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),

-by-

CORTLANDT RACQUET CLUB, INC. and VAL SANTUCCI,

Respondents.

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RULING ON MOTION FOR ORDER WITHOUT HEARING AND CROSS MOTION TO DISMISS COMPLAINT

DEC Case No. R3-20171003-174

Appearances

- Thomas S. Berkman, Deputy Commissioner and General Counsel (Ashley Welsch, Assistant Regional Attorney, Region 3) 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

INTRODUCTION AND SUMMARY OF RULING

Currently pending before me is a motion from staff of the Department of Environmental Conservation (Department) for an order without hearing. Department staff seeks judgment on 16 causes of action, remedial relief, and a civil penalty. Respondents Cortlandt Racquet Club, Inc. and Val Santucci oppose staff's motion, cross move to dismiss the complaint, and request to conduct a voir dire of Department staff.

Based upon my review of the parties' submissions, I conclude that Department staff has made a prima facie showing that respondents committed the violations alleged in causes of action 4-7, 10-17, and 19-21 and, therefore, grant Department staff's motion on the issue of liability for these causes of action. I grant partial summary judgment on the third cause of action. A hearing will be held to address the alleged violation that chemical bulk storage tank 2 is not properly labeled with the capacity of the tank. Department staff has withdrawn the other causes of action. I reserve on the issue of the remedial relief and the amount of the civil penalty. A hearing will be held on these issues. I deny respondents' cross motion in its entirety inasmuch

as Department staff has stated a claim upon which relief can be granted on all 16 causes of action, and deny respondents' request to conduct a voir dire of Department staff.

PROCEEDINGS

Department staff commenced this enforcement proceeding against respondents Cortlandt Racquet Club, Inc. and Val Santucci, by service of a notice of hearing and complaint on March 9, 2018 (Complaint), with accompanying exhibits served on March 16, 2018. The Complaint alleges 21 causes of action involving violations of ECL article 40 and the Department's chemical bulk storage (CBS) regulations at 6 NYCRR parts 596-599. 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 (*see* Complaint, Exhibits A, B, and C). Respondents submitted an answer dated April 9, 2018, generally denying the alleged violations and asserting eight affirmative defenses (Answer). A prehearing conference was held at the Department's Region 3 office at 21 South Putt Corners Road, New Paltz, New York on May 10, 2018.

On October 4, 2018, Department staff served a notice of motion for order without hearing (Motion). In support of its Motion, Department staff provided the affirmation of Ashley Welsh, Esq. (Welsch Aff), dated October 4, 2018, attaching the notice of hearing, the Complaint and the Answer, and the affidavit of Edward L. Moore, P.E., sworn to October 2, 2018 (Moore Aff), attaching exhibits A through O. Department staff withdrew the first, second, eighth, ninth, and eighteenth causes of action (Welsh Aff ¶ 4), and seeks a finding of liability on causes of action 3-7, 10-17, and 19-21 and a civil penalty in the amount of $73,200.

Respondents submitted a notice of motion to dismiss the Complaint (Cross Motion); an affirmation of David Engel, Esq. (Engel Aff) in opposition to staff's Motion and in support of respondents' Cross Motion, dated November 7, 2018, attaching one exhibit; an affidavit of Rodney L. Aldrich, P.E. in opposition to the Motion and in support of respondents' Cross Motion, attaching exhibits A through T (affidavit of Rodney L. Aldrich, P.E. sworn to November 7, 2018 [Aldrich Aff]); an affidavit of Mark Millspaugh, P.E. in opposition to the Motion and in support of the Cross Motion, attaching exhibits A through C (affidavit of Mark Millspaugh, P.E. sworn to November 7, 2018 [Millspaugh Aff]), and a copy of the Answer. Department staff submitted a response opposing respondents' Cross Motion by affirmation of Ashley Welsch dated November 26, 2018 (Welsch Aff 2) attaching exhibit A, and supporting affidavit of Edward L. Moore (affidavit of Edward L. Moore, sworn to November 24, 2018 [Moore Aff 2]).

By letter dated November 30, 2018, Mr. Engel, on behalf of respondents. requested an opportunity to conduct a voir dire of Department witness Moore. Department staff opposes

respondents' request (*see* Letter from Ashley Welsch to ALJ Wilkinson dated December 3, 2018). Mr. Engel reiterated his request to voir dire Mr. Moore by email dated December 7, 2018, following my request to Ms. Welsch to provide a copy of Mr. Moore's second affidavit.

FINDINGS OF FACT

The following facts are undisputed or are determinable as a matter of law based upon the submissions of the parties.

1. Respondent Cortlandt Racquet Club, Inc. (Cortlandt) is an active domestic business corporation registered with the New York State Department of State, Division of Corporations, having offices at 2127 Albany Post Road, Montrose, New York 10548. Cortlandt owns a fitness center, known as the Premier Athletic Club, also located at 2127 Albany Post Road, Montrose, New York 10548, including indoor and outdoor swimming pools (Facility). (*See* Complaint ¶¶ 2-3, 5 and Exhibits A [DOS entity information] and Exhibit B [deed for Cortlandt's acquisition of 2127 Albany Post Road property]; Moore Aff ¶ 7; Answer ¶¶ 2-3, 5; Engel Aff ¶ 6.)

2. Respondent Val Santucci is the president, chief executive officer and operator of the Facility (Moore Aff, Exhibit C; Answer ¶¶ 4,8).

3. Two 550-gallon chemical bulk storage (CBS) tanks were installed at the Facility to store sodium hypochlorite at 12.5% concentration, referred to herein collectively as the CBS tanks, or individually as tank 1 and tank 2. Tank 1 was installed in 1985. Tank 2 was installed in 2009. (Moore Aff ¶ 10 and Exhibit C.)

4. Edward L. Moore, P.E., was a Professional Engineer 2 and Manager of the Bulk Storage Unit and Supervisor of the Division of Environmental Remediation in the Department's Region 3 office. Mr. Moore supervised, and was responsible for, the Region's petroleum bulk storage (PBS), chemical bulk storage (CBS), and major oil storage facility (MOSF) programs. He was employed by the Department from 1992 until April 2018 when he retired. (Moore Aff ¶ 1.)

5. Mr. Moore regularly inspected regulated CBS facilities in Region 3 for compliance with article 40 of the Environmental Conservation Law and the Department's CBS regulations at 6 NYCRR parts 596-599 (Moore Aff ¶ 3). During his employment with the Department, he performed 400 CBS inspections, 1,000 PBS inspections, and 200 MOSF inspections (*id*. ¶ 5). Mr. Moore also reviewed and made enforcement determinations on approximately 400 other CBS inspections performed by his staff (*id*. ¶ 6).

6. On August 29, 2017, Mr. Moore inspected the Facility. At the time of the inspection, the Facility held a hazardous substance bulk storage registration pursuant to an application signed and submitted by respondent Val Santucci on or about May 12, 2017. The registration covered two CBS tanks that stored sodium hypochlorite with a listed capacity of 400 gallons. (*Id*. ¶ 7 and Exhibit A.)

7. Prior to his inspection, Mr. Moore notified the Facility by email that he would be inspecting the Facility on August 29, 2017, and requested that the spill prevention report (SPR), annual inspection reports, and five-year inspection report be made available (*id*. ¶ 9 and Exhibit D).

8. At the time of the inspection, respondents did not have a copy of the spill prevention report on the Facility premises and did not provide Mr. Moore a copy of the spill prevention report at the time of the inspection (Moore Aff ¶ 12[b]).

9. During his inspection, Mr. Moore observed two 550 gallon aboveground CBS tanks at the Facility that stored sodium hypochlorite at a 12.5% concentration (*id*. ¶ 10).

