STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 40 of the New York State Environmental Conservation Law (ECL) and Parts 596, 598, and 599 of Title 6 of the Official Compilation of Codes, Rules, and Regulations of the State of New York (6 NYCRR),

ORDER

DEC Case No. R3-20171003-174

-by-

CORTLANDT RACQUET CLUB, INC. and VAL SANTUCCI,

Respondents.

This administrative enforcement proceeding concerns alleged violations of ECL article 40 and 6 NYCRR parts 596, 598 and 599 by Cortlandt Racquet Club, Inc. (Cortlandt) and Val Santucci (Santucci) (collectively, respondents) at a fitness club, known as the Premier Athletic Club, located at 2127 Albany Post Road, Montrose, New York, Westchester County (facility).

Staff of the New York State Department of Environmental Conservation (Department) alleged respondents failed to comply with the Department's chemical bulk storage (CBS) regulations with respect to two out-of-service 400-gallon aboveground storage tanks and two unregistered 550-gallon aboveground storage tanks containing sodium hypochlorite. Sodium hypochlorite from the tanks is used to treat water for two swimming pools at the facility.

Department staff commenced this proceeding by serving respondents with a notice of hearing and complaint dated March 9, 2018 (Complaint) alleging twenty-one causes of action as follows:

1. 6 NYCRR 596.2(a) for failing to register two 550-gallon aboveground tanks of sodium hypochlorite (first cause of action);
2. 6 NYCRR 596.2(f) for failing to notify the Department of the permanent closure of two tanks at the facility (second cause of action);
3. 6 NYCRR 596.2(j) for failing to label tanks at the facility with the tank system identification number and the design capacity and working capacity (third cause of action);
4. 6 NYCRR 598.1(k)(1) for failing to maintain the spill prevention report at the facility (fourth cause of action);
5. 6 NYCRR 598.1(k)(2)(i) for failing to include a copy of the registration application and certificate in the spill prevention report (fifth cause of action);
6. 6 NYCRR 598.1(k)(2)(iii) for failing to include a copy of a current facility site map in the spill prevention report (sixth cause of action);

7. 6 NYCRR 598.1(k)(2)(iv) for failing to include the name, signature and license number of a professional engineer licensed in New York State or other qualified person who prepared the spill prevention report (seventh cause of action);
8. 6 NYCRR 598,1(k)(2)(v) for failing to include a listing and summary description for the past five years of releases required to be reported under state and federal law (eighth cause of action);
9. 6 NYCRR 598.1(k)(2)(vi) for failing to include an identification and assessment of causes of spills, leaks and releases at the facility in the facility's spill prevention report (ninth cause of action);
10. 6 NYCRR 598.1(k)(2)(vii) for failing to include a status report on compliance with 6 NYCRR parts 596-599 in the spill prevention report (tenth cause of action);
11. 6 NYCRR 598.1(k)(2)(x) for failing to include a spill response plan in the spill prevention report (eleventh cause of action);
12. 6 NYCRR 598.4(b)(7) for failing to include written site procedures in the spill prevention report (twelfth cause of action);
13. 6 NYCRR 598.4(b)(8) for failing to label fill ports (thirteenth cause of action);
14. 6 NYCRR 598.5(c)(1) for failing to equip the aboveground CBS tanks with secondary containment systems in accordance with 6 NYCRR 599.9 (fourteenth cause of action);
15. 6 NYCRR 598.5(e) for failing to install spill prevention methods at the pumps and valves for the CBS tanks (fifteenth cause of action);
16. 6 NYCRR 598.7(b)(2) for failing to conduct a comprehensive annual inspection (sixteenth cause of action);
17. 6 NYCRR 598.7(c)(1) for failing to conduct a five-year inspection during the last five years (seventeenth cause of action);
18. 6 NYCRR 598.10(c)(1)(i)-(vii) for failing to close permanently two out-of-service tanks (eighteenth cause of action);
19. 6 NYCRR 599.13(c)(4) for failing to label the aboveground piping for the CBS tanks with the chemical name or common name of the hazardous substance stored (nineteenth cause of action);
20. 6 NYCRR 599.17(b)(1)(i) for failing to install overfill prevention systems for the CBS tanks (twentieth cause of action); and
21. 6 NYCRR 599.17(c) for failing to install a transfer area secondary containment system (twenty-first cause of action).

On or about April 9, 2018, respondents served an answer on the Department (Answer).

On October 4, 2018, Department staff filed a notice of motion for order without hearing with supporting papers. In the motion, staff withdrew its first, second, eighth, ninth and eighteenth causes of action. Respondents opposed the motion and cross-moved to dismiss the Complaint. Department staff opposed respondents' cross motion.

The matter was initially assigned to Administrative Law Judge (ALJ) Lisa A. Wilkinson, who by ruling dated January 18, 2019, granted Department staff's motion in part, finding respondents liable on the third (in part), fourth, fifth, sixth, seventh, tenth, eleventh, twelfth,

thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, nineteenth, twentieth and twenty-first causes of action. ALJ Wilkinson denied staff's motion on that part of the third cause of action alleging a violation of 6 NYCRR 596.2(j)(3) for failing to label tank number 2 with the design capacity and working capacity of the tank. The ALJ reserved ruling on the penalties and remedial relief requested by Department staff and set the matter down for hearing (*see Matter of Cortlandt Racquet Club, Inc. and Val Santuccci*, Ruling of the ALJ, January 18, 2019 [Wilkinson Ruling or Ruling], at 26-27).

Following the departure of ALJ Wilkinson from the Office of Hearings and Mediation Services, the matter was reassigned to ALJ Michael S. Caruso, and the hearing was held at the Department's Region 3 office in New Paltz, New York. The parties presented evidence and testimony related to the labeling of tank number 2, as well as the staff-requested penalty and relief.

ALJ Caruso prepared the attached hearing report (Hearing Report), in which the ALJ (i) incorporated by reference the Wilkinson Ruling; (ii) made findings of fact and conclusions of law; and (iii) recommends that I issue an order that:

- finds liability on the third, fourth, fifth, sixth, seventh, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, nineteenth, twentieth and twenty-first causes of action;

- imposes a total civil penalty of fifty-one thousand one hundred dollars ($51,100) as allocated between the two respondents; and

- denies Department staff's request for further investigation and remediation of the site.

(*see* Hearing Report at 19-20).

I hereby adopt the Wilkinson Ruling and the Hearing Report, as my decision in this matter, subject to my comments below.

Background

The regulations that Department staff has cited in the Complaint set forth responsibilities of the owner and operator at CBS facilities. To provide further clarification to the Ruling, I note that certain of the regulatory responsibilities are solely those of the owner, certain of the responsibilities are solely those of the operator, and certain responsibilities are phrased as the responsibility of the "owner or operator."[1] Accordingly, any analysis of liability must consider which entity (owner or operator or both) is responsible pursuant to the specific regulation cited.

[1] Two of the regulatory provisions at issue impose requirements upon a CBS facility, but do not explicitly reference who is responsible (that is whether it is the owner, the operator, or the owner or operator). I have considered the regulatory language of these two provisions in the context of the requirements being imposed and related regulatory

In this proceeding, Department staff, in its papers, stated that respondent Cortlandt is the owner of the facility, which includes a fitness club with two swimming pools (*see* Complaint at 1, paragraph 3 [Cortlandt as owner] and at 2, paragraph 7 [Cortlandt as owner]); Answer at 1, paragraphs 3 and 7 [respondents admitting that Cortlandt is owner]; *see also* Affidavit of Edward L. Moore sworn to October 2, 2018 [Moore Affidavit], Exhibit C [CBS Facility Information Report listing Cortlandt as owner] and Exhibit J [Hazardous Substance Bulk Storage Application listing Cortlandt as owner]).

Department staff alleged that respondent Santucci is an operator of the facility. Testimony and related documents submitted as evidence in the proceeding reference respondent Santucci's activities with respect to the environmental operation of the facility and his identification as a facility operator (*see e.g.* Hearing Transcript [March 21, 2019] at 263 [closing the tanks and utilizing containers instead]; Hearing Transcript [March 22, 2018] at 50 [undertaking compliance activities], 60-61 [requesting tank inspections]; *see also* Hearing Exhibit [Staff] F [listing respondent Santucci as person responsible for spill prevention report for this facility]; Moore Affidavit, Exhibit C [CBS Facility Information Report listing Santucci as operator] and Exhibit J [Hazardous Substance Bulk Storage Application listing Santucci as operator]; Ruling at 3 [Finding of Fact No. 2]).

Respondents stored sodium hypochlorite, which is used to treat water in swimming pools, in CBS tanks at the facility (*see* Wilkinson Ruling, at 4 [Findings of Fact Nos. 9 and 10]). Sodium hypochlorite is listed as a hazardous substance and is subject to regulation pursuant to 6 NYCRR parts 595 through 599 (*see id.* [Finding of Fact No. 10]).

