mistake as one of fact rather than one of law. Chevron argued that its refund claims were proper because its payments were made under a mistake of fact. (*See* Chevron's response memorandum at 5.)

Chevron's procedural objection is addressed first. Subsequently, the question of whether Chevron's mistake is one of law or a mistake of fact is discussed.

A. Chevron's Procedural Objection

According to Department staff, nothing prohibits staff from raising relevant arguments in this proceeding that the Commissioner did not initially address in his January 24, 2012 Determination. Department staff argued that Chevron did not identify any authority that would limit the scope of this matter to the bases addressed in the Commissioner's January 24, 2012 Determination. With respect to the Commissioner's January 24, 2012 Determination, staff noted that the scope of the record was limited at that time. In preparation for this matter, however, Department staff noted further that extensive discovery had taken place, which expanded the scope of the record and identified additional issues. Department staff observed that the parties did not seek a determination from me, pursuant to 6 NYCRR 481.10(f)(2), to otherwise limit the scope of this matter to the bases identified in the Commissioner's January 24, 2012 Determination. Referring to 6 NYCRR 481.10(d)(2), Department staff argued that staff may present any relevant arguments on issues of law and fact. (Staff's reply memorandum at 3.)

Chevron contended, however, that Department staff knew about Chevron's refund requests since 2008. Now, with the cross-motion seeking summary judgment, Chevron observed that Department staff alleged, for the first time in this matter, that Chevron's payments from June 2003 to August 2007 were made under a mistake of law. Contrary to Department staff's argument, Chevron contended that Department staff did not explore any legal theory concerning a mistake of law during the discovery process. Chevron argued that this allegation should be dismissed as a matter of law. (*See* Chevron's sur-reply at 4.)

In addition, Chevron argued that Department staff's reliance on 6 NYCRR 481.10(d)(2) is misplaced. According to Chevron, the issues of law and fact contemplated by the regulation (*i.e.*, 6 NYCRR 481.10[d][2]) refer to those issues properly raised in the parties' pleadings. Chevron asserted that the orderly conduct of the hearing requires adequate notice to the adverse party of the factual and legal issues (*see e.g.*, CPLR 3018[b]⁹ and *DeLisa v Amica Mut. Ins. Co.*, 59 AD2d 380, 382 [3d Dept. 1977]). (*See* Chevron's sur-reply at 4-5.)

Referring to 6 NYCRR 622.1, Chevron contended that 6 NYCRR part 622 (Uniform Enforcement Hearing Procedures) applies to this proceeding. Chevron contended further that 6 NYCRR 622.5 requires a party to obtain leave from the ALJ before amending its pleadings. In addition, with reference to 6 NYCRR 481.10(f), Chevron argued that Department staff cannot unilaterally insert a new issue into the proceeding during motion practice. (*See* Chevron's sur-reply at 5.)

⁹ This rule requires parties to plead all matters to avoid surprising the adverse party and raising issues of fact not clear on the face of prior pleadings. The rule provides illustrative examples of affirmative defenses.

Because this is a case of first impression, the applicable procedural rules are not well established. Navigation Law § 174 and 17 NYCRR 30.9 outline the procedures for preparing and filing the major petroleum facility license fee reports and associated payments on a monthly basis. The Commissioner, pursuant to Navigation Law § 174(6), is authorized to modify, or determine the monthly major petroleum facility license fee (*see also* 17 NYCRR 30.9[f]).

In *Chevron* (86 AD3d 821), the court held that a licensee's assertion about an overpayment should be characterized as an "incorrect" amount pursuant to Navigation Law § 174(6) and 17 NYCRR 30.9(f). Therefore, Navigation Law § 174(6), in general, authorizes the administrative review of the Commissioner's determination of the MPFL fee for any given month and, in particular, an administrative review of Chevron's refund requests dated October 19, 2007 and June 24, 2009. Although the hearing procedures are briefly outlined at 17 NYCRR 30.9(g), and expressly reference SAPA § 301(3), the Department has not promulgated additional rules that otherwise elaborate upon the basic procedures presented at 17 NYCRR 30.9(g).

Any reliance on the procedures outlined at 6 NYCRR part 622 (Uniform Enforcement Hearing Procedures) is misplaced. The character of this matter is neither enforcement nor disciplinary (*see* 6 NYCRR 622.1[a][8]). Contrary to Chevron's argument, Department staff, therefore, did not need to obtain leave, pursuant to 6 NYCRR 622.5, to present a claim about a mistake of law that could serve as a legal basis to deny Chevron's refund requests dated October 19, 2007 and June 24, 2009.

Moreover, the procedures outlined in 6 NYCRR part 481 (Program Fees: In General) relate to the assessment and collection of program fees associated with the Department's issuance of environmental permits (*see* ECL article 72 [Environmental Regulatory Program Fees]). MPFL fees, paid pursuant to the Navigation Law, are not program fees. However, the hearing procedures outlined at 6 NYCRR 481.10, as well as the provisions of SAPA §§ 302, 305, and 306, are being relied upon here as guidance concerning discovery and motion practice.

Based on the following, I conclude that Department staff is not prohibited from asserting the claim that the MPFL fees paid by Chevron cannot be refunded because Chevron paid them voluntarily and without protest under a mistake of law. The motion practice followed here has preserved Chevron's due process rights (*see* SAPA § 301.4). Department staff presented its allegation in the April 5, 2013 cross-motion and response to Chevron's initial filing dated February 13, 2013, which was staff's first submission (*see* Staff's response at 26-31). Subsequently, Chevron filed a response dated May 6, 2013. In the May 6, 2013 response, Chevron objected to Department staff's claim that Chevron's refund requests were barred as voluntary payments made under a mistake of law and argued, in the alternative, that Chevron's payments were made under a mistake of fact (*see* Chevron's response memorandum at 5-7). Department staff offered additional argument about Chevron's mistake of law in the May 20, 2013 reply memorandum (at 4-5).

With a cover letter dated June 10, 2013, Chevron subsequently filed a sur-reply dated June 7, 2013, which further addressed Department staff's claim concerning a mistake of law, and reiterated Chevron's position that its error was a mistake of fact (*see* Chevron's sur-reply at 4-5).

In the June 10, 2013 cover letter, Chevron cited to *Merrill Lynch Mtge. Capital, Inc. v Gbenga*, 38 Misc 3d 1209(A) 2 (Sup Ct, Kings County 2013) citing *Zernitsky v Shurka*, 94 AD3d 875 (2d Dept 2012) for the proposition that leave to file a sur-reply was appropriate in the alternative to rejecting new arguments raised for the first time in a reply. I note that in the sur-reply, Chevron asserted, for the first time in this matter, that Chevron made a mistake of logic and arithmetic rather than a mistake of law, as well as other alternative arguments (*see e.g.*, Chevron's sur-reply at 6-7).

In addition to the presentation outlined in Chevron's May 6, 2013 response. I have considered the arguments presented in Chevron's June 7, 2013 sur-reply. As a result, Chevron has had two opportunities during the course of the motion practice to respond to Department staff's claim concerning a mistake of law, as initially presented in staff's April 5, 2013 cross-motion and response (at 26-31), as well as the opportunity to assert alternative legal theories in the subsequent filings in support of Chevron's refund requests.