10. Sodium hypochlorite (CAS number 7681-52-9) is a hazardous substance listed at 6 NYCRR 597.3 and is subject to regulation under 6 NYCRR parts 595 through 599. It is used to treat water in swimming pools. Human exposure to sodium hypochlorite can cause severe skin burns and eye damage. (Moore Aff ¶ 11.)

11. The CBS tanks at the Facility were not labeled with a tank system identification number. Tank 1 was not labeled with the design capacity and working capacity of the tank. (Moore Aff ¶¶ 12[a], 28[a].)

12. The fill and dispensing ports for the CBS tanks were not labeled with the chemical name or common name or category of the substance stored, hazard warnings or tank identification information (Moore Aff ¶ 28[b]).

13. The CBS tanks lacked secondary containment systems (Moore Aff ¶ 28[c]).

14. The pumps and valves of the CBS tanks did not have spill prevention methods installed (Moore Aff ¶ 28[d]).

15. The aboveground piping for the CBS tanks were not marked with the chemical name of the hazardous substance stored (Moore Aff ¶ 28[e]).

16. The CBS tanks were not equipped with overfill prevention systems (Moore Aff ¶ 28[f]).

17. The transfer station for the CBS tanks was not equipped with a secondary containment system (Moore Aff ¶ 28[g]).

18. Mr. Moore sent respondents a Notice of Violation (NOV) on September 6, 2017. The NOV cited respondents for having unregistered 550 gallon CBS tanks, and documented numerous violations including the failure to have a spill prevention report as required by regulation, failure to satisfy the requirements for tank design, and failure to meet specific requirement for tanks and piping (Moore Aff, Exhibit E at 2-6).

19. Mark Millspaugh, P.E. is the owner and chief engineer of Sterling Environmental Engineering P.C. (Sterling). Respondents retained Sterling following the Department's issuance of the NOV. Mr. Millspaugh attested that upon Sterling's initial review of this matter, Sterling recommended that respondents immediately close the CBS tanks and that future deliveries of sodium hypochlorite to the Facility be in small containers to avoid the need for a CBS registration (Millspaugh Aff ¶ 15).

20. On September 13, 2017, Rodney L. Aldrich, P.E., director of compliance at Sterling, informed Mr. Moore that the CBS tanks would remain in service until the sodium hypochlorite was fully used, that respondents would submit an application to the Department to close the CBS tanks, and that Sterling would provide a plan to respond to the NOV on or before October 6, 2017. (*See* Moore Aff, Exhibit F.)

21. Mr. Moore advised Mr. Aldrich on September 14, 2018 that the tanks could remain in service until the sodium hypochlorite was used, but no new deliveries could be made to the tanks. In addition, the Facility would have to inspect the tanks three times per week, submit plans and specifications to the Department for replacement tanks, and submit an application to close the unregistered CBS tanks. (Moore Aff, Exhibit G.)

22. On October 24, 2017, Mr. Aldrich provided a follow-up letter to Mr. Moore regarding the status of the existing CBS tanks in terms of the remaining sodium hypochlorite, the intention to close the CBS tanks, and the options Mr. Santucci was considering for delivery of sodium hypochlorite in smaller containers (Moore Aff, Exhibit H).

23. Mr. Moore replied by email on October 24, 2018 that proposed resolution of the violations was acceptable (Moore Aff, Exhibit I).

24. Sterling submitted a hazardous bulk storage application for the closure of the CBS tanks on December 22, 2017 (Moore Aff, Exhibit J).

25. By letter dated January 4, 2018, the Department's Division of Environmental Remediation confirmed the closure of the CBS tanks (Moore Aff, Exhibit K).

26. On January 16, 2018, Sterling submitted a work plan to conduct a site assessment to determine if any releases occurred at the Facility. The site assessment included two surficial samples to be obtained at the lowest ground elevation for each of the CBS tank locations and two additional background soil samples. All six samples would be analyzed for pH pursuant to EPA Method 9045D. (Moore Aff., Exhibit L.)

27. Mr. Moore approved the site assessment on January 18, 2018 (Moore Aff, Exhibit M).

28. Sterling submitted the results of the site assessment on February 2, 2018. The two background locations indicated a pH of 7.1 to 7.3. The two soil samples from beneath CBS tank 1 indicated a pH of 9.5 and 8.2, respectively. The two soil samples from beneath CBS tank 2 indicated a pH of 8.8 and 8.4, respectively. (Moore Aff Exhibit N.)

29. On June 14, 2018, respondents submitted a document entitled "2017 Spill Prevention Report" to Department staff. The 2017 report did not include the registration application and certificate, did not include a current Facility site map in sufficient detail to locate and identify the tank systems and transfer stations, did not include the name, signature and license number of a professional engineer or other qualified individual who prepared the report, did not include a spill response plan, and did not include written instructions to prevent the delivery of a substance to the wrong tank and prohibit the transfer of incompatible substances at the same time within the same transfer station. (Moore Aff ¶ 29[b]-[d], [e]-[g] and Exhibit O.)

DISCUSSION

A. Standards of Review

Motions for order without hearing under 6 NYCRR 622.12 are governed by the same principles that govern summary judgment motions pursuant to CPLR 3212 (*see* 6 NYCRR 622.12[d]). A motion for order without hearing will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment as a matter of law in favor of any party (*see* 6 NYCRR 622.12[d]; CPLR 3212[b]). Where the complaint alleges several causes of action, the motion may be granted in part if it is found that some, but not all, causes of action or defenses are sufficiently established (*see* 6 NYCRR 622.12[d]; CPLR 3212[e]). Similarly, the existence of a triable issue of fact regarding the amount of civil penalty does not prevent an ALJ from granting of a motion for order without hearing on the issue of liability (*see* 6 NYCRR 622.12[f]; CPLR 3212[c]).

In this case, Department staff bears the initial burden of making a prima facie showing of it is entitled to summary judgment as a matter of law with respect to each cause of action alleged.

To make a prima facie showing, Department staff must proffer "sufficient" evidence to support the factual assertions in its complaint (*see Matter of Tractor Supply Co*., Decision and Order of the Commissioner, Aug. 8, 2008, at 3 [and cases cited therein]). "Sufficient" evidence is such relevant proof as a reasonable person may accept as adequate to support a conclusion or ultimate fact (*see id*.). Once Department staff has put forward a prima facie case, the burden shifts to the respondent to produce sufficient evidence to establish a triable issue. (*Matter of Locaparra*, Commissioner's Decision and Order, June 16, 2003; *Cheeseman v Inserra Supermarkets, Inc*., 174 AD2d 956, 957-958 [3d Dept 1991].) Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to meet the parties' burdens. (*See Matter of Wilder*, Ruling/Hearing Report on Motion for Order Without Hearing at 10, *adopted by* Order of the Commissioner, November 4, 2004 [citing *Gilbert Frank Corp. v Federal Ins. Co*., 70 NY2d 966, 967 (1988), and quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980)].)

On a motion to dismiss a complaint (*see* CPLR 3211[a][7]), the ALJ must liberally construe the pleadings, accept the facts alleged in the complaint as true, accord Department staff every possible favorable inference, and determine only whether the allegations fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *AG Capital Funding Partners, L.P. v State Street Bank and Trust Company*, 5 NY3d 582, 591 [2005]). To determine whether a complaint states a claim, the facts alleged in the complaint are accepted as true, the proponent of the complaint is given the benefit of every possible favorable inference, and the complaint is examined to determine whether the facts as alleged fall within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1997]). In addition, affidavits submitted in support of a complaint may be considered to preserve inartfully pleaded, but potentially meritorious claims (*see Rovello v Orofino Realty Co*., 40 NY2d 633, 635-636 [1976]). The question is whether the complainant actually has a cause of action, not whether the complainant has properly stated one (*see Leon*, 84 NY2d at 88; *Rovello*, 40 NY2d at 635).