On August 29, 2017, Department staff inspected the facility and identified the violations that are the subject of this enforcement matter (*see id*. at 4 [Finding of Fact No. 6]). Following the inspection, Department staff sent respondents a notice of violation on September 6, 2017 (*see* Wilkinson Ruling at 5 [Finding of Fact No. 18]), which was served on respondents on September 11, 2017. Respondents hired an environmental engineering firm to assist respondents in bringing the facility into compliance (*see id.* [Finding of Fact No. 19]). As a result of the consultant's communication and coordination with Department staff, respondents elected to close its CBS tanks and remove the facility from the CBS program. By December 22, 2017, respondents, through their environmental engineering consultant, submitted to the Department an application for the permanent closure of the regulated tanks at the facility (*see id.* [Finding of Fact No. 24]). By letter to respondents dated January 4, 2018, the Department confirmed the closure of the tanks (*see id.* [Finding of Fact No. 24]).

Respondents conducted soil sampling pursuant to a Department approved work plan at the facility to investigate the presence of sodium hypochlorite in and around the vicinity of the CBS tanks. As a result of the soil sampling, Department staff requested that the soils beneath the former CBS tanks be removed and properly disposed. Respondents contend however that the pH soil sampling results do not support a request for further investigation or remediation.

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language. Upon consideration, I determine that it is appropriate to interpret these requirements as applying to the "owner or operator" (*see* 6 NYCRR 598.5[c][1] and 599.13[c][4]).

Liability

As noted, the CBS regulations place responsibility for some requirements on an owner, for some requirements on the operator, and for some requirements either the owner or operator must ensure compliance. The Complaint and motion papers cite two regulatory provisions that are the responsibility of the owner (third cause of action – 6 NYCRR 596.2[j][1] and [3]). The Complaint and motion papers cite two regulatory provisions that are the responsibility of the operator (twelfth and thirteenth causes of action – 6 NYCRR 598.4[b][7] and [b][8]). The remaining violations are the responsibility of the owner and operator.[2]

The Wilkinson Ruling addressed the liability of respondents for the alleged violations. The ALJ concluded that Department staff made a prima facie showing that respondents committed the violations alleged in causes of action 4-7, 10-17 and 19-21 (*see* Wilkinson Ruling at 1). The Ruling however did not distinguish between the liabilities of the owner and operator of the facility. Respondent Cortlandt, as the owner of the facility, is liable for all the cited violations except for those set forth in the twelfth and thirteenth causes of action. Respondent Santucci, as operator, is liable for all the violations except for the labeling requirements in 6 NYCRR 596.2(j)(1) and (3) in the third cause of action which are the responsibility of the owner.

With respect to the third cause of action, ALJ Wilkinson concluded that a hearing was required to determine whether CBS tank number 2 had not been properly labeled with the capacity of the tank (*see id.*). ALJ Caruso properly found, based upon the evidence submitted at hearing, that tank number 2 at the facility was not clearly marked or labeled with the design capacity and working capacity of the tank, in violation of 6 NYCRR 596.2(j)(3). In addition to Department staff's testimony that staff could not determine from the 535 gallons embossed on the tank whether it indicated design or working capacity, the ALJ noted respondents admitted that it is not clear what the embossed label on tank 2 represents without checking the manufacturer's literature (*see* Hearing Report at 7). ALJ Caruso recommends that respondent Cortlandt, the owner of the facility, be held liable for violations of 6 NYCRR 596.2(j)(1) and (3) (third cause of action)(*see* Hearing Report at 7, 19). I concur.

Civil Penalty

Department staff seeks a civil penalty of $73,200 for the twenty-five violations[3] proven by staff. ECL 71-4303 provides that any person who violates any of the provisions of, or who fails to perform any duty imposed by, ECL article 40 or any rule or regulation promulgated thereunder (which includes the regulations at issue here), shall be liable for a civil penalty not to exceed twenty-five thousand dollars and an additional penalty of not more than twenty-five thousand dollars for each day during which such violation continues. Staff notes that the maximum penalty allowed by law for just one day for the twenty-five violations in this

[2] The regulatory language in those instances uses the phrasing "owner or operator" (*see e.g.* 6 NYCRR 598.1[k]["the owner or operator of any facility must prepare and maintain a spill prevention report").

[3] Several of the causes of action include more than one count.

proceeding is $625,000 (*see* Hearing Report at 12). The maximum statutory penalties for all the violations would be in the millions of dollars (*see id.*).

Respondents argue that no penalty should be assessed, but if one is to be assessed it should be commensurate with the penalties assessed in consent orders for similar violations. It is respondents' position that this matter should have settled for $3,000 or $4,000. ALJ Caruso found respondents' argument to be unsupported and without merit. I agree.

Based upon my review, I concur with the ALJ's conclusion that a base penalty, or gravity component calculation, of $36,600 is supported and appropriate. I also find that the record supports an economic benefit penalty component of $21,100 as determined by the ALJ. Adjustments to the gravity component of the penalty as applied by the ALJ would reduce the civil penalty by $6,000, resulting in a total civil penalty of fifty-one thousand one hundred dollars ($51,100). The civil penalty recommended by the ALJ is authorized and appropriate.

With respect to the civil penalty, based on a review of the record and Department guidance, I am allocating four hundred dollars ($400) of the total penalty of fifty-one thousand one hundred dollars ($51,100) to address the violations with respect to the labeling requirements in 6 NYCRR 596.2(j)(1) and (3) that are the responsibility of respondent owner Cortlandt. I am allocating one thousand six hundred dollars ($1,600) of the total penalty of fifty-one thousand one hundred dollars ($51,100) to address the violations with respect to the labeling requirements in 6 NYCRR 598.4(b)(8) and the failure to include written site procedures in the spill prevention report in 6 NYCRR 598.4(b)(7) that are the responsibility of respondent operator Santucci. The remaining portion of the penalty (that is, forty-nine thousand one hundred dollars [$49,100]) is being assessed, jointly and severally, on respondents Cortlandt, as owner, and Santucci, as operator.

Remedial Relief

As noted, respondents conducted soil sampling pursuant to a Department-approved work plan at the facility to investigate the presence of sodium hypochlorite in and around the vicinity of the CBS tanks. The facility had been storing sodium hypochlorite at a 12.5% concentration. Because sodium hypochlorite at this concentration level constitutes a hazardous substance due to its pH of 13, the sampling was to test the pH levels of the soils beneath the tanks, as well as background soil sampling away from the tanks. New York soils generally range in pH levels from 4.5 to 8.5 (*see* Exhibit T to Hearing Exhibit [Respondents] A).

Results of sampling conducted in January 2018 indicated a soil pH beneath the tanks ranging from 8.2 to 9.5 (*see* Hearing Exhibit [Staff] D), while sampling conducted in March 2019 indicated a similar pattern of soil pH values ranging from 7.9 to 9.4 (*see* Hearing Exhibit [Respondents] C). The background samples in the 2018 sampling indicated a soil pH of 7.1 to 7.5, while the 2019 background sampling indicated a soil pH of 7.0 to 7.2 (*see id.*).

At hearing, staff testified that no further testing is needed, but that, based on soil sampling results beneath the tanks, respondents should remove the soils in the location of the

former CBS tanks due to sodium hypochlorite contamination (*see* Hearing Transcript [March 21, 2019], at 102-103).

The record contains circumstantial evidence that a release of sodium hypochlorite occurred due to overfilling or some other event in the past (*see* Hearing Report at 17). There is also however unrefuted testimony that the tanks were in excellent condition and there was no active leaking or evidence of releases from the tanks when respondents' consultants evaluated the facility (*id.* at 17-18).

ALJ Caruso concluded that Department staff did not meet its burden of proof on the question whether remediation requested by Department staff is necessary. The ALJ noted that soils with the pH levels detected do not constitute hazardous waste and further concluded that the variations in soil pH presented in this matter did not support the requested removal of soils from the site (*see* Hearing Report at 18). Based upon my review of the record and the ALJ's analysis, staff's request for remedial relief is denied.

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

I. Pursuant to 6 NYCRR 622.12, Department staff's motion for order without hearing is granted on the issue of liability as follows:

A. Respondents Cortlandt Racquet Club, Inc. and Val Santucci are adjudged to be jointly and severally liable for the following violations:

1. 6 NYCRR 598.1(k)(1), for failing to maintain the spill prevention report at the Facility (fourth cause of action);
2. 6 NYCRR 598.1(k)(2)(i), for failing to include a copy of the registration application and certificate in the spill prevention report (fifth cause of action);
3. 6 NYCRR 598.1(k)(2)(iii), for failing to include a copy of a current facility site map in the spill prevention report (sixth cause of action);
4. 6 NYCRR 598.1(k)(2)(iv), for failing to include the name, signature and license number of a professional engineer licensed in New York State or other qualified person who prepared the spill prevention report (seventh cause of action);
5. 6 NYCRR 598.1(k)(2)(vii), for failing to include a status report on compliance with 6 NYCRR parts 596-599 in the spill prevention report (tenth cause of action);
6. 6 NYCRR 598.1(k)(2)(x) for failing to include a spill response plan in the spill prevention report (eleventh cause of action);
7. 6 NYCRR 598.5(c)(1), for failing to equip the aboveground CBS tanks with secondary containment systems in accordance with 6 NYCRR 599.9 (fourteenth cause of action);

8. 6 NYCRR 598.5(e), for failing to install spill prevention methods at the pumps and valves for the CBS tanks (fifteenth cause of action);
9. 6 NYCRR 598.7(b)(2), for failing to conduct a comprehensive annual inspection (sixteenth cause of action);
10. 6 NYCRR 598.7(c)(1), for failing to conduct a five-year inspection during the last five years (seventeenth cause of action);
11. 6 NYCRR 599.13(c)(4), for failing to label the aboveground piping for the CBS tanks with the chemical name or common name of the hazardous substance stored (nineteenth cause of action);
12. 6 NYCRR 599.17(b)(1)(i), for failing to install overfill prevention systems for the CBS tanks (twentieth cause of action); and
13. 6 NYCRR 599.17(c). for failing to install a transfer area secondary containment system (twenty-first cause of action).