B. Mistake of Law

In addition to the claim that Chevron cannot obtain a refund of the MPFL fees paid from June 2003 to August 2007 due to a mistake of law, Department staff asserted that a refund of license fees or taxes paid to a governmental entity is possible only when the payments were made either involuntarily or, if voluntarily paid, under protest. To support of this assertion, staff cited *Mercury Machine* (3 NY2d at 428), and *Paramount Film* (30 NY2d at 420). In contrast to these two particular cases, Department staff contended that the process of self-reporting the amount of product transferred, computing the fee, and submitting certified MPFL reports with payments to the Department underscores the voluntary nature of the fees paid by Chevron. Without the transfer of any petroleum product, staff noted no fee is owed. Citing *Mercury Machine* (3 NY2d at 426), staff observed that taxpayers voluntarily paid taxes, which were not recoverable, even after the tax had been held to be unconstitutional. (*See Staff's response at 26-27.*)

Contrary to *Mercury Machine* (3 NY2d 418), Department staff contended that the MPFL fees at issue in this matter were not illegal (*see Long Island Oil Terminals*, 70 AD2d at 307). According to Department staff, Chevron had full knowledge of the following relevant facts: (1) how much petroleum product was shipped; (2) when it was shipped; (3) from where it was shipped; and (4) to where it was shipped (*see SJEx. 23*). None of the petroleum products identified in Chevron's MPFL fee reports from June 2003 to August 2007 passed through the Troy Asphalt plant. Nevertheless, Department staff asserted that Chevron misapplied the provisions of the Navigation Law concerning the payment of fees associated with petroleum products coming into New York State. According to Department staff, Chevron's ignorance of the law does not permit Chevron to obtain the requested refunds. To the contrary (*see Mercury Machine*, 3NY2d at 430), staff contended that Chevron's voluntary payments of MPFL fees without protest and with full knowledge of the facts, as identified above, may not be refunded (*see Bellefont Dyeing Corp.*, 148 NY2d at 896; *Matter of Trustees of Vil. of Delhi*, 201 NY 408 [1911]; *Berkshire Knitting Mills v City of New York*, 1 Misc 2d 189, 191 [1955], *affd* 2 AD2d 839 [1956], *affd sub nom. Mercury Machine Importing Corp. v City of New York*, 3 NY2d 942 [1957]). (*See Staff's response at 27-28.*)

Citing *Delhi* (201 NY at 413-415), Department staff argued that Chevron knew or should have known its own business and operations, and the amount, if any, of fees or taxes due with respect to such a highly regulated and subsidized industry. Department staff argued further that if Chevron had exercised reasonable care and diligence, it would have known when to stop making payments for the Troy Asphalt plant. In addition to the case law cited by Department staff, staff asserted that Chevron should be held to a higher standard of responsibility because the MPFL fee reports must be certified, under penalty of perjury, with respect to the number of barrels of oil product transferred to each New York facility every month. (*See* Navigation Law § 174[5]; Schwank Affidavit ¶¶ 11, 13, and 15; SJEx. 22.) (*See also* Staff's response at 30-31.)

Based on *Gimbel Brothers, Inc. v Brook Shopping Centers, Inc.* (118 AD2d 532 [2d Dept 1986]), Department staff also asserted that Chevron had a continuing obligation to know what MPFL fees were due. In *Gimbel Brothers* (118 AD2d at 535), the retail department store made voluntary rent payments for operating on Sundays without fully understanding what was legally due and, subsequently, requested a refund from its landlord after the payments were made. Here, according to Department staff, Chevron has argued that it "could not have made its refund claims any earlier because it was unaware that it had made overpayments" (Chevron's memorandum at 13). In addition, Department staff observed that Chevron admitted that it mistakenly applied the fee to all asphalt coming into New York State even though none went through the Troy Asphalt facility (*see* SJEx. 23; Chevron's memorandum at 12). Department staff concluded that Chevron's admissions, like those in *Gimbel Brothers*, "displayed a marked lack of diligence in determining what its ... rights were, and therefore is not entitled to the equitable relief of restitution" (118 AD2d at 535). (*See* Staff's response at 31.)

C. Chevron's Mistake of Fact Claim

According to Chevron, its mistake is one of fact rather than one of law. Chevron argued further that refund claims are proper when payments were made under a mistake of fact.¹⁰ (*See* Chevron's response memorandum at 5.)

Chevron claimed that it did not mistakenly read the Navigation Law and implementing regulations. Rather, Chevron explained that the personnel from the division at Chevron responsible for completing the MPFL reports and calculating the fees, which is located in California, mistakenly assumed that the asphalt distributed in New York State passed through the Troy Asphalt plant. According to Chevron, hindsight revealed its mistake of fact. Chevron contended that the only relevant mistake occurred when personnel at Chevron incorrectly recorded non-Troy Asphalt plant transfers on the MPFL fee reports related to the Troy Asphalt plant. As discussed further below, Chevron referenced the affidavit of Diane Eck sworn to December 28, 2012 to support these arguments. (*See* Chevron's response memorandum at 6.)

With specific reference to the MPFL reports and fees paid from June 2003 through September 2004, Chevron contended that it made a mistake of logic and arithmetic, and not one of law. According to Ms. Eck (Affidavit ¶¶ 26-27), the taxable barrels recorded on the original MPFL reports filed from June 2003 through September 2004 were calculated by dividing the

¹⁰ *See* note 3, *supra*.

sales price for the total amount of asphalt in dollars by 42, and recording the resulting quotient as barrels. According to Chevron, this process resulted in the calculation of erroneous fees totaling \$143,247.40 for the period. (See SJEx. 25.) Chevron explained that the correct method to determine the number of barrels is to divide the number of gallons by 42 because one barrel includes 42 gallons (see Eck Affidavit ¶ 27). Chevron argued that the miscalculations associated with the conversion of gallons of asphalt to barrels of asphalt that were recorded on the original MPFL reports filed from June 2003 to September 2004 are collectively a mistake in fact. (See Chevron's sur-reply at 3, 6-7.)

According to Chevron, the circumstances associated with the captioned matter are distinguishable from the circumstances discussed in the case law that Department staff identified. With respect to *Mercury Machine* (3 NY2d 418) and *Paramount Film* (30 NY2d 415), Chevron acknowledged that the facts concerning these two appellate cases are similar to this matter. For example, like the captioned matter, *Mercury Machine* (3 NY2d 418) and *Paramount Film* (30 NY2d 415) involved payments made to the government. Chevron argued, however, that these two cases apply the mistake of law doctrine in a limited fashion, which is not the case here. (See Chevron's sur-reply at 7.) To distinguish *Mercury Machine* (3 NY2d 418) and *Paramount Film* (30 NY2d 415), Chevron contended that it never had to pay the MPFL fees that it did pay because no petroleum products were actually transferred at the Troy Asphalt plant. Chevron contended further that the MPFL fees it paid were not mistakenly paid pursuant to a statute that was later declared unconstitutional or otherwise unenforceable, which was the case with respect to both *Mercury Machine* (3 NY2d 418) and *Paramount Film* (30 NY2d 415). (See Chevron's sur-reply at 8.)

With respect to *Gimbel Brothers* (118 AD2d 532), and *Bellefont Dyeing Corp.* (148 NYS 2d 895), Chevron observed that these decisions applied a mistake of law to non-governmental situations, which is not the case here. In *Gimbel Brothers* (118 AD2d at 535), Chevron noted that the Court held that a refund was barred as a mistake of law when the retail department store made voluntary payments under a mistaken legal interpretation of its commercial property lease. Chevron argued that the precedential value of *Bellefont* (148 NYS 2d 895) is limited because it is a New York State Supreme Court case, and the Court of Appeals and the Appellate Division had decided the previously mentioned cases (i.e., *Mercury Machine*, 3 NY2d 418, and *Paramount Film*, 30 NY2d 415). According to Chevron, *Bellefont* (148 NYS 2d 895), which provides a very limited discussion of the facts, has been superseded by later decisions of higher courts, with fuller factual development. (See Chevron's sur-reply at 8.)

D. Discussion and Ruling

To prove its claim that a mistake of fact occurred with respect to the preparation of the MPFL fee reports that Chevron filed from June 2003 to August 2007, Chevron offered Ms. Eck's affidavit. Ms. Eck said that Chevron pays transaction-based taxes, among others, in New York State. For example, Exhibit D to Ms. Eck's affidavit is a copy of Form PT-103 (New York State Department of Tax and Finance, *Tax on Residual Petroleum Product Businesses* [SJEx. 26]). Ms. Eck noted that on Lines 2 and 3 of Form PT-103, Chevron is required to report the total receipts in New York State in gallons (see Eck affidavit ¶ 15). Also, Exhibit E to Ms. Eck's affidavit is a copy of Form ST-809 (New York State Department of Tax and Finance, *New York*

State and Local Sales and Use Tax Return for Part-Quarterly [Monthly] Filers) [SJEx. 27]). Ms. Eck noted that on Line 1 of Form ST-809, Chevron is required to report total gross sales and services (*see* Eck affidavit ¶ 16). Ms. Eck observed that these two examples require Chevron to report statewide figures. (*See* Eck Affidavit ¶¶ 15-17.)

In contrast, Ms. Eck characterized the MPFL fee report as unique because it assesses a fee, which is essentially a tax, on transactions that have taken place at a particular licensed facility, rather than on all transactions in New York State (*see* Eck affidavit ¶ 18). Exhibit F to Ms. Eck's affidavit is a copy of the major petroleum facility license fee report form and instructions (SJEx. 20, Bates Nos. C000648-C000650). Quoting from Line 1 of the form and the related instructions, Ms. Eck said that the information requested is the "Total Quantity Received By You During This Month," and that the requested amount is not expressly limited to the number of barrels received at a particular facility in New York State. (*See* Eck affidavit ¶¶ 19-20; SJEx. 20.)