Based upon my review of the record, I conclude that Department staff has demonstrated its entitlement to judgment as a matter of law on 15 causes of action asserted in the Complaint and partial judgment on the third cause of action. The issue whether tank 2 was properly labeled with the capacity of the tank will be addressed at an adjudicatory hearing. Department staff has withdrawn five causes of action and respondents have not raised a meritorious affirmative defense, or demonstrated that Department staff has failed to state a claim, with respect to any of the remaining causes of action. Consequently, respondents' Cross Motion to dismiss the Complaint is denied.

B. Affirmative Defenses

I first address the affirmative defenses to determine whether respondents have asserted a legal basis to dismiss a cause of action in the complaint. Part 622 recognizes as an affirmative defense a defense based upon the regulatory exemptions from permitting requirements, *i.e.*, the activity charged in the complaint as having been improperly conducted without a permit does not require a permit (*see* 6 NYCRR 622.3[a][2]). The CPLR also provides specific examples of affirmative defenses, including an arbitration and award, collateral estoppel, a discharge in bankruptcy, payment, release, or statute of limitation. More generally, the CPLR defines affirmative defenses as "matters which if not pleaded would likely take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading" (CPLR 3018[b]; *Matter of Truisi*, Ruling of the Chief ALJ on Motion to Strike or Clarify Affirmative Defenses, April 1, 2010, at 5).

Respondents' asserted affirmative defenses are not affirmative defenses as contemplated under Part 622 or the CPLR and do not provide a basis to grant Respondents' Cross Motion to dismiss the Complaint.

Failure to State a Cause of Action

Respondents' first affirmative defense asserts that "[t]he Complaint fails to state causes of action upon which relief may be granted" (Answer at 14, first affirmative defense). This defense is not an affirmative defense. Moreover, inasmuch as I am granting Department staff's Motion in whole with respect to fifteen causes of action, in part with respect to one cause of action, and setting the remaining issue for hearing, the assertion that Department staff has not stated a cause of action is without merit. Department staff has not only stated a claim for relief on the causes of action in the Complaint, staff has demonstrated its entitlement to judgment as a matter of law on 15 causes of action and partial summary judgment with respect to the third cause of action. The remaining issue with respect the labeling of tank 2 in the third cause of action states a valid claim for relief and, therefore, survives respondents' Cross Motion to dismiss to the Complaint.

Respondents' argument that the Complaint should be dismissed because the violations have been resolved or rendered moot is without merit (*see* Engle Aff ¶¶ 24-40). As discussed below, the fact that violations occurred entitles Department staff to take appropriate enforcement action and seek a civil penalty. Respondents also claim that Department staff inappropriately disclosed the subject matter of settlement discussions and derogated respondents' rights and privileges (*see* Engel Aff ¶¶ 10-23). This argument, also discussed below, is unpersuasive and does not justify dismissal of the Complaint. Respondents have answered the Complaint, responded to the Motion, and will have the opportunity to present evidence with respect to the

proposed remedial relief and civil penalty at the adjudicatory hearing. No abridgment of respondents' rights has occurred as a result of Department staff's disclosure that the parties could not settle the matter. Respondents' Cross Motion to dismiss the Complaint is, therefore, denied.

Mootness

As a second affirmative defense respondents argue that the violations alleged in the Complaint have been rendered moot due to the termination of CBS operations at the Facility, the removal of the tanks, and other corrective actions respondents undertook (*see* Engel Aff ¶¶ 29-40). Department staff asserts that "[c]orrecting violations after they occur neither absolves an entity from liability for violations nor replaces the needs for penalties (Welsch Aff ¶ 18). Respondents' second affirmative defense is without merit and is not grounds to dismiss the Complaint.

Department staff's contention that an enforcement action is not rendered moot because a respondent corrects the violation or no longer engages in the regulated activity is consistent with the Department's civil penalty policy (DEE-1: Civil Penalty Policy [June 20, 1990] [Civil Penalty Policy]). As the Civil Penalty Policy states:

> The fundamental purpose of environmental enforcement is to promote compliance with environmental laws and thereby improve and protect New York's natural resources and environmental quality. . . Enforcement is also necessary to abate and remediate damage and to restore natural resources. However, remedial or abatement actions do not replace the need for penalties.

(DEE-1 at III). The assessment of a civil penalty in an enforcement action provides an incentive to the violator and other regulated entities to comply with environmental laws and regulations. The Civil Penalty Policy instructs that "[p]enalties should persuade the violator to take precautions against falling into non-compliance again, as well as persuade others not to violate the law. . . In order to provide adequate deterrence, penalties for the same violation of the law may have to be different for different violators." Effective deterrence, according to the Policy, "provides the best protection for the environment." If a penalty is to achieve deterrence, both the violator and general public must be convinced that the penalty places the violator in a worse position than entities who operate in compliance. (*See* DEE-1 at III.)

Notably, the Commissioner has rejected the fact that a site had been remediated as a basis for reducing the recommended penalty and claims by respondents that deterrence is no longer relevant after they cease the offending activity -- storing hazardous wastes at the facility. According to the Commissioner, "[t]he deterrence component is directed not

only to specific violators, but also to the general public – *i.e.*, penalties should deter others from violations of the law" (*Matter of Giambrone and Macron Erectors, Inc.*, Order of the Commissioner, March 17, 2010 at 20 [*citing* Civil Penalty Policy ¶ III]). Thus, a civil penalty serves an important policy objective for the Department when a violation has occurred, notwithstanding respondents' efforts to return to compliance.

Dismissing this proceeding without assessing any penalties would send the wrong message to regulated entities that the consequences of violating environmental laws are minimal compared with the cost of compliance. Letting violators escape with impunity would also place law abiding entities at a competitive disadvantage. The Civil Penalty Policy strives to maintain a level playing field among regulated entities by encouraging compliance with environmental laws and regulations and imposing penalties when appropriate to redress violations. Accordingly, this enforcement proceeding is not moot and respondents' second affirmative defense is without merit.

Defenses Related to the Civil Penalty Amount

Respondents claim "[t]here has been no environmental harm or damage due to, or arising from any of the acts or conditions alleged in DEC Staff's Complaint," that they have cooperated with Department staff to resolve the violations, and that "penalty requested in the Complaint. . . is unconscionable and wholly out of proportion to the violations alleged by DEC Staff to have occurred" (Answer at 14 [third, fourth and fifth affirmative defenses]). These defenses are not affirmative defenses and do not warrant dismissal of the Complaint.

Actual harm to the environment is not a prerequisite to liability under any cause of action in the Complaint, however, potential harm is a relevant factor in determining the penalty amount. According to the Civil Penalty Policy, the penalty "should be proportional to potential harm and/or actual damage," in recognition that risk is an important factor in assessing a civil penalty (DEE-1 IV. D. 2.). A violator who cooperates with the Department may be assessed a lower civil penalty, but is not absolved from liability or excused from paying a civil penalty (DEE-1 E. Penalty Adjustments). Evidence in the record indicates elevated pH levels in the soils around the CBS tanks, raising the possibility that the soil is contaminated and the environment was harmed, or that further investigation or remedial work is necessary. A hearing will be held on these issues, during which respondents will have the opportunity to address the proposed penalty and any mitigating factors they believe are relevant.

Defenses Related to the Tanks

Respondents assert as a sixth affirmative defense "[a]ny discrepancy between the size of the tanks set forth in the Registration for the Facility and the size of the tanks present at the Facility was inadvertent. Such discrepancy was without any environmental consequences" (Answer at 15). Respondents assert as a seventh affirmative defense that the tanks were "clearly marked and labeled as to the contents thereof" (Answer at 15). The sixth affirmative defense is not a defense to any of the charges in the Complaint on which Department staff seeks judgment. Moreover, as discussed below for the third cause of action, the Complaint does not charge respondents with failure to mark the tanks with the name of the hazardous substance. Accordingly, the sixth and seventh affirmative defenses, which essentially deny violations that Department staff is not seeking judgment on, are irrelevant and without merit.