B. Respondent Cortlandt Racquet Club, Inc. is adjudged to have violated 6 NYCRR 596.2(j)(1) for failing to label tank 1 and tank 2 with the tank system identification number; and 6 NYCRR 596.2(j)(3) for failing to label tank 1 and tank 2 with the design capacity and working capacity of the tank (third cause of action); and

C. Respondent Val Santucci is adjudged to have violated 6 NYCRR 598.4(b)(7) for failing to include written site procedures in the spill prevention report (twelfth cause of action) and 6 NYCRR 598.4(b)(8), for failing to label fill ports (thirteenth cause of action).

II. Respondents Cortlandt Racquet Club, Inc. and Val Santucci are jointly and severally assessed a civil penalty in the amount of forty-nine thousand one hundred dollars ($49,100) for the violations set forth in paragraph I.A of this order.

III. Respondent Cortlandt Racquet Club, Inc. is hereby assessed an additional civil penalty of four hundred dollars ($400) for the violations set forth in paragraph I.B. of this order.

IV. Respondent Val Santucci is hereby assessed an additional civil penalty of thousand six hundred dollars ($1,600) for the violations set forth in paragraph I.C. of this order.

V. Within thirty (30) days of the service of this order upon respondents, payments of the civil penalties shall be made by cashier's check, certified check or money order made payable to the "New York State Department of Environmental Conservation" and mailed or hand-delivered to the Department at the following address:

Ashley R. Johnson, Esq.
Assistant Regional Attorney
NYSDEC Region 3
21 South Putt Corners Road
New Paltz, New York 12561

VI. Any questions or other correspondence regarding this order shall also be addressed to Ashley R. Johnson, Esq. at the address referenced in paragraph V of this order.

VII. The provisions, terms and conditions of this order shall bind respondents Cortlandt Racquet Club, Inc. and Val Santucci, and their agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: /s/
Basil Seggos
Commissioner

Dated: September 16, 2021
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Alleged Violations of Article 40 of the New York State Environmental Conservation Law (ECL) and Title 6 of the Official Compilation of Codes, Rules, and Regulations of the State of New York (6 NYCRR),

HEARING REPORT

-by-

DEC Case No.
R3-20171003-174

CORTLANDT RACQUET CLUB, INC. and VAL SANTUCCI,

Respondents.

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Appearances

- Thomas S. Berkman, Deputy Commissioner and General Counsel (Ashley Welsch, Assistant Regional Attorney, of counsel) for staff of the Department of Environmental Conservation

- Nolan & Heller, LLP (David A. Engel of counsel) for respondents Cortlandt Racquet Club, Inc. and Val Santucci

In this administrative enforcement proceeding, New York State Department of Environmental Conservation (Department) staff charges respondents Cortlandt Racquet Club, Inc. and Val Santucci with violations of ECL article 40 and the Department's chemical bulk storage (CBS) regulations at 6 NYCRR parts 596-599 related to two aboveground storage tanks storing sodium hypochlorite used to treat water in two swimming pools. The alleged violations occurred at a fitness club, known as the Premier Athletic Club, located at 2127 Albany Post Road, Montrose, New York, Westchester County (facility). The facility is owned by respondent Cortlandt Racquet Club, Inc. and operated by respondent Val Santucci.

Department staff commenced this enforcement proceeding against respondents by service of a notice of hearing and complaint with accompanying exhibits. The complaint alleged twenty-one causes of action involving violations of ECL article 40 and 6 NYCRR parts 596-599. Respondents answered the complaint, denied the alleged violations, and asserted affirmative defenses.

On October 4, 2018, Department staff filed a notice of motion for order without hearing with supporting papers (Motion). In the Motion, staff withdrew staff's first, second, eighth,

ninth, and eighteenth causes of action. Respondents opposed the motion and cross-moved to dismiss the complaint. Department staff opposed respondents' cross motion.

By ruling dated January 18, 2019, which is incorporated herein by reference, Administrative Law Judge (ALJ) Lisa Wilkinson granted Department staff's motion, in part, on the issue of liability against respondents Cortlandt Racquet Club, Inc. and Val Santucci on the following violations:

1. 6 NYCRR 596.2(j)(1) and (3) for failing to label tank 1 and tank 2 with the tank system identification number and failing to label tank 1 with the design capacity and working capacity of the tank (third cause of action – two counts);[1]
2. 6 NYCRR 598.1(k)(1) for failing to maintain the spill prevention report at the facility (fourth cause of action);
3. 6 NYCRR 598.1(k)(2)(i) for failing to include a copy of the registration application and certificate in the spill prevention report (fifth cause of action);
4. 6 NYCRR 598.1(k)(2)(iii) for failing to include a copy of a current facility site map in the spill prevention report (sixth cause of action);
5. 6 NYCRR 598.1(k)(2)(iv) for failing to include the name, signature and license number of a professional engineer licensed in New York State or other qualified person who prepared the spill prevention report (seventh cause of action);
6. 6 NYCRR 598.1(k)(2)(vii) for failing to include a status report on compliance with 6 NYCRR parts 596-599 in the spill prevention report (tenth cause of action);
7. 6 NYCRR 598.1(k)(2)(x) for failing to include a spill response plan in the spill prevention report (eleventh cause of action);
8. 6 NYCRR 598.4(b)(7) for failing to include written site procedures in the spill prevention report (twelfth cause of action);
9. 6 NYCRR 598.4(b)(8) for failing to label fill ports (thirteenth cause of action – two counts);
10. 6 NYCRR 598.5(c)(1) for failing to equip the CBS tanks with secondary containment systems in accordance with 6 NYCRR 599.9 (fourteenth cause of action – two counts);
11. 6 NYCRR 598.5(e) for failing to install spill prevention methods at the pumps and valves for the CBS tanks (fifteenth cause of action – two counts);
12. 6 NYCRR 598.7(b)(2) for failing to conduct a comprehensive annual inspection (sixteenth cause of action – two counts);
13. 6 NYCRR 598.7(c)(1) for failing to conduct a five-year inspection during the last five years (seventeenth cause of action – two counts);

[1] Department staff counts violations of the labeling requirements of 6 NYCRR 596.2(j)(1)-(3) as a single violation for purposes of calculating a penalty. In this matter, ALJ Wilkinson found each tank was in violation of paragraph (j)(1) and one tank was in violation of (j)(3). For purposes of staff's penalty calculation, two counts are used, not three.

14. 6 NYCRR 599.13(c)(4) for failing to label the aboveground piping for the CBS tanks with the chemical name or common name of the hazardous substance stored (nineteenth cause of action - two counts);
15. 6 NYCRR 599.17(b)(1) for failing to install overfill prevention systems for the CBS tanks (twentieth cause of action – two counts); and
16. 6 NYCRR 599.17(c) for failing to install a transfer area secondary containment system (twenty-first cause of action – two counts).

The issue remaining to be decided after hearing was the alleged violation of 6 NYCRR 596.2(j)(3) for failing to label tank 2 with the design capacity and working capacity of the tank (third cause of action). In addition, evidence and testimony on the penalties and remedial relief requested by Department staff were to be presented at hearing (*see Matter of Cortlandt Racquet Club, Inc. and Val Santuccci*, Ruling of the ALJ, January 18, 2019 [Ruling] at 26-27).

Because this matter concerns Department staff's enforcement of the ECL and regulations, the proceedings are governed by 6 NYCRR part 622 - Uniform Enforcement Hearing Procedures (*see* 6 NYCRR 622.1[a][1]). To prevail on the alleged violation preserved for hearing, Department staff must prove its allegations by a preponderance of the evidence (6 NYCRR 622.11[b]).

As the Ruling sets forth ALJ Wilkinson's findings of fact (Ruling at 3-6) and conclusions of law (*id.* at 7-22), such will not be repeated herein. Liability has already been established on the third (in part), fourth, fifth, sixth, seventh, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, nineteenth, twentieth and twenty-first causes of action. Accordingly, the hearing and this report address the alleged violation of 6 NYCRR 596.2(j)(3) and the penalties and relief requested by staff.

I. SUMMARY OF THE PARTIES' POSITIONS

A. Department Staff

In addition to the liability for twenty-five violations already found against respondents, Department staff alleges that respondents failed to label tank 2 with the design and working capacity of the tank, in violation of 6 NYCRR 596.2(j)(3). Furthermore, staff argues that the soil beneath tanks 1 and 2 has been contaminated by sodium hypochlorite. Department staff seeks a civil penalty of $73,200 and removal and proper disposal of contaminated soils from the site.