The following additional information appears on SJEx. 20. This particular major petroleum facility license fee report form is addressed to Chevron USA, Inc. at PO Box F, Section No. 610, Concord, CA 94524. Chevron's federal identification number is pre-printed at the top of the form, as well as the license number for the Troy Asphalt plant (MPF License No. 04-1540). (*See* Eck Affidavit; SJEx. 20.)

According to Ms. Eck, the personnel at Chevron, who review and prepare the various forms, specialize in particular states. Ms. Eck said that the same individual would prepare all the forms required by New York State such as, Forms PT-103 (*see* SJEx. 26) and ST-809 (*see* SJEx. 27), as well as the MPFL fee reports (*see e.g.*, SJEx. 20). Ms. Eck said further that from June 2003 to August 2007, more than one individual held this position at Chevron. (*See* Eck affidavit ¶ 21.)

Ms. Eck also stated, in full, that:

[i]t is a natural mistake for a return preparer to interpret Line 1 of the MPFL Fee report as requesting a New York state-wide figure, not limited to the amount passing through the particular facility that is subject to the NYS DEC license. This misinterpretation was the cause of Chevron's erroneous MPFL Fee reporting during the months at issue¹¹ (Eck affidavit ¶ 22).

The MPFL Fee report is addressed to Chevron U.S.A. Inc. Both the report form and the instructions to Line 1 ask for the amount of petroleum products "received by you," without limitation to the licensed facility. A return preparer accustomed to the New York taxes discussed above [*i.e.*, Forms PT-103 and ST-809] would not necessarily be alerted by this wording to the limited scope of the MPFL fee compared to the statewide scope of the New York taxes (Eck affidavit ¶ 23). (Bracketed material supplied.)

¹¹ *See* note 6, *supra*.

As a Chevron employee, specializing in federal and state excise tax compliance, Ms. Eck stated that she had personal knowledge of the matters related to Chevron's requested refunds (*see* Eck affidavit ¶¶ 1 and 2). However, Ms. Eck did not expressly state that she prepared any of Chevron's original MPFL fee reports filed from June 2003 to August 2007. Moreover, Chevron did not offer an affidavit from anyone who actually prepared any of the original MPFL fee reports filed from June 2003 to August 2007 to explain how the preparer, or the preparers, interpreted the information sought on Line 1 of the MPFL fee report form. Ms. Eck's statements at ¶¶ 22 and 23 of her affidavit, therefore, express an opinion about how Ms. Eck interpreted, and how the personnel whom Ms. Eck supervised at Chevron may have interpreted, Line 1 of the MPFL fee report (SJEx. 20) based on the information sought in New York State Department of Tax and Finance Forms PT-103 (SJEx. 26) and ST-809 (SJEx. 27). As previously noted, the latter two tax forms require Chevron to report statewide figures, and the former MPFL fee form requires information specific to a particular MOSF.

Given the hearsay nature of Ms. Eck's opinion, and absent of any proof from the Chevron personnel who actually prepared the original MPFL fee reports filed from June 2003 to August 2007, the Commissioner may reasonably conclude that Chevron did not make a *prima facie* showing that its refund requests are proper under a mistake of fact.

In the alternative, probative value may be assigned to Ms. Eck's opinion given her experience. If the Commissioner chooses to assign weight to Ms. Eck's opinion, it demonstrates that Chevron personnel misinterpreted the legal requirements concerning the information to be reported on Line 1 of the MPFL fee report form (SJEx. 20). According to Ms. Eck, Chevron personnel made the legal mistake of concluding that all petroleum shipments received in New York were subject to fees. In addition, Ms. Eck's affidavit is silent about whether she, or the Chevron personnel she supervised, knew that the Troy Asphalt plant was closed during the months at issue in this case. Therefore, Ms. Eck's affidavit establishes that Chevron paid MPFL fees from June 2003 to August 2007 under a mistake of law resulting from its misinterpretation of the Navigation Law, rather than from any mistake of fact concerning the status of the Troy Asphalt facility.

As previously mentioned, Chevron contended that unique circumstances apply to the MPFL fee reports that Chevron filed from June 2003 through September 2004 because Chevron personnel miscalculated the number of barrels reported in this set of MPFL fee reports (*see* Eck Affidavit ¶¶ 26-27; SJEx. 25, rows 1-16, inclusive). According to Chevron, the miscalculation is a mistake in fact. (*See* Chevron's sur-reply at 3, 6-7.)

With respect to Chevron's MPFL fee reports filed from June 2003 to September 2004, the total number of barrels cannot be derived by dividing the total dollar value of the asphalt by 42 gallons per barrel. Accordingly, such a mathematical error is a mistake of fact. Nevertheless, the mathematical error associated with this set of MPFL fee reports does not refute, or otherwise, outweigh the underlying mistake of law. With respect to Chevron's MPFL fee reports filed from June 2003 to August 2007, Ms. Eck's affidavit (¶¶ 22, 23) demonstrates that personnel at Chevron misinterpreted the legal requirement with respect to the information that must be reported on Line 1 of the MPFL fee reports (SJEx. 20) by determining the number of barrels based on the total amount of asphalt distributed in New York State rather than on the amount of

petroleum product actually transferred at the Troy Asphalt plant. Therefore, Chevron's attempt to distinguish the set of MPFL fee reports filed from June 2003 to September 2004 from Chevron's other MPFL fee reports is without merit. Rather, Chevron's mistake of law applies to all MPFL fee reports that are the subject of the refund requests.

Based on the foregoing, Chevron's legal argument that refund claims are proper when voluntary payments were made without protest under a mistake of fact is moot. The issue now becomes whether voluntary payments made without protest under a mistake of law can be forgiven and, if so, under what circumstances. Contrary to Chevron's arguments, the case law offered by Department staff addresses this issue.

Mercury Machine (3 NY2d at 424) involved the right of taxpayers to obtain a refund after the statute establishing a tax was determined to be unconstitutional when applied to interstate business. The Court held that voluntary payments cannot be recovered, and noted that the basis for this rule is related to the way municipalities are financed (*see id.* at 426). The Court explained that:

[w]here protest has been interposed, the municipality is notified that it may be obliged to refund the taxes and is required to be prepared to meet that contingency. If no protest has been lodged, it is generally assumed that taxes paid can be retained to meet authorized public expenditures, and financial provision is not made for contingent refunds (*id.* at 426).

The Paramount Film Distributing Corporation was a motion picture distributor that sought to recover motion picture license fees paid to New York State from June 10, 1959 to June 10, 1965 after the applicable statute was nullified. In *Paramount Film* (30 NY2d at 418-419) the court relied upon *Mercury Machine* (3 NY2d 418) and distinguished it from *Five Boroughs Electric Contractors Association v City of New York* (12 NY2d 146). Because Paramount Film voluntarily paid the taxes without protest, the Court held that Paramount Film was not entitled to recover the fees even though the statute had been nullified. As a basis for the determination, the Court identified the impact on the public fisc when revenues collected long ago have been spent. (*See Paramount Film*, 30 NY2d at 420.)

In considering the equities of whether to grant Paramount Film's refund request, the Court held that it would be difficult to conclude that the State received a benefit or was otherwise enriched because the taxes paid defrayed the cost of the licensing program. The Court held further that the intent of the licensing program was to further the interests of the industry and the public. In addition, the Court observed that the collected funds had been disbursed long ago. (*See id.* at 421-422.)

Chevron's argument that the captioned matter can be distinguished from *Mercury Machine* (3 NY2d 418) and *Paramount Film* (30 NY2d 415) is without merit. With respect to these cases, Chevron observed that respondents were obliged to pay the taxes whereas Chevron stated that it was not obliged to pay any MPFL fees from June 2003 to August 2007 because Chevron had closed the Troy Asphalt plant in 1999. According to Chevron, the lack of any obligation to pay MPFL fees is a significant distinction. (*See Chevron's sur-reply* at 8.) I

disagree that Chevron's asserted distinction is significant. Regardless of whether Chevron was obliged to pay any MPFL fees from June 2003 to August 2007, Chevron paid them, and did so voluntarily without protest.