Defense Related to Remedial Relief

As an eighth affirmative defense, respondents assert in relevant part that "there is no basis nor need for the relief requested by DEC Staff with respect to an investigation or remediation of the alleged sodium hypochlorite contamination at the Facility" and that Department staff's claim in the Complaint that "elevated pH is [sic] soil is consistent with a release of sodium hypochlorite' is without any basis" (Answer at 15). The eighth so-called affirmative defense relates to the relief remedial relief and is not a basis to dismiss any cause of action in the Complaint. Department staff and respondents offer differing opinions as to what remedial relief is necessary. Because a factual dispute exists, a hearing will be convened on the remedial relief and the parties will have the opportunity to present evidence on this issue.

C. Liability

As discussed below, Department staff has made a prima facie showing with respect to each cause of action in the Complaint on which staff seeks judgment. With one exception, related to the labeling of tank 2 with the capacity of the tank, respondents have failed to raise a triable issue of fact warranting an adjudicatory hearing. Respondents' motion to dismiss the Complaint is denied. The causes of action are discussed below.

Third Cause of Action

The third cause of action alleges that respondents violated 6 NYCRR 596.2 by failing to properly label the two CBS tanks with the tank identification number and the design capacity and working capacity of the tank (Complaint ¶ 82). Section 596.2 of 6 NYCRR regulates the

registration of aboveground tanks with a storage capacity of 185 gallons or greater used to store hazardous substances (*see* 6 NYCRR 596.1[b] and 596.2). Labeling requirements for regulated tanks are set forth in section 596.2(j) which states in relevant part that "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."

Respondents assert that the "tanks and equipment at the Facility were clearly marked and labeled as to the contents thereof" (Answer ¶ 162 [seventh affirmative defense]) and that the third cause of action "was fully resolved when the tanks were removed." Counsel further states, "it is clear that the CBS tanks were clearly labeled as to their chemical contents and other pertinent information while they were in use." (Aldrich Aff ¶¶ 9, 15.) As already noted, the Complaint does not allege a violation of 6 NYCRR 596.2(j)(2) regarding the labeling of the tanks with the name of the hazardous substance (*see* Complaint ¶ 82; *see also* Welsch Aff ¶ 19). Likewise, respondents' argument that this action is moot is without merit, as discussed above.

On the merits, Mr. Moore's affidavit and the photographs submitted with the parties' papers provide proof that the tanks did not meet the labeling requirements in 6 NYCRR 596.2(j)(1), and that tank 1 did not meet the labeling requirements in 6 NYCRR 596.2(j)(3) (*see* Moore Aff ¶ 12[a], 28[a]); Aldrich Aff Exhibits C and D). Respondents' counsel claims that the tanks were labeled with pertinent information and cites to the affidavit of respondents' consultant Aldrich and Exhibit A to the Answer (*see* Engel Aff ¶ 29 [*citing* Aldrich Aff ¶¶ 9,15 and Answer, Exhibit A]). Neither the Aldrich affidavit, nor Exhibit A to the Answer, address the labeling of the tanks with the "tank system identification number as shown in the registration certificate." Respondents have presented no other evidence to counter Department staff's allegation they violated 6 NYCRR 596.2(j)(1).

With respect to the labeling of the tanks with the design capacity and working capacity, Mr. Aldrich's statement that the translucent material from which the tanks were constructed provided "a functional" capacity gauge (Aldrich aff ¶¶ 7, 13) does not demonstrate compliance with section 596.2(j)(3). Respondents presented no additional evidence showing that tank 1 was properly marked as required by 6 NYCRR 596.2(j)(3). For tank 2 respondents submitted a photograph that shows "Gallons - 535" embossed in the plastic top of the tank (*see* Aldrich Aff ¶ 19 [third bullet]). Department witness Moore attests in his affidavit that respondents failed to properly label both tanks with the design and working capacity of the tank (Moore Aff ¶ 12[a]). The conflicting evidence presented by the photograph of tank 2 purporting to show a capacity and the Moore affidavit raises a question of fact whether the tank 2 was properly labeled with the design capacity and working capacity of the tank pursuant to 6 NYCRR 596.2(j)(3). Therefore, this issue will be set for hearing.

In sum, the record evidence demonstrates that respondents violated 6 NYCRR 596.2(j)1) with respect to tank 1 and tank 2, and violated 6 NYCRR 596.2(j)(3) with respect to tank 1. Department staff is entitled to judgment on its Motion on these charges in the third cause of action. Because a question of fact exists whether respondents violated 6 NYCRR 596.2(j)(3) with respect to tank 2, the motion for order without hearing is denied and that issue will be set for hearing.

Fourth, Fifth, Sixth, Seventh, Tenth, Eleventh, and Twelfth Causes of Action

Causes of action 4, 5, 6, 7, 10, 11, and 12 relate to violations of regulations involving the spill prevention report (*see* Complaint ¶¶ 86, 90, 94, 98, 110, 114, 118, and 122). Specifically, Department staff alleges that respondents failed to maintain the spill prevention report on the Facility premises and provide a copy of the report to Department staff in violation of 6 NYCRR 598.1(k)(1) (fourth cause of action); failed to include a registration application and certificate in the spill prevention report in violation of 6 NYCRR 598.1(k)(2)(i) (fifth cause of action); failed to include a facility site map in violation of 6 NYCRR 598.1(k)(2)(iii) (sixth cause of action); failed to include the credentials of the person who prepared the report in violation of 6 NYCRR 598.1(k)(2)(iii) (seventh cause of action); failed to include a compliance status report in violation of 6 NYCRR 598.1(k)(2)(vii) (tenth cause of action); failed to include a spill response plan in violation of 6 NYCRR 598.1(k)(2)(x) (eleventh cause of action); and failed to include written site procedures to prevent a delivery of a substance to the wrong tank and transfer of incompatible substances at the same time within the same transfer station in violation of 6 NYCRR 598.4(b)(7) (twelfth cause of action).

Department witness Edward Moore attested that respondents failed to have the spill prevention report on the premises of the Facility, and failed to provide it to him during the inspection, despite the advance notice he gave respondents of the inspection and his request that they provide a copy of the report at the inspection (Moore Aff ¶ 12[b], Exhibit D [email from Edward Moore dated August 25, 2017 to KLENT at Premiere Athletic Club]). On September 6, 2017, Mr. Moore sent respondents a NOV which stated that the Facility should have had a spill prevention report prepared when the tanks were installed and that the report should have been updated annually. According to the NOV, the Facility does not have a current spill prevention report. The NOV directed respondents to prepare and submit a spill prevention report within 30 days from the date of the NOV. Among the deficiencies noted in the NOV were the failure of the spill prevention report to include the preparer's credentials, a copy of the current registration certificate and application, a site map, a spill response plan, written procedures to prevent the delivery of a substance to the wrong tank and the mixing of incompatible substances at the transfer station, and a self-audit by the Facility. (*See* Moore Aff Exhibit E.) Mr. Moore attested that he received a copy of the spill prevention report on June 14, 2018, but the report, dated May

2017, failed to include the information cited in the NOV and as charged in the Complaint (*see* Moore Aff ¶ 29[a]-[g]). Mr. Moore attested that "of the approximately 400 CBS facilities [he] inspected in [his] career with the Department, this is one of only a handful where no complete [spill prevention report] existed and yet the facility owner and/or operator claimed that a sufficient report had been prepared" (Moore Aff ¶ 13).