B. Respondents

Respondents argue that tank 2 was labeled with the capacity of the tank. Respondents assert there has been no release of sodium hypochlorite or contamination at the facility and no need for further investigation or remediation. Respondents also assert that they quickly addressed the alleged violations after Department staff inspected the facility by properly closing and removing the tanks. Respondents argue that the civil penalty requested by staff is draconian and inconsistent with similar matters that settled for less. Respondents request that no penalty be

imposed.

II. HEARING

The hearing was held on March 21 and 22, 2019, in the Department's Region 3 Office, 21 South Putt Corners Road, New Paltz, New York. Assistant regional attorney Ashley Welsch, Esq. appeared on behalf of Department staff and presented two witnesses: Joshua P. Cummins, Assistant Engineer, Division of Environmental Remediation, DEC Region 3 and Michael D. Kilmer, Engineer Trainee, Division of Environmental Remediation, DEC Region 3.

David A. Engel, Esq. appeared on behalf of respondents and presented two witnesses: Rodney Aldrich, P.E. and Mark Millspaugh, P.E., both of Sterling Environmental Engineering, P.C.

Department staff offered fourteen exhibits at the hearing. Respondents offered four exhibits at the hearing. The attached exhibit chart describes each exhibit and whether it was received into evidence. The matter concluded in two days.

The transcripts of the hearing were received on April 9 and 10, 2019. Briefs were received on May 9, 2019, and the record was closed.

III. DISCUSSION

A. Admissibility of Mediation Discussions

At hearing, respondents wanted to present testimony regarding the settlement recommendations of the mediator during mediation of this matter. Department staff objected claiming: (1) the statements are not relevant; (2) the statements of the mediator would be hearsay; and (3) the mediator had advised the parties that mediation discussions were confidential.

In support of respondents' position, respondents' counsel read the following from the Department's mediation guidance webpage: "'Caucuses are confidential,' and we all know that. But it goes on to state, 'The mediator cannot reveal the information learned in the caucus unless released by you to do so'" (March 21, 2019 hearing transcript [3/21 tr.] at 24-25). Considering that guidance statement, respondents argued that it is their confidentiality privilege to waive, therefore recommendations made by the mediator are admissible in the enforcement hearing.

During the hearing, I denied respondents' request to allow testimony regarding discussions that occurred during mediation. I noted that allowing one party to present testimony or evidence in a hearing regarding what transpired during mediation would have a negative impact on the mediation process. Open discussions during mediation would be severely limited if those discussions would later be used against a party in an enforcement hearing.

I further explained that the language regarding caucuses during mediation, quoted by respondents, was intended to advise parties that they could speak freely with the mediator without fearing that what was said in caucus would be revealed to the opposing party. The process of caucusing with the parties is described in detail under the heading "What happens in mediation?" (*see* http://www.dec.ny.gov/regulations/2578.html [Mediation]). A party may authorize the mediator to share with the other party, during mediation, positions, statements or offers of compromise discussed with the mediator during caucus. It does not, however, authorize those settlement discussions to be revealed or admitted into evidence at hearing.

I also directed the parties' attention to the section of the Mediation webpage entitled "Are discussions in mediations confidential?" That section reads, "[u]nless otherwise disclosable in an administrative hearing or court action, information from a mediation cannot be used or disclosed without the permission of the parties" (3/21 tr. at 141; *see also* http://www.dec.ny.gov/regulations/2578.html). In addition, CLPR 4547 provides, in part, that "[e]vidence of any conduct or statement made during compromise negotiations shall also be inadmissible." Accordingly, when a party objects to the admission of information or statements made during mediation, as staff did here, the objection should be sustained.

B. Expert Witnesses

Before addressing the merits, a brief discussion of the parties' respective positions regarding expert witnesses is necessary. Department staff advised respondents in writing before the hearing that staff would be calling Mr. Cummins and Mr. Kilmer as witnesses in this matter and identified the subject of their respective testimonies. Staff also advised respondents that staff did not intend to call any individuals as expert witnesses. During the hearing, however, Department staff attempted to qualify each witness, so that the witnesses could provide opinion testimony. Neither Mr. Cummins nor Mr. Kilmer had ever been to the respondents' facility, and the facts relied upon by the witnesses were gleaned from the administrative record in this matter.

Department staff witnesses can be both fact and opinion witnesses. When staff is being asked to express an opinion based on staff's education, knowledge or experience, staff is an expert witness and should be revealed as such to opposing parties. In *Matter of U.S. Energy Dev. Corp.*, Chief ALJ James T. McClymonds explained,

> "In both Departmental administrative enforcement proceedings under Part 622, and permit hearings under 6 NYCRR part 624 (Part 624), agency staff is regularly called upon to offer opinions on a variety of issues that involve scientific, technical or professional knowledge that goes well beyond the knowledge or experience of lay persons. Such issues include testing procedures and protocols, the assessment of environmental impacts, the evaluation of the adequacy and effectiveness of pollution control measures, and the content and application of Departmental law and policy, including whether certain factual observations constitute violations of statutory or regulatory standards. Moreover, prior to presenting such evidence, Department witnesses state their education, training, and experience on the record, thereby demonstrating their qualifications

to provide expert opinion. Indeed, both administrative tribunals and courts on judicial review have recognized that qualified agency staff are expert witnesses when testifying on these types of issues (*see e.g. Matter of Karta Corp.*, Order of the Commissioner, Aug. 10, 2010, adopting Hearing Report, at 16-17 [staff monitor qualified to provide expert testimony]; *Matter of Bath Petroleum Storage, Inc.*, ALJ Ruling on Discovery Disputes, June 13, 2005, at 5-6 [staff routinely called as both expert and fact witnesses]; *State of New York v Barone*, 74 NY2d 332, 338 [1989] [clean up costs]; *State of New York v 158th St. & Riverside Dr. Hous. Co., Inc.*, 100 AD3d 1293, 1298 [3d Dept 2012] [impact and sources of oil spill]; *Matter of DeCaprio v Zagata*, 235 AD2d 970, 973 [3d Dept 1997] [pesticide identification and registration])." (*Matter of U.S. Energy Dev. Corp.*, Rulings of the Chief Administrative Law Judge on Pre-Hearing Motions, February 23, 2016, at 6.)

In this matter, staff's testimony regarding the regulatory violation, civil penalty and remedial relief depends upon the scientific, technical or professional knowledge of the witness. These are subjects that go beyond the ordinary experience of a lay witness. Accordingly, Department staff should have disclosed its witnesses as experts. In this matter, there is no evidence that staff intentionally or willfully failed to disclose its witnesses as experts or that there was any prejudice to respondents. Accordingly, staff's witnesses were allowed to testify subject to respondents' objections and cross-examination. Respondents challenged Mr. Cummins and Mr. Kilmer's qualifications to testify on the penalty and relief requested by staff. Those objections are addressed below.

C. Liability

As noted above, the Ruling finds respondents liable for twenty-five violations. Respondent Cortlandt is the owner of the CBS facility and respondent Santucci is the operator of the facility (*see* Ruling at 3 [Findings of Fact Nos. 1 and 2]). As discussed below, the regulatory requirements of the third cause of action, however, are the obligation of the owner (respondent Cortlandt) (*see* 6 NYCRR 596.2[j]). Staff's complaint recites the regulatory language that the owner is responsible for the tank labeling requirements (*see* Complaint ¶ 54).

On this record, I cannot reconcile the Ruling's conclusion that respondent Santucci is liable for the regulatory obligation of respondent Cortlandt for violation of the tank labeling requirements. Although respondents have not appealed the Ruling, and this issue did not arise during the hearing, I recommend that the Commissioner modify the finding of liability in the Ruling accordingly.

D. Department Staff's Third Cause of Action

ALJ Wilkinson's Ruling concluded that Department staff and respondents presented conflicting evidence regarding the labeling of tank 2 with the working and design capacity as required by 6 NYCRR 596.2(j)(3). The regulation reads, "the owner must clearly mark or label

each tank . . . with the following information: (1) tank system identification number as shown on the registration certificate; (2) chemical name, or common name if the chemical name is not appropriate, for the substance stored; and (3) design capacity and working capacity of each tank in the tank system."

Evidence produced at hearing demonstrates that tank 2 was embossed with "Gallons" above "— 535" (*see* Staff Exhibit B; testimony of Joshua Cummins [Cummins Testimony], 3/21 tr. at 44). Department staff testified that staff cannot determine from the 535 gallons embossed on the tank whether it indicates design or working capacity (*see* Cummins Testimony, 3/21 tr. at 46, 57-58, 63). Staff testified that tank 2, as labeled, is not properly labeled with the design capacity and working capacity as required by 6 NYCRR 596.2(j)(3) (*see id.* at 53-54).

"Design capacity means that amount of hazardous substance that a tank is designed to hold" (6 NYCRR 596.1[c][17]). "Working capacity means the portion of the design capacity of a tank that may be filled before engaging the overfill prevention device, reduced by an allowance for freeboard and expansion" (6 NYCRR 596.1[c][61]).

Respondents testified that tank 2 is marked with its working capacity which also may be the design capacity of the tank (*see* testimony of Mark Millspaugh [Millspaugh Testimony], March 22, 2019 hearing transcript [3/22 tr.] at 80-81). Respondents admitted, however, that it is not clear what the label on tank 2 represents without checking the manufacturer's literature (Millspaugh Testimony, 3/22 tr. at 81).