With respect to *Bellefont* (148 NYS2d 895), Chevron argued that this case had been superseded by later decisions of higher courts with further factual development (*see* Chevron's sur-reply at 8). To address Chevron's concern, some more recent cases that I found include the following.

In *City of Rochester v Chiarella* (58 NY2d 316 [1983]), property owners sought a refund of excess real property taxes paid pursuant to an unconstitutional levy for tax years 1974-1975 through 1977-1978. The taxpayers had paid the excess taxes for those years without protest (*id.* at 320). Referencing *Mercury Machine* (3 NY2d 418), the Court held that the voluntary payment of a tax or fee may not be recovered (*Rochester*, 58 NY2d at 323), and affirmed the Appellate Division's order to deny the requested refund (*see id.* at 326). (*See also Video Aid Corp. v Town of Wallkill*, 85 NY2d 663, 666-667 [1995], and *Community Health Plan v Burckard*, 3 AD3d 724 [2004].) *Video Aid Corp.* (85 NY2d 663) and *Community Health Plan* (2 AD3d 724) apply the holdings from *Mercury Machine* (3 NY2d 418), *Paramount Film* (30 NY2d 415), and *Rochester* (58 NY2d 316). All matters cited were available when the parties were preparing their respective papers and prior to filing them with me.

Finally, Chevron contended that the Department knew that Chevron's Troy Asphalt plant had been closed. Upon receipt of payments filed from June 2003 to August 2007, Chevron noted that Department staff did not attempt to confirm with Chevron that the Troy Asphalt plant was closed. (*See* Chevron's response memorandum at 1.)

Based on *Paramount Film* (30 NY2d 415), and *Gimbel Brothers* (118 AD2d 532) Chevron, rather than Department staff, should have known what its obligations were with respect to the payment of MPLF fees. In *Paramount Film*, the Court noted that:

one would expect motion picture distributors, and especially a corporation as large as claimant with its staff of lawyers, to protest if the fees were thought illegal. Indeed, the failure to protest indicates that there was no authentic resistance to making the minimal payments for the extensive procedures in licensing motion pictures whose gross yield would be massive compared to the trivial fees imposed. (*Paramount Film*, 30 NY2d at 420.)

In a similar manner, the Court held, among other things, in *Gimbel Brothers* that:

Gimbels displayed a marked lack of diligence in determining what its contractual rights were, and is therefore not entitled to the equitable relief of restitution (*Gimbel Brothers*, 118 AD2d at 536).

Given the Court's observations in *Paramount Film* (30 NY2d 415), and *Gimbel Brothers* (118 AD2d 532), I am persuaded by Department staff's argument. The process of self-reporting the amount of product transferred, computing the fee, certifying the correctness of the facts

stated in the MPFL fee reports, and submitting the MPFL fee reports with payments to the Department underscores the voluntary nature of the fees that Chevron paid. In addition, Chevron showed a lack of diligence to determine what its obligations were with respect to the payment of MPFL fees from June 2003 to August 2007.¹²

To recover taxes or other payments made under a mistake of law, the payer must show that the payments were made involuntarily. This requirement ensures that governmental entities have notice that a refund of some kind may become necessary at some future date. (*See Matter of Level 3 Communications, LLC v Essex County*, 129 AD3d 1255, 1257 [3d Dept 2015].) Accordingly, I conclude that Chevron is not entitled to a refund of the MPFL fees it voluntarily paid without protest under a mistake of law from June 2003 to August 2007. The voluntary nature of the payments was demonstrated by Chevron's timely completion and certification of the original MPFL fee reports each month from June 2003 to August 2007, and the enclosed payment with each report. I recommend that the Commissioner conclude the same, and deny Chevron's refund requests dated October 19, 2007 and June 24, 2009.

V. Refunds

A. Chevron's amended August 2007 MPFL Fee Report

With respect to the application of a statute of limitations to Chevron's amended August 2007 MPFL fee report, as outlined in the **Discussion** at § II.C, the Commissioner may grant, in part, Chevron's October 19, 2007 refund request. According to the original August 2007 MPFL fee report (*see* SJEx. 1, Bates No. 000862), Chevron paid \$13,736.78, but did not actually transfer any petroleum products at the Troy Asphalt plant. For the reasons outlined above, Chevron timely amended the original August 2007 MPFL fee report within 30 days from the initial filing date in a manner consistent with the Navigation Law and implementing regulations, and the Court's interpretation of same (*see Chevron*, 86 AD3d at 820).

If the Commissioner adopts this recommendation, it is not clear how the refund would be made to Chevron. In their respective papers, the parties did not discuss the details of how any disbursements of this nature would be made from the Spill Compensation Fund and the Remedial Fund, which are managed by the New York State Comptroller.

However, based on the analysis in the **Discussion** at § IV.D, the Commissioner may conclude that Chevron is not entitled to any refund with respect to the amended August 2007 MPFL fee report. Although Chevron timely filed the amended August 2007 MPFL fee report, Chevron's mistake of law, nevertheless, applies given the voluntary nature of the payment made with the original August 2007 MPFL fee report, regardless of when Chevron filed the amended MPFL fee report requesting the refund. The parties' papers (*see* Appendix A) did not address

¹² When filing each MPFL fee report, the licensee is required to respond to the questions on Lines 17 and 18 concerning any changes in conditions at the MOSF, and changes in ownership, respectively. On the MPFL fee reports at issue in this matter, Chevron responded in the negative except on the MPFL fee report dated August 15, 2005. For the August 2005 MPFL fee report, Chevron provided no responses to the questions on Lines 17 and 18. (*See* Findings of Fact Nos. 17-19, 23, 24).

whether the Commissioner would have discretion to order a refund, if timely filed, in the event the Commissioner concludes that Chevron voluntarily paid MPFL fees under a mistake of law.

B. The Remainder of Chevron's Refund Requests

With respect to the remainder of Chevron's refund requests totaling \$460,371.89, the Commissioner may rely on a number of distinct bases to deny Chevron's request. The bases are the following: (1) a consideration of the appropriate statute of limitations; (2) the application of the doctrine of laches; and (3) Chevron's mistake of law and the voluntary nature of the MPFL fees paid. The discussion outlines the information provided by the parties, and considers the proffered evidence as well as the parties' respective legal arguments. The Commissioner may rely on any one as a basis to deny the balance of Chevron's requested refunds totaling \$460,371.89, or on a combination of them.

Conclusions

I. Procedures

1. Licensees may claim an overpayment of MPFL fees as a credit balance on subsequently filed reports. In addition, an assertion about an overpayment falls within the category identified in Navigation Law § 174(6) and 17 NYCRR 30.9(f) as an "incorrect" amount, which may reviewed administratively.
2. The monthly fees that major petroleum facility licensees pay pursuant to Navigation Law § 174(4)(a) and 17 NYCRR 30.9 are different from the annual program fees assessed pursuant to ECL Article 72 and 6 NYCRR Parts 482-486. Therefore, the hearing procedures outlined at 6 NYCRR 481.10 do not expressly apply to the review of the Commissioner's January 24, 2012 Determination or other MPFL fee disputes.
3. Any reliance on the procedures outlined at 6 NYCRR part 622 is misplaced. The character of this matter is neither enforcement nor disciplinary (*see* 6 NYCRR 622.1[a][8]). Furthermore, any reliance on the procedures outlined at 6 NYCRR part 624 is inappropriate. The procedures at 6 NYCRR part 624 relate to the administrative review of environmental permit applications for programs administered by the Department. No environmental permit application is being considered in this matter.

II. Chevron's August 2007 MPFL Fee Report

4. Department staff received Chevron's original August 2007 MPFL fee report for the Troy Asphalt plant on September 24, 2007, which included a payment of \$13,736.78. With the October 19, 2007 refund request, Chevron filed an amended August 2007 MPFL fee report, which stated that Chevron did not transfer any petroleum products at the Troy Asphalt plant. Department staff received Chevron's October 19, 2007 refund request on October 22, 2007. Given that Chevron commenced its refund request with respect to the August 2007 MPFL fee report within 28 days from when Chevron filed the original report, Chevron may be entitled to a refund of the MPFL fees paid in the amount of

\$13,736.78. This conclusion concerning a refund limited to the amended August 2007 MPFL fee report is conditioned upon the Commissioner's determination with respect to Staff's claim of a mistake of law.