Counsel for respondents makes several arguments, including that charges related to the spill prevention report are moot due to the removal of the CBS tanks, that respondents had already provided the location of the tanks to the Department, that respondents obviously had a spill prevention report, that respondents reasonably concluded that the Facility was compliant with CBS requirements based upon DEC's issuance and reissuance of certifications for the Facility, and that written procedures existed to prevent a delivery of hazardous substance to the wrong tank or transfer of incompatible substances (Engel Aff ¶¶ 32-35). Counsel further argues that "it strains credulity that a substance could have been delivered to the wrong tank or that an incompatible substance could have been delivered" given that the only CBS tank at the facility was used for sodium hypochlorite and that the Facility did not otherwise store bulk chemicals. (Engel Aff ¶¶ 36-37.) These arguments are not persuasive and the evidence presented by respondents fails to raise a triable issue of fact rebutting Department staff's allegations concerning the spill prevention report.

Mr. Aldrich attested that the hazardous substances bulk storage registration certificate was posted on the building wall over the tank with a date of June 20, 1995 and identifying tank 1 (*see* Aldrich Aff ¶ 11), and that a hazardous substances bulk storage application was at the premises and endorsed by Mr. Santucci on May 26, 2009 for tank 2 (Aldrich Aff ¶ 21). Counsel for respondents relied upon both of these statements in opposition to the sixth cause of action, however, neither establishes that the spill prevention report included a current facility site map with the information prescribed in 6 NYCRR 598.1(k)(2)(iii). Mr. Aldrich also attested that when he inspected the Facility on September 6, 2017, respondents produced several spill prevention reports for him (Aldrich Aff ¶ 18). Section 598.1(k)(1) of 6 NYCRR requires respondents to maintain a current report at the Facility and provide it to Department staff upon request. That respondents produced a spill prevention report for their consultant after Department staff's inspection does not demonstrate compliance with section 598.1(k)(1). Respondents also submitted photographs dated 1995 showing blue print drawings of a proposed swimming pool, neither of which constitutes a current facility site map (Aldrich Aff ¶ 19, Exhibits I and K). Moreover, Mr. Moore attested that he did not receive a copy of the spill prevention report or other documents until June 2018 (Moore Aff ¶ 29).

Respondents' claims that a plan for spill response was completed and that written procedures existed to prevent delivery of a substance to the wrong tank and prohibit the transfer of incompatible substances are also not supported by the evidence in the record (*see* Aldrich Aff

¶¶ 9, 15). Mr. Aldrich attests that tank 1 contained a decal on the tank side wall with first aid information and storage and disposal directions stating, "In case of spill, flood areas with large quantities of water." He further attests that a decal was posted on the sidewall of tank sidewall 2 and that "First Aid information, and complete Precautionary Statements: Hazards to Humans and Domestic Animals were also given." (*See* Aldrich Aff ¶¶ 9, 15.) Decals affixed to the side of a tank containing hazardous material information do not demonstrate that the spill prevention report included either a plan for spill response or written site procedures to ensure the proper delivery of hazardous substances, as required under 6 NYCRR 598.1(k)(2)(x) and 598.4(b)(7).

Respondents' mootness argument is without merit. Nor does a legal basis exist, as discussed below, for respondents to claim that they relied upon Department staff's issuance of a registration certificate to conclude that the Facility was in compliance with CBS regulations. Accordingly, Department staff has made a prima facie case that respondents violated 6 NYCRR 598.1(k)(1) (fourth cause of action), 6 NYCRR 598.1(k)(2)(i) (fifth cause of action); 6 NYCRR 598.1(k)(2)(iii) (sixth cause of action), 6 NYCRR 598.1(k)(2)(iii) (seventh cause of action), 6 NYCRR 598.1(k)(2)(vii) (tenth cause of action), 6 NYCRR 598.1(k)(2)(x) (eleventh cause of action), and 6 NYCRR 598.4(b)(7) (twelfth cause of action), and respondents failed to raise triable issues of fact requiring a hearing on any of these causes of action. Staff is entitled to judgment on these causes of action.

Thirteenth Cause of Action

Department staff asserts in the thirteenth cause of action that respondents failed to properly label all fill and dispensing ports for the tanks with the chemical name or common name or category of substance, hazard warnings or tank identification number (Complaint ¶ 122). Respondents' counsel argues that the thirteenth cause of action is moot due to the corrective action they took and that the CBS tanks were "clearly and plainly labeled," and that "[t]he 'fill and dispensing parts' were in close proximity to the tank labels and clearly provided the necessary information." (Engle Aff ¶ 38; *see also* Aldrich Aff ¶¶ 6-9, 13-19.)

Section 598.4(b)(8) of 6 NYCRR requires all fill and dispensing ports for aboveground tanks which are remote from the tank to be labeled with the chemical name or common name or category of substance and, information on the point of delivery, which for a registered tank system is the tank identification number. Department staff has submitted prima facie proof that respondents violated 6 NYCRR 598.4(b)(8). Department witness Edward L. Moore attested that during his inspection of the Facility, he observed that the fill ports and dispensing ports for the CBS tanks were not labeled with the chemical name or common name or category of substance, hazard warnings, or tank identification number (Moore Aff ¶ 12[i]). Respondents offered no evidence or legal basis to raise a triable issue of fact to rebut Mr. Moore's affidavit. Mr. Aldrich's affidavit does not address the labeling of the fill and dispensing ports, and although the

photographs with his affidavit submitted show that the tanks were labeled with the name of the hazardous substance stored, they do not show the tank identification number on the tanks or the fill and dispensing ports labeled in accordance with 6 NYCRR 598.4(b)(8) (*see* Aldrich Aff Exhibits C and D). Even if relevant information was located in proximity to the fill and dispensing parts, as counsel for respondents suggests, the issue is whether the fill ports were labeled in accordance with the Department's regulations. The evidence shows that they were not. Department staff is entitled to judgment on the thirteenth cause of action.

Fourteenth Cause of Action

The fourteenth cause of action alleges that respondents failed to equip the two aboveground CBS tanks at the Facility with secondary containment systems (Complaint ¶ 126). Department witness Moore attested that during his inspection, he observed that the two aboveground tanks at the Facility were not equipped with secondary containment systems consistent with 6 NYCRR 599.9 (Moore Aff ¶ 12[j]).

The requirements for secondary containment system are set forth at 6 NYCRR parts 596, 598 and 599. Part 598 regulates facilities handling and storing hazardous substances, including aboveground tank systems that have a tank with a storage capacity of 185 gallons or greater (*see* 6 NYCRR 598.1 and 596.1[b]). By December 22, 1999, all existing aboveground tanks used to store a hazardous substance – such as tank 1 -- had to be upgraded with a secondary containment system in accordance with section 599.9 (6 NYCRR 598.5[c][1]). Aboveground tanks installed on or after February 11, 1995 that store a hazardous substance must be equipped with a secondary containment system to collect and contain a leak or spill upon installation (6 NYCRR 599.9).

Respondents do not claim that either CBS tank was equipped with secondary containment systems. Counsel contends that the fourteenth cause of action "was resolved and made moot by reason of the removal of the tanks" (Engel Aff ¶ 39). As discussed above, corrective action does not moot an enforcement proceeding. Respondents' witness Mark Millspaugh, P.E. asserts that "neither of the CBS tanks which are the subject of this matter were equipped with secondary containment." According to Mr. Millspaugh, tank 1 was installed in 1985 when such containment was not required and the Department continued to renew the registration certificates on a biennial basis, contrary to DER-12 (Millspaugh Aff ¶¶ 14-15). Mr. Millspaugh explains in his affidavit:

> At no time did DEC inform the owner that the CBS tanks required upgrade to provide secondary containment even when each renewal application submitted by the owner clearly stated that the tanks did not have secondary containment.

> It is apparent that in reviewing the CBS renewal applications, DEC staff failed to follow DER-12.

(Millspaugh aff ¶¶ 15 and 16). Mr. Millspaugh's argument is essentially one of equitable estoppel, that Department bears culpability for respondents' violation because staff renewed the CBS registration certificate even though the Facility was not in compliance with regulations, contrary to Department policy.