Although the design capacity and working capacity may be the same number, the regulation requires the owner to clearly mark or label each tank with the design capacity and working capacity. If Department staff or respondents' expert needs to review the manufacturer's literature to determine whether the number of gallons embossed on a tank represents both design and working capacity, then the tank is not clearly marked or labeled.

I conclude that Department staff has demonstrated by a preponderance of the evidence that tank 2 is not clearly marked or labeled with the design capacity and working capacity of the tank, in violation of 6 NYCRR 596.2(j)(3). The adjudication of this issue, however, was unnecessary. ALJ Wilkinson had already ruled that the labeling on tanks 1 and 2 did not meet the requirements of 6 NYCRR 596.2(j)(1) (third cause of action – two counts), and Department staff testified during the hearing that, for purposes of the penalty calculation, the third cause contains two counts – one for each tank not properly labeled, including the multiple violations of the labeling requirements of paragraph 596.2(j)(1)-(3) (Cummins Testimony, 3/21 tr. at 35). Tanks 1 and 2 have been closed and removed from the facility so no corrective action is necessary. In short, the adjudication of this count of the third cause of action is not relevant to the penalty and relief requested by staff.

E. Civil Penalty

1. Department Staff's Penalty Calculation

For the twenty-five violations proven by staff, Department staff seeks a civil penalty in the amount of $73,200. ECL 71-4303 provides that any person who violates any of the provisions of, or who fails to perform any duty imposed by, ECL article 40 or any rule or regulation promulgated thereunder, shall be liable for a civil penalty not to exceed twenty-five thousand dollars and an additional penalty of not more than twenty-five thousand dollars for each day during which such violation continues. Department staff calculated the maximum statutory penalty provided for under ECL 71-4303 for one day for the twenty-five violations proven by staff to be $625,000 (25 x $25,000). Department staff notes that the requested penalty of $73,200 is roughly one-eighth of the maximum one-day penalty.

At hearing, staff based its requested penalty on a matrix of base penalties for CBS violations used by Region 3 Department staff to settle CBS matters. The total base penalty according to staff is $36,600. Staff attempted to support its base penalty calculation using a Region 3 CBS penalty matrix with an effective date of July 13, 2018. The matrix was marked for identification but was not received into evidence. Staff's testimony demonstrated that the base penalty, according to the 2018 matrix, would have been $44,000 (Cummins Testimony, 3/21 tr. at 169). The matrix, however, was not in effect at the time of the violations in this matter or as of the date staff commenced this proceeding, March 9, 2018. Staff testified that the 2018 matrix was not used to calculate the penalty in this matter (*id.* at 169). Therefore, I conclude that the matrix and staff's testimony regarding the base penalty are not probative of staff's base penalty calculation.

Department staff also testified regarding six orders on consent that resolved CBS violations in Region 3 (Staff Exhibits H-M) to demonstrate the penalties assessed and number of violations in matters settled by the Department (Cummins Testimony, 3/21 tr. at 173-175). The orders on consent, however, relate to penalties for settled matters and are not relevant to the calculation of penalties in this proceeding except to the extent they may demonstrate that the penalties in an adjudicated matter should be higher. The orders on consent do not demonstrate what base penalties were used for similar violations as this matter. Accordingly, I conclude that the orders on consent have little or no probative value and do little to demonstrate staff's requested penalty is supported and appropriate.

Staff also estimated costs avoided by respondents in determining the economic benefit realized by respondents' failure to comply with the CBS regulations (Cummins Testimony, 3/21 tr. at 175 – 190). Staff, however, failed to qualify Mr. Cummins to opine on such estimates (3/21 tr. at 178, 179, 184, 187 and 189 [objections sustained]). Department staff also testified regarding the importance of the regulatory requirements to the statutory scheme, such as secondary containment of the tanks, secondary containment for the transfer areas, and maintaining a spill prevention report (Cummins Testimony, 3/21 tr. at 191-196).

Consistent with DEE-1, Department staff calculated a higher penalty than the base penalty of $36,600 because the matter was adjudicated. Department staff states in its memo of

law that staff considered eight aggravating factors and four mitigating factors in determining the penalty. Because the aggravating factors outweighed the mitigating factors two to one, staff doubled the base penalty to reach a total requested penalty of $73,200 (Department staff's memorandum of law, p. 14; *see also,* Opening Statement, 3/21 tr. at 13).

2. Respondent's Penalty Position

Respondents object to the assessment of any civil penalty because all of the violations have been resolved. Respondents also argue that the penalty requested by staff grossly exceeds the penalties assessed in the orders on consent (Staff Exhibits H-M; Respondents' Exhibit B). The record supports respondents' position that upon receiving the notice of violation from staff in September 2018, that respondents cooperated and coordinated with staff to address the violations and their options for coming into compliance with the CBS regulations (*see* Ruling at 5-6; Millspaugh Testimony, 3/22 tr. at 49-50, 87). As noted by ALJ Wilkinson, and demonstrated throughout the hearing, respondents chose to close the CBS tanks and use smaller portable containers that removed respondents' facility from the CBS program (*id.*). Respondents cooperated with Department staff in resolving the CBS violations.

Respondents argue that the orders on consent introduced at hearing (Staff Exhibits H-M; Respondents' Exhibit B) support respondents' position that a lower penalty is appropriate in this matter. Respondents compare the penalties assessed in those settled matters, which included schedules for the facilities to come into compliance, with this matter in which respondents claim there is no need for a compliance schedule because the facility has been removed from the CBS program. In addition, respondents note some of the facilities who settled with the Department had not been registered facilities.

Mr. Millspaugh testified on behalf of respondents that it was his opinion that the penalty being sought by staff in this matter is "grossly inappropriate in comparison with the penalties that resolved essentially the same violations" in Staff's Exhibits H-M and Respondents Exhibit B (Millspaugh Testimony, 3/22 tr. at 50). Mr. Millspaugh noted that some of those settled matters involved facilities the Department was not aware of because they were not registered as CBS facilities and the facilities did not have secondary containment (*id.*).

Respondents acknowledge that the facility was not in compliance with the CBS regulations, but the facility was registered, and the registration applications admitted some of respondents' noncompliance, such as lack of secondary containment (Millspaugh Testimony, 3/22 tr. at 50). Based on DER-12/Application Review Policy for PBS and CBS Registration Applications (October 14, 2005) (DER-12), respondents argue that Department staff had an affirmative duty to reject respondents' CBS applications.

DER-12 directs Department staff to review CBS registration applications to determine whether the facility is in compliance with regulatory requirements such as secondary containment. Respondents argue that respondents submitted registration applications that indicated that secondary containment did not exist at the facility (*see* Exhibit Q to Respondents' Exhibit A). As such, respondents argue that staff had an affirmative duty to return the application and fee based on respondents' failure to have secondary containment in place. It is

respondents' opinion that had staff done so, the violations would have been corrected years ago without the need for enforcement (Millspaugh Testimony, 3/22 tr. at 51). Therefore, respondents aver that the number of years the facility has been in noncompliance should not serve as an aggravating factor in determining an appropriate penalty for the violations alleged and proven. According to respondents, the penalty should be significantly reduced because staff failed to follow the guidance contained in DER-12.

Even if I accepted respondents' argument, the fact remains that DER-12 was not issued until October 14, 2005. Tank 1 was installed in 1985 and CBS facilities were required to have secondary containment for aboveground tanks and transfer areas by December 22, 1999 (*see* 6 NYCRR 598.5). Therefore, tank 1 was required to have secondary containment for five years, nine months and twenty-two days (2,123 days) before DER-12 was issued. In addition, DER-12 states, "[n]othing contained in these procedures relieves any owner or operator of a CBS facility of its obligation to comply with all applicable statutes and regulations, nor waives the Department's rights to undertake enforcement action, as it deems appropriate" (DER-12 at 6).

Mr. Millspaugh testified that respondents believed they were in compliance with the law and regulations (Millspaugh Testimony, 3/22 tr. at 82), and if respondents had been advised earlier of their noncompliance, pursuant to DER-12, none of the current enforcement would be necessary (*see* Millspaugh Testimony, 3/22 tr.at 51). ALJ Wilkinson rejected this argument in her determination that respondents are liable for the violations cited by staff (*see* Ruling at 17-18). Respondents now raise the same argument to mitigate the penalty requested by staff. That argument must also be rejected. DER-12 is clear and unambiguous in stating that the policy does not relieve respondents from the obligation to comply with the ECL and regulations.

Moreover, respondents' argument that they thought the facility was in compliance with the regulations is an ignorance of law defense to the penalty requested by staff. The CBS regulations have the force and effect of law, and respondents and the public are charged with knowledge of those regulatory requirements. Ignorance of the law is no defense (*see e.g. Matter of Jeff Myers*, Interim Decision and Order of the Commissioner, February 24, 2016, at 3 [citing Hearing Report at 6-7]; *Matter of Crow Properties, LLC*, Ruling of the Chief ALJ, December 20, 2010, at 7). I conclude that ignorance of the law is no defense to liability or to the determination of an appropriate penalty.