III. Statute of Limitations

5. Navigation Law § 174(6) sets no limitation by when the Commissioner must commence a fee determination when a particular monthly MPFL fee report is either not filed or, if filed, is incorrect or insufficient. However, 17 NYCRR 30.9(f) expressly requires the Commissioner to determine the fee within 30 days after the due date of the monthly MPFL fee report.
6. The regulatory requirement at 17 NYCRR 30.9(f) requires the Commissioner to act within 30 days of the missing, incorrect, or insufficient MPFL fee reports. Based on the requirement imposed on the Commissioner, a reasonable interpretation of the regulation would be to require a licensee to initiate a refund request within 30 days from when the licensee filed the MPFL fee report.
7. Chevron has not identified any authority for applying the six-year statute of limitations, as provided by CPLR 213, to its MPFL fee refund requests dated October 19, 2007 and June 24, 2009.

IV. Laches

8. The doctrine of laches may apply when an allegedly aggrieved party does not proceed promptly to make a formal demand for the relief available to it. Here, the relief Chevron seeks is a refund from the overpayment of MPFL fees. The applicable elements of laches are whether Chevron unduly delayed making its refund requests and, if so, whether the undue delay resulted in prejudice.
9. With respect to the Troy Asphalt plant, Chevron unduly delayed filing the October 19, 2007 refund request for MPFL fees paid from September 2004 to July 2007.
10. The Spill Compensation Fund must be a non-lapsing revolving fund. Consequently, cash reserves must be available for timely and comprehensive responses to any unauthorized oil spill. A reimbursement of Chevron's MPFL fees paid from September 2004 to July 2007 totaling \$332,768.34 would prejudice the State given the revolving nature of the Spill Compensation Fund. Therefore, Chevron's refund request dated October 19, 2007 concerning MPFL fees paid from September 2004 to July 2007 is barred based on the doctrine of laches. The doctrine of laches, however, does not apply to Chevron's amended MPFL fee report for August 2007 because Chevron did not unduly delay the filing of the refund request for this month.
11. Concerning the Troy Asphalt plant, Chevron unduly delayed filing the June 24, 2009 refund request for MPFL fees paid from June 2003 to August 2004. Chevron filed its June 24, 2009 refund request almost 6 years after Chevron was required to file the June

2003 MPFL fee report. Furthermore, Chevron filed its June 24, 2009 refund request more than 4½ years after Chevron was required to file the August 2004 MPFL fee report.

12. The Spill Compensation Fund must be a non-lapsing, revolving fund. Consequently, cash reserves must be available for timely and comprehensive responses to any unauthorized oil spill. A reimbursement of Chevron's MPFL fees paid from June 2003 to August 2004 totaling \$127,603.55 would prejudice the State given the revolving nature of the fund. Therefore, I conclude that Chevron's refund request dated June 24, 2009 concerning MPFL fees paid from June 2003 to August 2004 is barred based on the doctrine of laches.

V. Mistake

13. Pursuant to CPLR 3005, relief from a mistake cannot be denied simply because the mistake was one of law rather than one of fact.
14. In this matter, Department staff is not prohibited from claiming that the MPFL fees paid by Chevron cannot be refunded because Chevron paid them voluntarily and without protest under an alleged mistake of law. The motion practice followed here has preserved Chevron's due process rights. In particular, Chevron subsequently filed a sur-reply dated June 7, 2013, which is appropriate in the alternative to rejecting new arguments raised for the first time in a reply.¹³
15. In her December 28, 2012 affidavit, Ms. Eck's statements at ¶¶ 22 and 23 demonstrate how she erroneously interpreted, and how the personnel whom Ms. Eck supervised at Chevron may have erroneously interpreted, the information that must be presented on Line 1 of the MPFL fee report (SJEx. 20). Such a misinterpretation of what was legally required is a mistake of law, rather than a mistake of fact.
16. With respect to the MPFL fee reports that Chevron filed from June 2003 to September 2004, the total number of barrels cannot be derived by dividing the total dollar value of the asphalt by 42 gallons per barrel. Accordingly, such a mathematical error is a mistake of fact.
17. Nevertheless, the mathematical error associated with Chevron's MPFL fee reports filed from June 2003 to September 2004 does not refute or otherwise outweigh the underlying mistake of law. With respect to the MPFL fee reports filed by Chevron from June 2003 to August 2007, personnel at Chevron misinterpreted the legal requirement with respect to the information that must be presented on Line 1 of the MPFL fee reports (SJEx. 20) by reporting the number of barrels based on the total amount of asphalt distributed in New York State rather than on the amount of petroleum product actually transferred at the Troy Asphalt plant. Consequently, Chevron's mistake of law applies to the set of MPFL fee reports filed from June 2003 to September 2004, as well as to all other MPFL fee reports that are the subject of Chevron's refund requests.

¹³ See *Merrill Lynch Mtge. Capital, Inc., v Gbenga*, 38 Misc 3d 1209(A) 2 (Sup Ct, Kings County 2013) citing *Zernitsky v Shurka*, 94 AD3d 875 (2d Dept 2012).

18. To recover taxes or other payments made under a mistake of law, the payer must show that the payments were made involuntarily. This requirement ensures that governmental entities have notice that a refund of some kind may become necessary at some future date.¹⁴
19. With respect to the Troy Asphalt plant, however, Chevron is not entitled to a refund of the MPFL fees paid from June 2003 to August 2007 because it paid them voluntarily and without protest as a mistake of law. Chevron demonstrated the voluntary nature of its payments by timely completing and certifying the MPFL fee reports filed from June 2003 to August 2007, as well as by providing payments with the MPFL fee reports.
20. Concerning the Troy Asphalt plant, Chevron also showed a lack of diligence to determine what its obligations were with respect to the payment of MPFL fees from June 2003 to August 2007.

Recommendations

1. Because 17 NYCRR 30.9(f) requires the Commissioner to act within 30 days of a missing, incorrect, or insufficient MPFL fee reports, the Commissioner should similarly require a licensee to initiate a refund request within 30 days from when the licensee filed the MPFL fee report.
2. The Commissioner may grant, in part, Chevron's February 13, 2013 motion for summary judgment concerning its October 19, 2007 refund request with respect to the amended MPFL fee report for August 2007. The Commissioner may award Chevron a refund for the amount of \$13,736.78 based on the amended August 2007 MPFL fee report for the Troy Asphalt plant. This recommendation is conditioned, however, upon the Commissioner's determination with respect to whether Chevron paid MPFL fees from June 2003 through August 2007 under either a mistake of fact, or a mistake of law.
3. But for the amended MPFL fee report for August 2007, the Commissioner should deny Chevron's February 13, 2013 motion for summary judgment with respect to the remainder of its October 19, 2007 refund request concerning MPFL fee reports filed from September 2004 to July 2007 based on the doctrine of laches.
4. Based on the doctrine of laches, the Commissioner should deny, in full, Chevron's February 13, 2013 motion for summary judgment concerning its June 24, 2009 refund request with respect to the MPFL fee reports filed from June 2003 to August 2004.
5. The Commissioner should deny Chevron's February 13, 2013 motion for summary judgment seeking a refund of the MPFL fees paid from June 2003 to July 2007 concerning the Troy Asphalt plant because Chevron paid the fees voluntarily without protest under a mistake of law. In denying the motion, the Commissioner should

¹⁴ See *Matter of Level 3 Communications, LLC v Essex County*, 129 AD3d 1255, 1257 (3d Dept 2015).

conclude that Chevron showed a lack of diligence to determine what its obligations were with respect to the payment of MPFL fees paid from June 2003 to July 2007.

6. But for the amended MPFL fee report for August 2007 and the associated refund of \$13,736.78, the Commissioner should grant, in part, Department staff's April 5, 2013 cross-motion to dismiss Chevron's February 13, 2013 motion for summary judgment.
7. In the alternative, the Commissioner should grant, in full, the Department staff's April 5, 2013 cross-motion to dismiss Chevron's February 13, 2013 motion for summary judgment, provided the Commissioner concludes that Chevron paid MPFL fees from June 2003 through August 2007 under a mistake of law and, therefore, determines he has no discretion to grant any refund request.

_____/s/_____
Daniel P. O'Connell
Administrative Law Judge

Dated: Albany, New York
June 30, 2016

Appendix A – Index of the parties' papers

Appendix B – Exhibit Chart

Appendix C – SJEx. 9

Chevron USA, Inc.
DEC Case No. 4-01540
Appendix A

Cover letter dated February 13, 2013 from David G. Burch, Jr., Esq., Hiscock & Barclay, LLP, with the following enclosures.