Estoppel, as a general proposition, may not be used against a governmental agency that is discharging its statutory duties (*see Matter of Wedinger v Goldberger*, 71 NY2d 428, 440-441 [1988]; *Waste Recovery Enterprise LLC v Town of Unadilla*, 294 AD2d 766, 768 [3rd Dep't 2002].) A government agency's error in executing its duties, for example issuing a permit contrary to the agency's rules and regulations, does not preclude the agency from correcting its mistake and enforcing the laws and regulations under its jurisdiction (*Matter of Parkview Associates v City of New York*, 71 NY2 274 [1988]). Equitable estoppel is not available against the Department unless it is determined that the Department was guilty of improper conduct and that the opposing party justifiably relied on that conduct (*see Matter of Forest Creek Equity Corp. v Department of Envtl. Conservation*, 168 Misc2d 567, 571 [Sup Ct Monroe County 1996]). The Department's tacit awareness of, or acquiescence toward, a respondent's unlawful activity does not prevent the Department from later taking action to halt that activity (*see Matter of Craig Kincade*, Decision and Order of the Commissioner, June 11, 2015 [respondent could not rely upon his previous use of State land as a defense against staff's allegation that he had no authorization from the Department to do so]). Further, estoppel may not be used when the party invoking the doctrine should have been aware of its statutory requirements through diligent research (*see Waste Recovery Enterprise LLC, supra* at 769). (*See Matter of the Edkins Scrap Metal Corp*., Ruling of the Administrative Law Judge, March 10, 2015 at 24.)

Even if respondents were unaware of the Department's CBS regulations before 2009, respondents should have been aware in 2009, when they installed a second CBS tank at the Facility, that both tanks required secondary containment and tank 1 was ten years overdue for a retrofit (*see* 6 NYCRR 599.9[1]) and 598.5[c][1]). The tanks at the Facility stored sodium hypochlorite, a hazardous substance, and met the storage capacity threshold for applicability under 6 NYCRR parts 598 and 599. Tank 1 was installed prior to February 11, 1995, and, therefore, had to be upgraded with secondary containment by December 22, 1999 (6 NYCRR 598.5[c][1]). Tank 2 was installed in 2009 and had to be equipped with secondary containment at the time of installation (*see* 6 NYCRR 599.9; Moore Aff Exhibit A). Thus, respondents should have known of their obligations under the Department's CBS regulations long before 2017. Accordingly, it was not improper for Department staff not to advise respondents of their regulatory obligations.

Respondents' claim that Department staff failed to follow DER-12 by issuing a CBS renewal certificate for CBS tanks that did not comply with current requirements and regulations (*see* Millspaugh Aff ¶¶ 14-15) does not implicate improper conduct on the part of Department staff. DER-12 is a policy document intended to provide guidance to Department staff in processing applications to register or renew registrations for petroleum bulk storage and chemical bulk storage facilities (*see* DER-12 at 1). DER-12 does not create any substantive rights on behalf of respondents, nor does it impose a regulatory obligation on Department staff with respect to CBS facility registrations. Mr. Moore attested that in the 13 years DER-12 was effective during his employment with the Department:

> I was never told by any staff member in the Division of Environmental Remediation that they could not issue a certificate until I completed an inspection or otherwise verified compliance. It would not be fair or feasible for Department staff to withhold a facility's certificate until they were verified to be in compliance. There are nearly 200 active, registered chemical bulk storage facilities in Region 3 alone

(Moore Aff 2 ¶ 15). Although Department staff may have missed the Facility's non-compliance with CBS regulations, nothing in the record indicates that the conduct of Department staff was improper. As discussed above, the obligation to comply with CBS regulations rested squarely with respondents who maintained and operated two 550 gallon tanks that stored a hazardous substance.

Department staff has a made a prima facie showing that neither tank was equipped with a secondary containment system as required and respondents have not raised triable issues of fact in response. Department staff is entitled to judgment on the fourteenth cause of action.

Fifteenth Cause of Action

Department staff alleges in the fifteenth cause of action that respondents failed to install spill prevention methods at all pumps and valves for the CBS tanks in accordance with 6 NYCRR 598.5(e)(1), (2), or (3), thereby violating section 598.5(e) (Complaint ¶ 130). Section 598.5(e) states that by December 22, 1999, the owner or operator must prevent spills and leaks at all pumps and values which control a liquid hazardous substance by using one or more methods authorized in regulation. Department witness Edward Moore attested in his affidavit in support of staff's Motion that the spill prevention methods were not installed on all pumps and valves for the two CBS tanks (Moore Aff ¶ 12[k]).

Counsel for respondents claims that the fifteenth cause of action is moot due to the corrective actions respondents took and, in any event, "the pumps and valves were, at all times,

properly maintained and that no spills occurred" (Engel aff ¶ 40). In support, counsel for respondents relies on paragraphs 6-9 and 13-19 of the affidavit of Rodney Aldrich.

Counsel's argument that no spill occurred at the Facility is irrelevant to a finding of liability. The focus of 6 NYCRR 598.5(e) is whether respondents utilized one of three authorized spill prevention methods on the pumps and values connected to the CBS tanks to prevent spills from occurring. Notably, Mr. Aldrich's affidavit makes no claim that any spill prevention methods authorized in 6 NYCRR 598.5(e) was utilized at the Facility. With respect to tank 1, Mr. Aldrich asserts that the "outlet was dry with no evidence of leakage at the fitting that connected to the tank immediately above the bottom of the tank" and that the "piping, in a mechanical room internal of the building adjacent to tank 1 was dry with no evidence of any release" (Aldrich Aff ¶¶ 10, 12). These statements do not demonstrate compliance with section 598.5(e). Similarly, Mr. Aldrich attests with respect to tank 2, "[t]here was no evidence of leaks or stains on the surface of tank 2. There was no evidence of a release below tank 2. The outlets were dry with no evidence of leakage at or from the fittings which connected to the top of Tank 2" (*see* Aldrich Aff ¶ 16). Once again, these statements skirt the central issue which is whether the pumps and valves utilized one of three acceptable methods for preventing a spill and not whether a spill occurred.

In sum, the record lacks any evidence that the valves and pumps on the CBS tanks were properly equipped with an authorized spill prevention method. Accordingly, Department staff has made a prima facie showing that respondents violated 6 NYCRR 598.5(e), and respondents raise no triable issues of fact. Staff is entitled to judgment on the fifteenth cause of action.

Sixteenth and Seventeenth Causes of Action

Department staff alleges in the sixteenth cause of action that respondents failed to conduct a comprehensive annual inspection in violation of 6 NYCRR 598.7(b)(2) and 598.7(c)(1) (*see* Complaint ¶¶ 134, 138). Department witness Moore attested that during his inspection he observed that respondents had failed to conduct either an annual or a five-year inspection as required by the regulations (Moore Aff ¶¶ 12[l] and [m]).

Sections 598.7(b)(2) and 598.7(c)(1) of 6 NYCRR require annual and five year inspections, respectively. Counsel for respondents argues, unpersuasively, that the sixteenth and seventeenth causes of action are moot due to the corrective actions respondents took, an argument I have already rejected (Engel Aff ¶ 40). Respondents produced no evidence that they conducted an annual or a five-year inspection with their papers to rebut the charges in the Complaint.

Department staff has made a prima facie showing that respondents failed to conduct either an annual inspection of the CBS tanks or a five-year inspection of the CBS and respondents raise no triable issues of fact. Staff is entitled to judgment on the sixteenth and seventeenth causes of action.

Nineteenth, Twentieth, and Twenty-First Causes of Action

The nineteenth, twentieth, and twenty-first causes of action allege, respectively, that respondents failed to mark the aboveground piping for the two CBS tanks with a label, stencil, or plate for the substance stored in violation of 5 NYCRR 599.13(c)(4) (Complaint ¶ 147); failed to install an overfill prevention system in violation of 6 NYCRR 599.17(b)(1)(i) (Complaint ¶ 150); and failed to install transfer area secondary containment in violation of 6 NYCRR 599.17(c) (Complaint ¶ 155). These charges are supported by the affidavit of Mr. Moore (*see* Moore Aff ¶¶ 12[n], [o], and [p]).