Respondents also argue that this matter should have settled, but Department staff was unreasonable and abused its prosecutorial discretion in this matter. The basis for respondents' position was respondents' belief that that Department staff should have offered respondents a consent order like those entered with other respondents regarding similar violations (Staff Exhibits H-M; Respondents' Exhibit B). Settled matters do not establish precedent for determining an appropriate penalty in an adjudicated matter. Although I am not required to review settlement of unrelated matters in determining whether staff's requested penalty is supported and appropriate, I am providing a brief discussion of respondents' argument.

The orders on consent that were received into evidence demonstrate that the seven matters that were settled involved similar violations regarding the CBS program. As discussed above, the orders on consent do not explain how staff arrived at the civil penalty in each matter.

Each of the six settled matters, introduced by staff, assessed a total penalty and suspended one-half of the penalty. The order on consent introduced by respondents assessed a civil penalty and suspended four-fifths of the penalty. Six of the seven orders contained a compliance schedule of items to be performed by respondents. The total penalties and number of violations from each of the orders on consent are outlined as follows: $22,500 (eight violations); $17,500 (six violations); $16,000 (eight violations); $16,000 (ten violations); $12,500 (nine violations); $13,500 (six violations); and $25,000 (one violation). None of the compliance schedules required investigation or remediation of a facility due to a suspected spill or release.

If the total penalty amount per violation was averaged for the seven orders on consent, the result would be approximately $2,500 per violation. Applying respondents' argument that the penalty should be comparable to those matters that settled, to the 25 violations proven by Department staff in this matter, would result in a total penalty of $62,500. Although such an approach is oversimplified, it demonstrates that respondents' argument that the appropriate settlement penalty in this matter should have been "on the order of $3,000 or $4,000" (Millspaugh Testimony, 3/22 tr. at 90) is unrealistic and not supported by prior settled matters. Moreover, this matter involves four separate violations for areas that did not have secondary containment as required, whereas two settled matters contained two counts for failure to have secondary containment and four matters had a single count.

Accordingly, I find respondents' argument regarding settlement of this matter to be unsupported and without merit.

Respondents also argue that the penalties assessed in recent petroleum bulk storage (PBS) enforcement matters should be considered in determining the appropriate penalty in this matter. Respondents cite, *Matter of Ave. C Tenants Hous. Dev. Fund Corp.*, Order of the Commissioner, September 28, 2018; *Matter of Lawrence Darrow*, Order of the Commissioner, September 24, 2018; *Matter of Nussbaum Assoc. Co., LLC*, Order of the Commissioner, October 9, 2018; and *Matter of 941 Rogers Place Hous. Dev. Fund Corp.*, Order of the Commissioner, October 10, 2018. Each of those matters involves a single violation for failing to renew the registration of the respective respondent's PBS tank, which contained heating oil. In addition, each of those facilities is subject to the precedent set by *Matter of 12 Martense Assoc., LLC*, Order of the Commissioner, December 19, 2011, which established a penalty matrix (for matters solely involving New York City apartment buildings) based upon the duration of that single violation. Respondents reliance on those matters in support of what an appropriate penalty would be in this matter is misplaced. The minimum penalty assessed in those PBS matters is $5,000 for a single violation. In this matter, twenty-five violations have been proven. I conclude that the PBS matters cited by respondents are not analogous to the current matter before me or appropriate to consider as precedent to be applied in this matter (*see Yogiji Real Estate LLC.*, Order of the Commissioner, September 17, 2018, at 2 n1).

I have considered respondents' remaining arguments regarding staff's requested penalty and find they are without merit.

3. DEE-1: Civil Penalty Policy

The Department's DEE-1: Civil Penalty Policy (June 20, 1990) (DEE-1) requires an analysis in support of an appropriate penalty that includes a discussion of the potential statutory maximum, an estimate of the economic benefit of delayed compliance, and a determination of a gravity component for non-compliance. Staff's penalty request contains two components, a base penalty of $36,600 and a consideration of aggravating and mitigating factors which caused staff to double the penalty to $73,200. I review staff's requested penalty and staff's basis for the penalty through the application of DEE-1.

a. Statutory Maximum Penalty

Department staff demonstrated that the statutory maximum penalty for a single day of the 25 violations proven by staff is $625,000. Because tank 1 was required to have secondary containment from December 22, 1999 and tank 2 was required to have secondary containment from the date it was placed in service, May 16, 2009, and respondents did not provide secondary containment for either tank, staff could easily have demonstrated the maximum penalty for those violations from those respective dates until the date the tanks were closed. I use December 22, 2017, the date the application was submitted to the Department to close the tanks (*see* Ruling at 5 [Finding of Fact No. 24]), as the date the tanks were closed. Tank 1 was in violation of 6 NYCRR 598.5(c)(1) for 6,575 days and tank 2 was in violation of 6 NYCRR 598.5(c)(1) for 3,142 days for a total of 9,717 days. The maximum statutory penalty for Department staff's fourteenth cause of action alone would be $242,295,000.

Respondents objected to any calculation of the maximum statutory penalty, arguing that it would be prejudicial and "calculated to create an appearance of reasonableness to an otherwise unreasonable goal" (3/21 tr. at 160). Because staff is required by DEE-1 to provide an analysis of the maximum statutory penalty, the objection was overruled. The determination of the maximum penalty also demonstrates that the penalty requested does not exceed the maximum penalty allowed by law.

Accordingly, I conclude staff's requested penalty of $73,200 is significantly less than the statutory maximum.

b. Economic Benefit

DEE-1 directs Department staff to make every effort to calculate and recover the economic benefit of non-compliance. The assessment and recovery of the economic benefit component of a penalty merely levels the playing field between the violator and those that comply. The estimate of the economic benefit of noncompliance includes "the present value of avoided capital and operating costs and permanently avoided costs which would have been expended if compliance had occurred when required" (DEE-1 § IV, C).

As discussed above, Department staff was unable to provide credible expert testimony on the estimated economic benefit of respondents' delayed compliance with the CBS regulations. Mr. Millspaugh, however, testified that his firm prepared cost estimates to bring respondents' facility into compliance with the CBS regulations and determined it would have cost respondents "in the tens of thousands of dollars of facility improvements" such as new tanks, tank secondary containment, and transfer area secondary containment (Millspaugh Testimony, 3/22 tr. at 51-52).[2] Mr. Millspaugh also testified that it would cost up to several hundred dollars, but it would not exceed $500, to conduct the five year inspection (*id*. at 53) and about $1,000 to $1,200 to prepare a full spill prevention report (*id*. at 53-54).

In staff's closing memorandum of law, staff estimates the economic benefit, based on Mr. Millspaugh's testimony, to be $21,100, at a minimum, to bring the facility into compliance. Respondents attempted to rehabilitate Mr. Millspaugh's testimony regarding avoided costs by portraying those costs as unnecessary. Mr. Millspaugh testified that if staff had advised respondents of the noncompliance sooner, respondents would have gotten out of the program sooner and thereby avoided all the costs for secondary containment, and so on (Millspaugh Testimony, 3/22 tr. at 90). That conclusion, however, is speculative and unsupported. Even if respondents' argument were true, this does not eliminate the avoided cost; it just shortens the length of time the costs were avoided.

Based on this record, I conclude that a $21,100 economic benefit of non-compliance is supported and appropriate.

c. Gravity Component

DEE-1 requires an analysis of the potential harm or actual damage caused by the violations and an analysis of the importance of the type of violation in the regulatory scheme in determining a preliminary gravity penalty component (DEE-1 § IV, D). Generally, when Department staff assigns a base penalty to each violation, whether using a matrix or not, those base penalties take into consideration the likelihood for potential harm or actual damage and the importance of the requirement to the regulatory scheme. Here, Department staff requested a penalty for each cause of action in staff's complaint and staff's memorandum of law based on the gravity of the violation. For instance, the base penalty requested for failure to install tank secondary containment ($5,000 per tank) is much higher than the penalty requested for failure to properly label the tanks ($100 per tank). Department staff explained at hearing the importance of secondary containment to the statutory scheme (Cummins Testimony, 3/21 tr. at 191-192). Accordingly, I review staff's requested base penalty of $36,600 as the gravity component penalty.

The potential harm from a spill or release resulting from an overfill or leaking tanks, pipes or fittings is exacerbated by respondents' lack of tank secondary containment and transfer

[2] Tens of thousands of dollars means anything from $20,000 to $100,000 as the plural "tens" means at least twenty (two tens).

area secondary containment as well as the lack of regular inspections of the tanks, pipes and fittings. Respondents lacked proper protections to prevent a release of sodium hypochlorite to the environment. Staff also argues that actual damage occurred from a release of sodium hypochlorite as exhibited by the pH levels of soils beneath tanks 1 and 2 (testimony of Michael Kilmer [Kilmer Testimony], 3/21 tr. at 83, 91-93, 95-96). Department staff also testified that the violations occurred in a mixed business and residential area along a main thoroughfare in Montrose, New York (Cummins Testimony, 3/21 tr. at 210), thus elevating the potential harm from a release.

As elaborated in DEE-1, the longer a violation continues uncorrected, the greater the risk of harm, and, correspondingly, the greater the amount of the gravity component. Here, as discussed above, tanks 1 and 2, and the transfer areas for each tank, did not have second containment for a total of 9,717 days.