- A. Memorandum of Law in Support of Chevron USA, Inc.'s Motion for Summary Judgment dated February 13, 2013.

- B. Affidavit of Robert Lavorerio, sworn to December 10, 2012, with attached Exhibits A through D.
 - 1. Exhibit A: Email dated June 14, 2004 from John Bolt (Chevron) to Robert Lavorerio regarding the Troy Terminal;

 - 2. Exhibit B: Letter dated December 11, 1998 from Edward L. Moore, P.E. (DEC – Region 4) to Beneta Hegar (Chevron) regarding inspection of the Troy Terminal on July 20, 1998;

 - 3. Exhibit C: Letter dated October 20, 1999 from Edward L. Moore, P.E. (DEC – Region 4) to Beneta Hegar (Chevron) regarding annual inspection of the Troy Terminal on October 19, 1999; and

 - 4. Exhibit D: Facility Closure Site Investigation Report dated August 9, 2005. Prepared by TRC Raviv Associates, Inc. regarding the Troy Terminal. Cover letter dated August 10, 2005 and report. (Bates Nos. 000585 to 000750)

- C. Affidavit of Diane Eck, sworn to December 28, 2012, with attached Exhibits A through K.
 - 1. Exhibit A: List of Four Asphalt Terminals: (1) IPT, LLC; (2) Chevron (Troy Terminal); (3) Castle Oil; and (4) Groman;

 - 2. Exhibit B: Material Movements for Troy Terminal;

 - 3. Exhibit C: Report of Material Movements for the Three Asphalt Terminals other than Chevron (Troy Terminal);

 - 4. Exhibit D: New York State Tax Form PT-103 (8/12), Tax on Residual Petroleum Product Businesses;

 - 5. Exhibit E New York State and Local Sales and Use Tax Return for Part-Quarterly (Monthly) Filers (ST-809);

Chevron USA, Inc.
DEC Case No. 4-01540
Appendix A

6. Exhibit F: NYS DEC, Division of Management and Budget Services, Major Petroleum Facility License Fee Report and Instructions;
 7. Exhibit G: Spreadsheet for reporting periods June 2003 through September 2004;
 8. Exhibit H: An enhancement of Exhibit C, which subtotals the intrastate receipts by month;
 9. Exhibit I: Exhibit I compares the monthly subtotals to Column D of Exhibit G for the months in which Chevron reported the intrastate receipts in its returns;
 10. Exhibit J: Chevron Texaco Invoice No. 622796479 charged to Gorman Asphalt, Ltd.
 11. Exhibit K: New York State Department of Taxation and Finance (9/11) Publication 131 entitled, Your Rights and Obligations under the Tax Law.
- D. Affirmation of David G. Burch, Jr., Esq., dated February 13, 2013, with attached Exhibits A through T.
1. Exhibit A: Commissioner's January 24, 2012 Determination regarding Application of Chevron USA, Inc. – Demand for Refund of Major Petroleum Facility License Fees;
 2. Exhibit B: Letter dated February 22, 2012 from Hiscock & Barclay appealing from Commissioner's January 24, 2012 Determination;
 3. Exhibit C: Major Petroleum Facility License issued March 28, 2000, to Chevron USA, Inc., Troy Asphalt Terminal;
 4. Exhibit D: NYS DEC Staff's Response to Chevron USA Inc.'s First Notice to Admit, sworn to August 2, 2012, with attached documents;
 5. Exhibit E: NYS DEC Staff's Response to Chevron USA Inc.'s Second Notice to Admit, sworn to October 22, 2012, with attached documents;
 6. Exhibit F: Letter dated December 11, 1998 from Edward L. Moore, P.E. (DEC – Region 4) to Beneta Hegar (Chevron) regarding the July 20, 1998 inspection of the Troy Terminal;

Chevron USA, Inc.
DEC Case No. 4-01540
Appendix A

7. Exhibit G: Letter dated February 13, 2004 from Edward L. Moore, P.E. (DEC – Region 4) to W.D. Howard (Chevron) regarding the February 5, 2004 inspection of the Troy Terminal;
8. Exhibit H: Letter dated October 20, 1999 from Edward L. Moore, P.E. (DEC – Region 4) to Beneta Hegar (Chevron) regarding the Department’s October 19, 1999 annual inspection of the Troy Terminal;
9. Exhibit I: Cover letter dated January 26, 2000 from T.H. Lambert (Chevron) to Edward L. Moore, P.E. (DEC – Region 4) with renewal application for major petroleum facility license for the Troy Terminal (License No. 4-1540);
10. Exhibit J: Affidavit of Kevin P. Glynn, an Excise Tax Compliance Supervisor (Chevron), sworn to June 24, 2009, with attached Exhibits A through E. Filed with New York State Court of Claims;
11. Exhibit K: Affidavit of Diane Rodrigues, an Excise Tax Compliance Supervisor (Chevron), sworn to July 8, 2009, with attached Exhibits A through B. Filed with New York State Court of Claims;
12. Exhibit L: Letter dated February 13, 2008 from Kevin P. Glynn, Excise Tax Supervisor (Chevron) to Benjamin A. Conlon, Esq., responding to Department staff’s request for additional information;
13. Exhibit M: Email dated February 14, 2005 from Charleton N. Carandang to Lisa Wasko regarding refund of fees;
14. Exhibit N: Letter dated April 4, 2008 from Edward L. Moore, P.E. (DEC – Region 4) to R. Lavorerio (Chevron) regarding tank closure at the Troy Terminal, and enclosed substantial tank modification application form;
15. Exhibit O: Letter dated June 2, 2008 from Robert Lavorerio, Area Manager Refining, US East (Chevron) to NYS DEC Region 4 and completed substantial tank modification application form for the Troy Terminal;
16. Exhibit P: Letter dated April 29, 2009 from Shawn Vitas, Associate Accountant, Regulatory Fee and Oil Spill Revenue Bureau (DEC) to Chevron (Concord CA) requesting March 2009 Major Petroleum Facility License Fee Report;
17. Exhibit Q: New York State Court of Claims, Decision and Order (Motion No. M-77154) dated January 12, 2010, filed February 5, 2010;

Chevron USA, Inc.
DEC Case No. 4-01540
Appendix A

18. Exhibit R: Letter dated May 6, 2010 from Hiscock & Barclay to DEC Commissioner Grannis regarding refund of fees;
19. Exhibit S: New York State Supreme Court (Albany County), Decision and Order (Index No. 6001-10) dated September 28, 2011; and
20. Exhibit T: New York State Supreme Court, Appellate Division (3d Department), Memorandum and Order (Index No. 511645) dated July 21, 2011.

E. Affidavit of Service by Amy M. Campbell, sworn to February 13, 2013.

Cover letter dated April 5, 2013 from Michael S. Caruso, Esq., Senior Attorney, NYS Department of Environmental Conservation with enclosures as follows.

- A. Department Staff's Notice of Cross-Motion to Dismiss or for Summary Judgment, dated April 5, 2013.
- B. Affidavit of Scott W. Caruso, sworn to April 4, 2013, with attached Exhibits A through EE:
 1. Exhibit A: Chevron's May 6, 2010 demand letter;
 2. Exhibit B: Commissioner's Determination, dated January 24, 2012;
 3. Exhibit C: Application of Major petroleum Facility License filed by Chevron USA Inc., Troy Asphalt Term., dated January 26, 2000;
 4. Exhibit D: Major Petroleum Facility License issued to Chevron USA, Inc., for the Chevron USA Inc., Troy Asphalt Terminal. License No. 4-1540. Date issued: March 28, 2000; Expiration date: March 31, 2004;
 5. Exhibit E: Department staff's letter dated February 13, 2009, from Dan Lightsey, P.E. to Kathleen Abell;
 6. Exhibit F: Chevron's letter dated February 13, 2008, from Kevin P. Glynn to Benjamin Conlon;
 7. Exhibit G: Various checks from Chevron dated from July 17, 2003 to September 17, 2007, payable to NYS Department of Environmental Conservation for NY Oil Spill Fees;