Counsel for respondent asserts that these causes of action "have been rendered moot due to the corrective actions taken by Respondents. Moreover, it is apparent that the pumps and valves were, at all times properly maintained and that no spills occurred" (Engel Aff ¶ 16). In support, counsel points to the affidavit of respondents' witness Aldrich (Aldrich aff ¶¶ 6-9, 13-19). Counsel's arguments are not persuasive.

Section 599.13(c)(4) requires all aboveground pipes to be labeled as follow:

> All new aboveground piping must bear a stencil, label or plate which contains the chemical name or common name if the chemical name is not appropriate, for the substance stored. The stencil, label or plate must be located at all valves, pumps, switches, and on each side of any wall where piping enters or exits. At least one conspicuously visible label must be provided at each end of the piping.

With respect to tank 1, Mr. Aldrich attests that "[a] sign stating the contents of Tank 1 was present consisting of a decal on the tank sidewall above the outlets" (Aldrich Aff ¶ 9). With respect to tank 2, Mr. Aldrich attests, "Tank 2 had two plastic pipe outlets on the topside. A sign stating the contents of the tank consisted [sic] of a decal was posted on the sidewall of the tank" and that "the piping, in a mechanical room internal to the building adjacent to tank 2 was dry with no evidence of a release" (Aldrich Aff ¶¶ 15, 17). Mr. Aldrich further attested he reviewed a drawing "identified as S-1/3, entitled, 'Proposed Swimming Pool for The Club at Montrose,'" which was prepared by an engineering firm with a note next to an arrow pointing to the chlorine transfer line which read, "Chlorine feed line to be installed from existing 500 gal chlorine tank located in an outside shed west of the building to the chlorine dispenser. Use 3/8" rigid PVC affixed to

wall in existing equipment room and pitch at a min slope of 1% to the new chlorine dispenser" (Aldrich Aff ¶ 18). Essentially Mr. Aldrich argues that no harm occurred inasmuch as the tanks did not leak, and, in any case, pertinent information regarding the aboveground piping could be found at the Facility.

Nothing in Mr. Aldrich's affidavit, however, raises a factual issue that respondents labeled the aboveground piping associated with the CBS tanks as required by the Department's regulations, or rebutted the affidavit of Mr. Moore who attested that the piping associated with the CBS tanks was not labeled with the name of the hazardous substance as required by 6 NYCRR 599.13(c)(4) (Moore Aff ¶ 29[e]).

Department witness Moore also attested that respondents failed to equip the two CBS tanks with overfill prevention systems or a permanently installed secondary containment system (Moore Aff ¶ 12[o] and [p]). Pursuant to section 599.17(b)(1)(i) of 6 NYCRR aboveground tanks must be equipped with devices to alert facility operators that the volume of hazardous substance has reached the tank capacity and automatically shut off or restrict the flow of the hazardous substance to prevent overfills. Likewise, the transfer of a hazardous substance to a tank must occur within a transfer station that is equipped with a permanently installed secondary containment system (6 NYCRR 599.17[c]). Respondents presented no evidence that the CBS tanks at the Facility had installed overfill prevention equipment or a permanent secondary containment system.

In sum, Department staff has made a prima facie showing that respondents failed to properly label the piping associated with the CBS tanks in violation of 6 NYCRR 599.13[c][4]; failed to equip the tanks with an overfill prevention system in violation of 6 NYCRR 599.19(b)(1)(i); and failed to equip the transfer station with a permanently installed secondary containment system (6 NYCRR 599.17[c]). Respondent raise no triable issues of fact. Accordingly, Department staff is entitled to judgment on the nineteenth, twentieth and twenty-first causes of action.

Settlement Discussions

Respondents claim their rights have been abrogated because Department staff's Complaint sets forth allegations pertaining to settlement discussions, which respondents claim are inadmissible in enforcement proceedings and cannot be raised as evidence of liability or to support a claim for damages (*see* Engle Aff ¶¶ 14-23). Specifically, paragraph 50 alleges that Department staff offered respondent Santucci an order on consent on November 28, 2017 and a revised order on consent with a reduced payable penalty on January 16, 2018 and could not reach a settlement (*see* Complaint ¶ 50). Respondents contend that the Administrative Law Judge must "give effect to the rules of privilege recognized by New York State Law" pursuant to 6 NYCRR

622.11(a) (*see* Moore Aff ¶ 15), and that "CPLR § 4547 sets forth the rule of privilege that applies to settlement or 'compromise negotiations;' specifically, 'evidence of any conduct or statement made during compromise negotiations shall also be inadmissible'" (*id* ¶ 16).

CPLR 4547, entitled "Compromise and offers to compromise," is a rule of evidence and states that communications and conduct during settlement negotiations are not admissible as proof of liability for or invalidity of a claim or amount of damages (*see Soumayah v Minnelli*, 41 AD3d 390, 393 [1st Dept 2007]). The provision does not state that settlement discussions or conduct are "confidential" or "privileged," and, therefore, does not provide a basis for a confidentiality privilege (*see* Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 4547, at 842-844; *see also Matter of Town of Waterford v New York State Dept. of Envtl. Conservation*, 77 AD3d 224, 233 [3d Dept], *appeal dismissed* 15 NY3d 906 [2010], *affirmed as modified* 18 NY3D 652 [2012]).

That the parties did not reach a settlement of the violations alleged in the Complaint is apparent from the fact that Department staff has pursued litigation. A statement that a case did not settle prior to Department staff initiating formal enforcement has no bearing on the determination of respondents' liability and does not implicate CPLR 4547. Department staff has not disclosed the details of the settlement talks with respect to any cause of action, and respondents have had a full opportunity to rebut the charges in the Complaint.

Additionally, as discussed below, respondents will have the opportunity to challenge the proposed civil penalty at an adjudicatory hearing. The offer of settlement will have no bearing on the penalty amount and respondents can raise any mitigating factors they believe relevant to the determination of the civil penalty amount. That respondents may be assessed a higher civil penalty following the hearing than if they had settled the charges in the Complaint is contemplated by the Civil Penalty Policy and does not implicate a CPLR 4547 issue (*see* DEE-1 II Penalty Policy Purpose "[t]he penalty amounts calculated with the aid of this guidance in adjudicated cases must, on average and consistent with consideration of fairness, be significantly higher than the penalty amounts which DEC accepts in orders which are entered into voluntarily by respondents"). The intent of the Civil Penalty Policy is to provide an incentive and benefit to those who voluntarily enter into a binding agreement to come into compliance by assessing a lower penalty amount than what would be assessed after a hearing (*id*.). This policy objective will factor into the penalty assessment along with respondents' objections to the proposed penalty amount.

D. Civil Penalty

In its Motion, Department staff seek a civil penalty in the amount of $73,200 (Welsch Aff ¶ 8). Respondents object to the assessment of any civil penalty given that all violations have

been resolved, in view of the Department's "actions in derogation of respondents' rights to fair treatment by the Department and a fair hearing" (Engel Aff ¶ 59). Respondents also object on the grounds that the penalty "grossly exceeds the penalties assessed in recent decisions by the Commissioner in matters in which the facilities were not registered and all the violations remained unresolved at the conclusion of such matters" (Engel Aff ¶ 60).