Respondents argue that the length of time of the violations should not be considered in determining the penalty because respondents would have corrected the violations long ago if staff notified respondents of the violations. I disagree. As discussed above, respondents were required to comply with the CBS regulations. Speculating how respondents would have reacted to a hypothetical notice is not supported on this record nor should such speculation ever be the basis for determining an appropriate penalty.

As noted above, Department staff testified regarding the importance of secondary containment and other CBS requirements to the regulatory scheme (Cummins Testimony, 3/21 tr. at 191-192). Secondary containment beneath the tanks and the transfer areas is required to prevent releases from overfills, leaks or mechanical failures from entering the environment. The elevated risk of potential harm and the importance of secondary containment and other regulatory spill prevention requirements to the regulatory scheme support a significant gravity component penalty in this matter.

Based on the record before me, I conclude that a $36,600 gravity component penalty is supported and appropriate.

d. Adjustments to the Gravity Component

DEE-1 also provides for adjustments to the gravity component of the penalty to allow for flexibility and equity in assessing an appropriate penalty. The policy lists culpability, cooperation, history of non-compliance, ability to pay, and unique factors as factors to be considered in adjusting the gravity component of the penalty. Department staff listed aggravating and mitigating factors in its computation of the requested penalty. Because there were twice as many aggravating factors as mitigating factors, staff doubled the base penalty

calculation. Nothing in DEE-1 or administrative precedent supports using aggravating factors or mitigating factors as simple multipliers in justifying a requested penalty.[3]

I address each of the asserted aggravating factors in the order presented by staff.

- The violations were of an ongoing nature. This factor is already addressed in the initial assessment of the gravity component and will not be used here to further increase the penalty.

- Respondents committed the violations knowingly or intentionally. This aggravating factor listed by staff attempts to address respondents' culpable mental state. Culpability, however, was not proven at hearing. Mr. Santucci was not called to testify, and although of low probative value into Mr. Santucci's mental state, respondents' experts testified that Mr. Santucci believed he was in compliance as his registration applications were prepared by a local engineer and the applications were truthful in that they demonstrated no secondary containment (*see e.g.* Millspaugh Testimony, 3/22 tr. at 82).

- Respondents knew or should have known of the Department's regulations for CBS facilities and the need for strict compliance. Although it is true that respondents were obligated to comply with the CBS regulations, this is not a factor to be used in adjusting the gravity component of the penalty.

- There is evidence of actual environmental harm. As this factor is already addressed in the initial gravity component analysis, it will not be used to further increase the penalty.

- The facility is located in a mixed use area with the risk of human exposure to a release (Cummins Testimony, 3/21 tr. at 210). Again, this is already addressed in determining the initial gravity component in analyzing the potential for harm. Accordingly, this factor should not be used to further increase the penalty.

- Respondents were given the opportunity to resolve this matter by order on consent and did not do so. As a general proposition and policy, penalties in adjudicated matters should be significantly higher than in matters that settle (*see* DEE-1 at 1-2). The failure to settle, however, should not be used as a factor to increase the gravity component unless it is part of staff's proof to demonstrate a violator's refusal to cooperate, such as refusing to engage in settlement negotiations coupled with a refusal to address the violations. Because staff did not allege any aggravating factors that were the cause of the matter not settling, I do not consider the fact that this matter did not settle alone as an aggravating factor.

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[3] Some Department programs provide multipliers in program specific penalty guidance which are applied to penalty calculations in enforcement matters (*see e.g.* Division of Water Technical and Operational Guidance Series [TOGS] 1.4.2, Compliance and Enforcement of SPDES Permits [June 24, 2010]).

- Respondents have avoided the cost of compliance. This is part of the economic benefit component of a penalty and should not be used to increase the gravity component.

- The violations are very important to the regulatory scheme for CBS facilities because the requirements are meant to prevent releases of hazardous substances to the environment (Cummins Testimony, 3/21 tr. at 191, 194). This is also part of the analysis and determination of the initial gravity component and cannot be used to further increase the gravity component.

I conclude that Department staff has not proven any factors justifying an upward adjustment of the gravity component penalty.

For mitigating factors, staff lists respondent's cooperation in resolving the violations and lack of a history of non-compliance (Cummins Testimony, 3/21 tr. at 212). In addition, staff found the small size of the facility and the fact that only two tanks were present at the facility were also mitigating factors (*id*. at 211-212).

Respondents' cooperation and the lack of previous enforcement against respondents support a downward adjustment to the gravity component penalty. Respondents acted quickly to address the violations after receiving a notice of violation from the Department. Respondents worked with staff to reach an understanding and resolution of the CBS violations. In light of the corrective actions taken by respondents and the removal of the facility from the CBS program, I conclude it would be appropriate to reduce the gravity component penalty. I cannot, however, recommend that the gravity component be eliminated in its entirety.

I will not consider the size of the facility to reduce the gravity component. Respondents stored a hazardous substance in tanks with a total capacity of 1,100 gallons. A reportable release of sodium hypochlorite is 100 pounds, which equals approximately 10 gallons. With no secondary containment, I have already determined the potential for harm is significantly increased. The size of the facility should not be used to further reduce the gravity component based on this record.

Based on the discussion above, I conclude that the gravity component penalty should be reduced from $36,600 to $30,000. Therefore, I conclude that a total payable penalty of $51,100 comprised of a $21,100 economic benefit component and a $30,000 gravity component is supported and appropriate.

F. Remedial Relief

Staff's complaint and motion for order without hearing requested that respondents be directed to investigate and remediate the sodium hypochlorite contamination at the facility pursuant to a Department-approved work plan to be submitted within 30 days. In reviewing Department staff's motion and respondents' response, ALJ Wilkinson noted, "[t]he question here is whether follow up action is necessary and, if so, what action is appropriate" (Ruling at 23).

ALJ Wilkinson went on to discuss the various arguments and proof submitted by the parties. "To summarize the parties' arguments, Department staff asserts that evidence of contamination exists and wants respondents to perform an additional investigation pursuant to a Department approved plan. Respondents contend that no harm has occurred, and no further investigation or remedial action is necessary. I note that Department staff does not indicate in its papers the objectives of the additional investigation it is seeking or what the scope of study would be. The answers to these questions are relevant and require further factual development to determine whether further investigation is necessary, what the scope of study will be, and what regulatory purpose it will serve." (Ruling at 24 [emphasis added].)

Accordingly, at hearing Department staff had the burden of showing what additional investigation is being requested and demonstrate that further investigation and remediation are necessary, supported and appropriate.

A brief recap of events is warranted. Respondents submitted a work plan to Department staff on January 16, 2018 (Staff Exhibit C). The work plan was approved by Department staff on January 18, 2018. The work plan required respondents to obtain two surficial soil samples at each of the former locations of the CBS tanks. The four samples were to be analyzed for pH using EPA Method 9045D. In addition, respondents were to obtain background soil samples at two additional locations at the facility, to also be analyzed for pH. On January 23, 2018, respondents conducted the site assessment in accordance with the approved work plan. On February 2, 2018, respondents provided the results of the soil sampling to Department staff, which demonstrated that the soil samples beneath tank 1 had a pH of 9.5 and 8.2 and soil samples beneath tank 2 had a pH of 8.8 and 8.4. Background soil near tank 1 had a pH of 7.5 and near tank 2 had a pH of 7.2 (Staff Exhibit D). Generally, New York soils range in pH levels from 4.5 to 8.5 (*see* Kilmer Testimony, 3/21 tr. at 80; Exhibit T to Respondents' Exhibit A).

Department staff's position is that the pH levels in soils beneath tanks 1 and 2 indicate that the soils have been contaminated by a release of sodium hypochlorite (Kilmer Testimony, 3/21 tr. at 91; *see also* Ruling at 23-24). In addition, staff believes that the wood enclosure at tank 1 is discolored due to bleaching as the result of a spill (Kilmer Testimony, 3/21 tr. at 84-85; *see also* Ruling at 24).

Respondents on the other hand explained that the pH levels in soils below the tanks were caused by road salts (Exhibit T to Respondents' Exhibit A; *see also* Ruling at 24). Respondents testified that if a sodium hypochlorite release occurred, the pH level of the soil would be much higher (Millspaugh Testimony, 3/22 tr. at 62-63; *see also* Ruling at 24).

The proof adduced at hearing varies little from the proof provided through affidavits on the motion. Respondents did provide additional sampling of the soils from March 7, 2019 consistent with the first round of sampling. The 2019 results indicate a similar pattern of pH soil values with the pH of the soils beneath the tanks ranging from 7.9 to 9.4 (*see* Respondents' Exhibit C).

At hearing, Department staff testified that staff wants the soil in the areas of the tanks excavated, but no further testing is required (Kilmer Testimony, 3/21 tr. at 102). Staff reasons

that "for contamination on a smaller scale, it would be cheapest and easiest remedial solution to just excavate the contaminated areas around the tank" (*id.*). After soil removal, staff states sampling should be conducted to confirm that the contamination has been removed (*id.* at 97).