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Appendix A

8. Exhibit H: Invoices dated July 2003 to August 2004 from Chevron to Barrett Paving Materials;
9. Exhibit I: Invoices dated April 2005 to August 2007 from Chevron to Bimasco, Inc.;
10. Exhibit J: Invoices dated June 2003 to November 2005 from Chevron to GL Paving Products, Inc.;
11. Exhibit K: Invoices dated April 2003 to September 2007 from Chevron to Gorman Asphalt, Ltd.;
12. Exhibit L: Invoices dated November 2003 to December 2003 from Chevron to Hudson Liquid Asphalt;
13. Exhibit M: Invoices dated May 2003 to June 2007 from Chevron to Nassau Asphalt Supply Corp. (Cedarhurst);
14. Exhibit N: Invoices dated November 2003 to December 2006 from Chevron to Nassau Asphalt Supply Corp. (Farmingdale);
15. Exhibit O: Invoices dated August 2003 to July 2007 from Chevron to Nassau Asphalt Supply Corp. (Glen Cove Plant);
16. Exhibit P: Invoices dated December 2004 from Chevron to New York City DOT Highways;
17. Exhibit Q: Invoices dated April 2003 to August 2007 from Chevron to Posillioco Bros. Asphalt;
18. Exhibit R: Invoices dated April 2003 to September 2006 from Chevron to Prima Asphalt Concrete Inc.;
19. Exhibit S: Invoices dated December 2003 to March 2007 from Chevron to RCA Asphalt, LLC.;
20. Exhibit T: Invoices dated August 2004 to December 2006 from Chevron to Suffolk Asphalt Supply, Inc. (Hauppauge);
21. Exhibit U: Invoices dated June 2003 to December 2006 from Chevron to Suffolk Asphalt Supply, Inc. (West Hampton);

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22. Exhibit V: Invoices dated October 2006 to November 2006 from Chevron to Tilcon (Riverdale Plant);
 23. Exhibit W: Invoices dated October 2006 to November 2006 from Chevron to Tilcon (Haverstraw);
 24. Exhibit X: Invoices dated July 2005 to July 2005 from Chevron to Tilcon (Bogota Plant);
 25. Exhibit Y: Invoices dated August 2007 to September 2007 from Chevron to Weatherguard;
 26. Exhibit Z: Memorandum filed with Senate Bill No. 3030-C (Navigation Law) dated August 11, 1977;
 27. Exhibit AA: ChevronTexaco, *Powering Performance*, 2003 Annual Report;
 28. Exhibit BB: ChevronTexaco, *A New Equation*, 2004 Annual Report;
 29. Exhibit CC: ChevronTexaco, *Human Energy*, 2005 Annual Report;
 30. Exhibit DD: ChevronTexaco, *Managing the Energy Portfolio*, 2006 Annual Report;
 31. Exhibit EE: ChevronTexaco, *Ingenuity*, 2007 Annual Report;
- C. Affidavit of Robert Schwank, sworn to March 22, 2013, with attached Exhibits A through G:
1. Exhibit A: Chevron USA, Inc., Major Petroleum Facility License Fee Reports, dated July 2003-September 2007;
 2. Exhibit B: Instructions for Major Petroleum Facility License Fee Report;
 3. Exhibit C: Letter dated April 29, 2009 from Shawn Vitas, Associate Accountant (Chevron) to DEC Bureau of Revenue Management, Regulatory and Oil Spill Fee Unit;
 4. Exhibit D: Chevron's Voluntary Payments from June 2003-August 2007;

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5. Exhibit E: Chevron USA, Inc., Major Petroleum Facility License Fee Reports, October 2007-March 2009;
 6. Exhibit F: Letter dated October 19, 2007 from Olga Saegert, Compliance Tax Analyst (Chevron) to DEC Bureau of Revenue Management, Regulatory and Oil Spill Fee Unit with amended Major Petroleum Facility License Fee Reports from September 2004-August 2007;
 7. Exhibit G: Letter dated June 24, 2009 from Athena Wang, Compliance Tax Analyst (Chevron) to DEC Bureau of Revenue Management, Regulatory and Oil Spill Fee Unit with amended Major Petroleum Facility License Fee Reports from June 2003-August 2004;
- D. Affidavit of Dennis Farrar, sworn to March 22, 2013, with attached Exhibits A through H:
1. Exhibit A: NYS DEC Division of Environmental Remediation, Remedial programs Annual Report for State Fiscal Year 2003-2004;
 2. Exhibit B: NYS DEC Division of Environmental Remediation, Remedial programs Annual Report for State Fiscal Year 2004-2005;
 3. Exhibit C: NYS DEC Division of Environmental Remediation, Remedial programs Annual Report for State Fiscal Year 2005-2006;
 4. Exhibit D: NYS DEC Division of Environmental Remediation, Remedial programs Annual Report for State Fiscal Year 2006;
 5. Exhibit E: NYS DEC Division of Environmental Remediation, Remedial programs Annual Report for State Fiscal Year 2007-2008;
 6. Exhibit F: NYS DEC Spill Report Form, Spill No. 0205025, Mohawk Tanker, Route 163 at Route 10 (Montgomery County);
 7. Exhibit G: NYS DEC 2003 Agreement, Standby Petroleum and Hazardous Waste Spill Response and Containment (Contract No. D400118), Contractor: Miller Environmental, 538 Edwards Avenue, Calverton, New York 11933 (Telephone: 631-369-4900); and

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8. Exhibit H: NYS DEC 2003 Agreement, Standby Investigation and Remediation (Contract No. D400302), Contractor: Aztec Technologies, Route 50 and Marion Avenue, Saratoga Springs, New York 12866 (Telephone: 518-583-4273).

- E. Affidavit of Suzette Baker, sworn to March 21, 2013.

- F. Memorandum of Law in Support of Department staff's Cross-Motion to Dismiss or for Summary Judgment dated April 5, 2013.

- G. Affidavit of Service by Brooke Turallo, sworn to April 4, 2013.

Cover letter dated May 6, 2013 from Michael A. Oropallo, Esq., Hiscock & Barclay, LLP, with the following enclosures.

- A. Chevron USA, Inc.'s Response Memorandum of Law in Opposition to Department of Environmental Conservation's Cross-Motion for Summary Judgment and in further support of Chevron's Motion for Summary Judgment dated May 6, 2013;

- B. Affirmation of David G. Burch, Jr., in Opposition to Department of Environmental Conservation's Cross-Motion for Summary Judgment, dated May 6, 2013 with attached Exhibits A and B.
 1. Exhibit A: State of New York, New York Environmental Protection and Spill Compensation Fund, *Annual Financial Report and Other Supplementary Information*, for Fiscal Year ended March 31, 2012, Thomas P. DiNapoli, State Comptroller; and

 2. Exhibit B: State of New York, New York Environmental Protection and Spill Compensation Fund, *Annual Financial Report and Other Supplementary Information*, for Fiscal Year ended March 31, 2008, Thomas P. DiNapoli, State Comptroller.

- C. Affidavit of Service by Amy M. Campbell, sworn to May 6, 2013.

Cover letter dated May 20, 2013 from Scott W. Caruso, Esq., Senior Attorney, NYS Department of Environmental Conservation with enclosure.

- Reply Memorandum of Law in Support of New York State Department of Environmental Conservation Staff's Cross-Motion to Dismiss or for Summary Judgment, and in

Chevron USA, Inc.
DEC Case No. 4-01540
Appendix A

Response to Chevron's Response Memorandum of Law in Opposition to the Department's Cross-Motion.

Cover letter dated June 10, 2013 from Michael A. Oropallo, Esq., Hiscock & Barclay, LLP, with the following enclosures.

- Chevron USA, Inc.'s Sur-Reply Memorandum of Law in Opposition to Department of Environmental Conservation's Cross-Motion for Summary Judgment and in further support of Chevron's Motion for Summary Judgment dated June 7, 2013.

Chevron Exhibit Chart
Appendix B

Summary Judgment Exhibit No.	Description	Chevron Source	Department staff Source
1	Cover letter dated October 19, 2007 from Olga Saegert, Compliance Tax Analyst (Chevron [Concord, CA] to Department staff with enclosed amended MPFL fee reports from September 2004 to August 2007	Burch Affirmation (February 13, 2013) Exhibit J (K. Glynn Affidavit, [June 24, 2009]) Exhibit B	Schwank Affidavit (March 22, 2013) Exhibit F
2	Letter dated February 13, 2008 from Kevin P. Glenn, Excise Tax Supervisor (Chevron [Concord, CA]) to Benjamin A. Conlon, Esq., Associate Attorney, NYS DEC Office of General Counsel		S. Caruso Affirmation (April 4, 2013) Exhibit F
3	Cover letter dated June 24, 2009 from Athena Wang, Compliance Tax Analyst (Chevron [Concord, CA]) to Department staff with enclosed amended MPFL fee reports from June 2003 to August 2004	Burch Affirmation (February 13, 2013) Exhibit K (D. Rodrigues Affidavit, [July 8, 2009]) Exhibit B	Schwank Affidavit (March 22, 2013) Exhibit G
4	New York Court of Claims, Decision and Order (Motion No. M-77154) dated January 12, 2010, filed February 5, 2010	Burch Affirmation (February 13, 2013) Exhibit Q	
5	Letter dated May 6, 2010 from Michael A. Oropallo, Esq., Hiscock & Barclay, to Hon. Alexander B. Grannis, Commissioner, New York State Department of Environmental Conservation	Burch Affirmation (February 13, 2013) Exhibit R	
6	New York State Supreme Court (Albany County), Decision and Order (Index No. 6001-10), dated September 28, 2011	Burch Affirmation (February 13, 2013) Exhibit S	

Chevron Exhibit Chart
Appendix B

7	Commissioner's January 24, 2012 Determination regarding Application of Chevron USA, Inc. – Demand for Refund of Major Petroleum Facility License Fees	Burch Affirmation (February 13, 2013) Exhibit A	S. Caruso Affirmation (April 4, 2013) Exhibit B
8	Letter dated February 22, 2012 from Mr. Oropallo, Hiscock & Barclay, appealing Commissioner's January 24, 2012 Determination	Burch Affirmation (February 13, 2013) Exhibit B	
9	Letter dated March 19, 2012 from Commissioner Joseph J. Martens to Mr. Oropallo, Hiscock & Barclay	Attached as Appendix C to this Summary Report and Ruling	Attached as Appendix C to this Summary Report and Ruling
10	Application for Major Petroleum Facility License for Troy Asphalt plant filed by Chevron USA, Inc., dated January 26, 2000		S. Caruso Affirmation (April 4, 2013) Exhibit C
11	Major Petroleum Facility License issued to Chevron USA, Inc., for the Troy Asphalt plant. License No. 4-1540. Date issued: March 28, 2000; Expiration date: March 31, 2004	Burch Affirmation (February 13, 2013) Exhibit C	S. Caruso Affirmation (April 4, 2013) Exhibit D
12	Letter dated February 13, 2009 by Daniel Lightsey, PE, Environmental Engineer II, from DEC Region 4 to Kathy Abell (Chevron [Concord, CA])		S. Caruso Affirmation (April 4, 2013) Exhibit E
13	Facility Site Investigation Report prepared by TRC Raviv Associates, Inc. dated August 9, 2005	Lavorerio Affidavit (December 10, 2012) Exhibit D	
14	Letter dated December 11, 1998 by Edward L. Moore, PE, Environmental Engineer II, from the Department's Region 4 office to Beneta Hegar (Chevron [Concord, CA]) regarding Department staff's July 20, 1998 inspection of the Troy Asphalt plant.	Lavorerio Affidavit (December 10, 2012) Exhibit B	

Chevron Exhibit Chart
Appendix B

15	Letter dated October 20, 1999 by Mr. Moore to Ms. Hegar regarding Department staff's October 19, 1999 inspection of the Troy Asphalt plant.	Lavorerio Affidavit (December 10, 2012) Exhibit C	
16	Letter dated January 26, 2000 by T.H. Lamber (Chevron [Perth Amboy, NJ]) to Mr. Moore with enclosed renewal Application for Major Petroleum Facility License (Troy Asphalt plant [No. 04-1540])		S. Caruso Affirmation (April 4, 2013) Exhibit C
17	Letter dated March 28, 2000 by Mr. Moore to Debbie Burdt (Chevron [Concord, CA]) with enclosed renewal Major Petroleum Facility License (Troy Asphalt plant [MPFL No. 04-1540])		S. Caruso Affirmation (April 4, 2013) Exhibit D
18	New York State Department of Environmental Conservation Remedial Programs Annual Report for State Fiscal Year 2003-04		Farrar Affidavit (March 22, 2013) Exhibit A
19	New York State Department of Environmental Conservation Remedial Programs Annual Report for State Fiscal Year 2004-05		Farrar Affidavit (March 22, 2013) Exhibit B
20	Major Petroleum Facility License Fee Report Form (April 2009) and Instructions	Eck Affidavit (December 28, 2012) Exhibit F, Bates Nos. C000648-50	Schwank Affidavit (March 22, 2013) Exhibit B [Instructions]
21	Letter dated April 29, 2009 from Shawn Vitas, Associate Accountant, Regulatory Fee and Oil Spill Revenue Bureau, New York State Department of Environmental Conservation to Chevron (Concord, CA)		Schwank Affidavit (March 22, 2013) Exhibit C
22	Chevron's Major Petroleum Facility License (MPFL) fee reports from June 2003 to August 2007 (original)		Schwank Affidavit (March 22, 2013) Exhibit A

Chevron Exhibit Chart
Appendix B

23	Material Movement for the three asphalt terminals other than Chevron's Troy Asphalt plant	Eck Affidavit (December 28, 2012) Exhibit C	S. Caruso Affirmation (April 4, 2013) Exhibits H-Y
24	New York State Department of Taxation and Finance, Publication 131, <i>Your Rights and Obligations Under the Law</i> , dated September 2011	Eck Affidavit (December 28, 2012) Exhibit K	
25	Chevron's re-creation of tax payment calculations from June 2003 to August 2007	Eck Affidavit (December 28, 2012) Exhibit G, Lines 1-16, inclusive	
26	New York State Department of Taxation and Finance, Form PT-103, <i>Tax on Residual Petroleum Product Business</i> [Tax Law Article 13-A]	Eck Affidavit (December 28, 2012) Exhibit D	
27	New York State Department of Taxation and Finance, Form ST-809, <i>New York State and Local Sales and use tax Return for Part-Quarterly [Monthly] Filers</i>	Eck Affidavit (December 28, 2012) Exhibit E	
28	Chevron's Voluntary Payments		Schwank Affidavit (March 22, 2013) Exhibit D
29	New York Environmental Protection and Spill Compensation Fund Annual Financial Report and Other Supplemental Information Fiscal Year Ended March 31, 2012	Burch Affirmation (May 6, 2013) Exhibit A	

Chevron Exhibit Chart
Appendix B

30	New York Environmental Protection and Spill Compensation Fund Annual Financial Report and Other Supplemental Information Fiscal Year Ended March 31, 2008	Burch Affirmation (May 6, 2013) Exhibit B	
31	New York State Department of Environmental Conservation Annual Remedial Programs Report for State Fiscal Year 2005-06 (Exhibit C) Division of Environmental Remediation 2006 Annual Report (Exhibit D) Division of Environmental Remediation 2007/2006 Annual Report (Exhibit E)		Farrar Affidavit (March 22, 2013) Exhibits C, D, and E

ANDREW M. CUOMO
GOVERNOR



JOE MARTENS
COMMISSIONER

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
ALBANY, NEW YORK 12233-1010

MAR 19 2012

VIA E-MAIL & CERTIFIED MAIL

Michael A. Oropallo, Esq.
Hiscock & Barclay LLP
One Park Place
S00 South State Street
Syracuse, New York 13202

Re: Matter of Chevron U.S.A., Inc.
Demand for Refund of Major Petroleum Facility License Fees

Dear Mr. Oropallo:

This is in response to your letter dated February 22, 2012, on behalf of Chevron U.S.A., Inc. (Chevron), in which you requested a hearing on my January 24, 2012 determination (determination) that denied Chevron's claim for a refund of major petroleum facility license fees paid on its asphalt plant in Troy, New York.

I am hereby directing the Department's Office of Hearings and Mediation Services to conduct a hearing on this matter. The hearing will be conducted in accordance with 17 NYCRR Part 30 and the procedures set forth in 6 NYCRR 481.10, to the extent that those procedures are consistent with 17 NYCRR Part 30.

The Office of Hearings and Mediation Services will contact you and Department staff once an Administrative Law Judge (ALJ) has been assigned to this matter.

In your February 22, 2012 letter, you state your understanding that the letter "will be treated as Chevron's answer to the [d]etermination." Questions concerning any pleadings in this proceeding, or their sufficiency or status, are to be addressed to the assigned ALJ.

Sincerely,

A handwritten signature in black ink that reads "Joseph J. Martens". The signature is fluid and cursive, with the first name "Joseph" and last name "Martens" clearly legible.

Joseph J. Martens

c: Loretta Simon, OAG
Marc Gerstman
Steven Russo
Louis Alexander
James McClymonds