Respondents, on the other hand, have conducted the investigation required by Department staff, which revealed soil pH levels ranging from 7.9 to 9.5. Soils with those pH levels, however, do not constitute hazardous waste (*see* 6 NYCRR 371.3[c]). Staff testified that sodium hypochlorite may react with organic matter to produce things like chloroform and speculated that there may need to be further testing to determine proper disposal of excavated soils (Kilmer Testimony, 3/21 at 119-120). Staff, however, has not requested sampling of other parameters and has not established what site conditions, if any, could lead to the production of chloroform or if those conditions were present here. Department staff received the results of the site assessment more than a year ago and during that time has not asked respondents to test for anything other than pH. Staff's testimony regarding chloroform, however, is speculative and contrary to staff's testimony that no further testing is needed. I conclude that Department staff's request for an order directing removal of soils beneath tanks 1 and 2 is not supported on this record.

Although the pH levels of the soils and the discolored wood below the tanks present circumstantial evidence that a release of sodium hypochlorite due to overfilling or some other event occurred in the past, it is equally possible that chlorine gas may have volatized, escaped the tanks and settled to the ground and wood structure while the tanks were being filled (*see* Kilmer Testimony, 3/21 tr. at 117; testimony of Rodney Aldrich [Aldrich Testimony], 3/21 tr. at 285). Department staff did not refute Mr. Aldrich's testimony that the tanks were in excellent condition and there was no active leaking or evidence of releases when he first evaluated respondents' facility (*see* Aldrich Testimony, 3/21 tr. at 274).

While I do not find respondents' speculation that road salt caused the higher pH levels in the soils beneath tanks 1 and 2 to be convincing, I find Mr. Millspaugh's testimony regarding the variability of pH inherent in sampling soils to be credible (Millspaugh Testimony, 3/22 tr. at 66-67). In short, I do not find the variations in soil pH presented in this matter support Department staff's position that the soils should be removed from the areas of tanks 1 and 2 based solely on the variations in soil pH. In addition, after searching nationwide federal and state judicial and administrative decisions, I have found no precedence for remediating soils allegedly contaminated with sodium hypochlorite or other chlorinated bleaching product based solely on pH levels of the soil.

At hearing, staff had the burden of demonstrating what additional investigation is needed or that the remedial activity requested by staff is supported and appropriate. On this record, I conclude that staff has not met its burden of proving further investigation is required or that soils with a pH ranging from 7.9 to 9.5 need to be removed or remediated. Accordingly, Department staff's request for remedial relief is denied.

RECOMMENDATIONS

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

1. Granting Department staff's motion for order without hearing, pursuant to 6 NYCRR 622.12, holding respondents Cortlandt Racquet Club, Inc. and Val Santucci violated the following:

    A. 6 NYCRR 598.1(k)(1) for failing to maintain the spill prevention report at the facility (fourth cause of action);
    B. 6 NYCRR 598.1(k)(2)(i) for failing to include a copy of the registration application and certificate in the spill prevention report (fifth cause of action);
    C. 6 NYCRR 598.1(k)(2)(iii) for failing to include a copy of a current facility site map in the spill prevention report (sixth cause of action);
    D. 6 NYCRR 598.1(k)(2)(iv) for failing to include the name, signature and license number of a professional engineer licensed in New York State or other qualified person who prepared the spill prevention report (seventh cause of action);
    E. 6 NYCRR 598.1(k)(2)(vii) for failing to include a status report on compliance with 6 NYCRR parts 596-599 in the spill prevention report (tenth cause of action);
    F. 6 NYCRR 598.1(k)(2)(x) for failing to include a spill response plan in the spill prevention report (eleventh cause of action);
    G. 6 NYCRR 598.5(c)(1) for failing to equip the CBS tanks with secondary containment systems in accordance with 6 NYCRR 599.9 (fourteenth cause of action – two counts);
    H. 6 NYCRR 598.5(e) for failing to install spill prevention methods at the pumps and valves for the CBS tanks (fifteenth cause of action – two counts);
    I. 6 NYCRR 598.7(b)(2) for failing to conduct a comprehensive annual inspection (sixteenth cause of action – two counts);
    J. 6 NYCRR 598.7(c)(1) for failing to conduct a five-year inspection during the last five years (seventeenth cause of action – two counts);
    K. 6 NYCRR 599.13(c)(4) for failing to label the aboveground piping for the CBS tanks with the chemical name or common name of the hazardous substance stored (nineteenth cause of action - two counts);
    L. 6 NYCRR 599.17(b)(1) for failing to install overfill prevention systems for the CBS tanks (twentieth cause of action – two counts); and
    M. 6 NYCRR 599.17(c) for failing to install a transfer area secondary containment system (twenty-first cause of action – two counts).

2. Granting Department staff's motion for order without hearing, pursuant to 6 NYCRR 622.12, holding respondent Cortlandt Racquet Club, Inc. violated 6 NYCRR 596.2(j)(1) and (3) for failing to label tank 1 and tank 2 with the tank system identification number and tank 1 with the design capacity and working capacity of the tank and, based upon the proof adduced at hearing, violated 6 NYCRR 596.2(j)(3) for failing to label tank 2 with the design capacity and working capacity of the tank (third cause of action – two counts).

3. Granting Department staff's motion for order without hearing, pursuant to 6 NYCRR 622.12, holding respondent Val Santucci violated 6 NYCRR 598.4(b)(7) for failing to include written site procedures in the spill prevention report (twelfth cause of action) and 6 NYCRR 598.4(b)(8), for failing to label fill ports (thirteenth cause of action-two counts).

4. Directing respondents Cortlandt Racquet Club, Inc. and Val Santucci, jointly and severally, to pay a civil penalty of fifty-one thousand one hundred dollars ($51,100) within thirty (30) days of service of the Commissioner's order on respondents.

5. Denying Department staff's request for further investigation and remediation of the site.

6. Granting such other and further relief as the Commissioner deems appropriate.

/s/
Michael S. Caruso
Administrative Law Judge

Dated: June 26, 2019
Albany, New York

EXHIBIT CHART – HEARING

Matter of Cortlandt Racquet Club, Inc. and Val Santucci

March 21 and 22, 2019

DEC Case No. R3-20171003-174

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
Staff A	Four Photographs of tanks labeled Image_5157, Image_5154, Image_5163 and Image_5167, originally attached as Exhibit A to respondents' answer	✓	✓	Department Staff	
Staff B	Photograph of Tank 002 showing embossed capacity label of 535 gallons, originally attached as Exhibit K to Affidavit of Rodney L. Aldrich, P.E., sworn to November 7, 2018	✓	✓	Department Staff	
Staff C	Correspondence from Sterling Environmental Engineering, P.C. to Edward L. Moore, P.E, NYSDEC, dated January 16, 2018 regarding work plan for site assessment, originally attached as part of Exhibit B to respondents' answer	✓	✓	Department Staff	
Staff D	Correspondence from Sterling Environmental Engineering, P.C. to Edward L. Moore, P.E, NYSDEC, dated February 2, 2018 regarding site assessment and soil sampling results with table and field log attached, originally attached as part of Exhibit C to respondents' answer	✓	✓	Department Staff	
Staff E	Photograph of Tank 001, originally attached as Exhibit B to Affidavit of Rodney L. Aldrich, P.E., sworn to November 7, 2018	✓	✓	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
Staff F	Premier Athletic Club Spill Prevention Report dated May 30, 2007 Including Text of Plan, originally attached as Exhibit M to Affidavit of Rodney L. Aldrich, P.E., sworn to November 7, 2018	✓	✓	Department Staff	
Staff G	CBS Penalty Matrix – Revised 7/13/18	✓		Department Staff	Penalty Matrix post dates violations
Staff H	Matter of Jewish Board of Family and Children's Services, Inc., Order on Consent, dated December 18, 2018	✓	✓	Department Staff	
Staff I	Matter of Northern Westchester Joint Water Works, Order of Consent, dated January 2, 2019	✓	✓	Department Staff	
Staff J	Matter of Pocantico Hills Central School District, Order of Consent, dated September 12, 2018	✓	✓	Department Staff	
Staff K	Matter of Coachlight Sq. Condo. Assoc. Inc., Order on Consent, dated October 24, 2018	✓	✓	Department Staff	
Staff L	Matter of City School District of New Rochelle, Order on Consent, dated November 30, 2018	✓	✓	Department Staff	
Staff M	Matter of EF International Language Schools, Inc., Order on Consent, dated September 12, 2018, with modification attached	✓	✓	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
Staff N	Photograph of Hazardous Substance Bulk Storage Registration Certificate for Tank 001, issued 6/20/95, expired 7/7/97, originally attached as Exhibit E to Affidavit of Rodney L. Aldrich, P.E., sworn to November 7, 2018	✓	✓	Department Staff	
Respondents A	Affidavit of Rodney L. Aldrich, sworn to November 7, 2018	✓	✓	Respondents	
Respondents B	Matter of Sullivan Pools, Inc., Order on Consent, dated August 31, 2017	✓	✓	Respondents	
Respondents C	Summary of Soil Sample Results from January 23, 2018 and March 7, 2019	✓	✓	Respondents	
Respondents D	Affidavit of Mark P. Millspaugh, P.E., sworn to November 6, 2018	✓	✓	Respondents	