A defendant who appears in an action is entitled to notice of the inquiry on damages, and an opportunity to offer proof in mitigation of damages (*see McCelland v Climax Hosiery Mills 252 NY2d at 351; Amusement Bus. Underwriters v American Intl. Group*, 66 NY2D at 880; *see also Eden Park Health Services, Inc. v Estes*, 2 AD2d 1186 [3d Dept 2003]; *see also* 22 NYCRR 202.46 [Damages, inquest after default; proof]). Respondents have indicated their desire to challenge Department staff's proposed civil penalty and are entitled to a hearing for that purpose and to offer any proof of mitigation of damages as they see fit. No infringement of respondents' rights has occurred in this proceeding that warrant or justify dismissal of the charges as respondents will have the opportunity to adjudicate the civil penalty.

E. Remedial Relief

Department staff requests that the Commissioner order respondents to investigate and remediate the sodium hypochlorite contamination at the Facility in accordance with a Department-approved work plan (*see* Motion, Wherefore Clause B).

Pursuant to 6 NYCRR 598.14(d)(1), an owner or operator of a facility must investigate all "actual, probable or suspected releases or spills requiring reporting" to determine the quantity of the release or spill and the extent of contamination and any threat to public health, safety or the environment. As noted herein, respondents conducted a site assessment pursuant to a Department approved work-plan. Upon reviewing the results of the investigation, the Department may require "the collection, evaluation and submission of additional information and preparation of a response and corrective action plan" (6 NYCRR 598.14[d][2]). The Department may direct an owner or operator to initiate corrective action or take other response actions, including removing and disposing of contaminated soil, or taking other remedial actions to protect the public health, safety or environment (6 NYCRR 598.14[e][i] and [x]).

The question here is whether follow up action is necessary and, if so, what action is appropriate. Mr. Moore attested that respondents' initial site assessment indicates that the soil samples taken where the CBS tanks were located show elevated pH levels compared to the pH levels of the background soil samples and indicate soil contamination consistent with a release of sodium hypochlorite. He stated that during his investigation, he observed no grass growing beneath or around the CBS tanks, indicating a possible release of sodium hypochlorite (Moore Aff ¶ 20). Mr. Moore opined that higher pH levels in the soil beneath the CBS tanks indicated

soil contamination consistent with a release of sodium hypochlorite. (*See* Moore Aff ¶¶ 25-26, Exhibit N.)

In their Answer, respondents claim that road salt caused the elevated pH levels beneath the tank area (Answer, Exhibit C). Respondents attached a chart showing the pH levels of common substances, including pure water and blood which have a pH of 7, baking soda, sea water and eggs which have a pH of 8 and permanent solutions which have a pH of 9 (Answer Exhibit D). In his affidavit in support of respondents' Cross Motion and in opposition to the Motion, Mr. Millspaugh claims that the site assessment showed no releases of sodium hypochlorite occurred at the Facility and that if a release had occurred, the pH of the underlying soil "should reveal a significantly elevated pH" (Millspaugh Aff ¶ 20). Mr. Millspaugh asserts that the background soil samples were wetter and more acidic due to recent rainfall, as compared to the soil samples taken underneath the tanks, which were shielded from precipitation and, therefore, drier. According to Mr. Millspaugh, the acidic precipitation likely explains "the slight difference in pH between the samples at the tank locations as compared to the pH observed at background locations" and that even a small release of sodium hypochlorite "would have elevated the pH of the soil to a value much greater than the range revealed by the onsite soil sampling" (Millspaugh Aff ¶ 22).

Mr. Moore attests that evidence of actual or potential harm at the Facility is indicated by the soil samples and that the pH of the soil would not need to be even close to the pH of sodium hypochlorite to confirm a release. Mr. Moore further contends that the tanks were vulnerable to overfills and were situated on wooden pallets exposed to soil. He notes that the CBS tanks had no secondary containment, no overfill prevention systems, no spill prevention methods and no transfer area secondary containment and, thus, lacked proper protections to prevent a release to the environment in the event of an overfill. He further points out that the wood visible in the photograph in Exhibit B of the Aldrich affidavit, associated with tank 1, appears bleached which may indicate one or more overfills. (Moore Aff 2 ¶¶ 10-11.)

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.

Because a factual dispute exists between the parties with respect the results of the site assessment and what, if any, additional investigation and remedial action is necessary, this issue will be set for an adjudicatory hearing.

F. Respondents' Request to Voir Dire Department Staff

Respondents seek to voir dire "those individuals who have submitted affidavits in this matter" regarding the alleged authority and knowledge of the affiants. Respondents specifically seek to question Department witness Edward Moore regarding: (1) his interpretation of DER-12[1]; (2) his claim with respect to the basis for the elevated pH in the soil; (3) his claim regarding avoided compliance costs; and his claim that the *Matter of Sullivan Pools, Inc.* (DEC Case No. R3-20170810-154) consent order is not applicable to this matter (Letter from David A. Engel, Esq. to ALJ Wilkinson dated November 30, 2018 [Engel Letter]). In an email dated December 7, 2018, Mr. Engel reiterated his request to conduct a voir dire of Mr. Moore.

Department staff opposes respondents' request. Staff contends that Mr. Engel's letter is essentially a sur-reply to staff's response to respondents' Cross Motion and that 6 NYCRR 622.6(c)(3) prohibits any such replies without permission of the ALJ. According to staff, the Department's regulations only allow depositions and written interrogatories with the consent of the ALJ upon a finding that they are likely to expedite the proceeding (6 NYCRR 622.7[b][2]). Staff argues that Mr. Engel has not demonstrated a need to examine Mr. Moore.

The Department's regulations and administrative precedent require a party seeking to examine a witness outside an adjudicatory hearing to demonstrate that the examination will expedite the proceeding and that unique or unusual circumstances exist warranting a departure from the typical administrative practice of examining a witness only at a hearing (*see* 6 NYCRR 622.7[b][2]; *Matter of C and J Enterprises, LLC*, Ruling of the Administrative Law Judge, January 18, 2018). Similar restrictions exist with respect to other disclosure devices in Part 622 (*see e.g*. 6 NYCRR § 622.7[b][3] [bills of particulars are not permitted] *and* section 622.7[b][2] [written interrogatories only allowed with ALJ permission and upon finding that they are likely to expedite the proceeding]), and are fully authorized by State Administrative Procedure Act § 305 ("[e]ach agency having power to conduct adjudicatory proceedings may adopt rules providing for discovery and depositions to the extent and in the manner appropriate to its proceedings").

Respondents have failed to demonstrate that a voir dire of Mr. Moore, or any other Department witness, would expedite this proceeding or that unique circumstances exist that necessitate this relief. Among the issues respondents contend justifies their request is their dispute with Department staff concerning the significance of the pH levels of the soil. This issue

[1] DER-12 – Application Review Policy for PBS and CBS Registration Applications (October 14, 2005 [DER-12]).

will be addressed at the adjudicatory hearing. Respondents also seek to question Department staff regarding the proposed civil penalty, including the relevance of the *Matter of Sullivan Pools* consent order and staff's estimate of respondents' avoided compliance costs. The civil penalty will also be addressed at the adjudicatory hearing. Respondents' questions concerning Mr. Moore's interpretation of DER-12 do not raise a triable issue of fact, as I discuss above, and do not necessitate a voir dire of Mr. Moore. Under the Department's uniform enforcement hearing procedures in part 622, respondents can seek discovery of Department staff with respect to the adjudicable issues and will have the opportunity to examine the Department staff's witnesses at the hearing. A pre-hearing examination of Department staff would be duplicative of these efforts and would delay, rather than expedite, this proceeding.

Because respondents have failed to meet their burden to demonstrate why a voir dire of Department staff is necessary or would expedite this proceeding, their request is denied.

RULING

Based on my review of the parties papers and the exhibits attached thereto, my ruling on Department staff's Motion and respondents' Cross Motion is as follows.

1. Department staff's motion for order without hearing dated October 4, 2018 is granted on the issue of liability as follows:

    a. 6 NYCRR 596.2(j)(1) for failing to label tank 1 and tank 2 with the tank system identification number;
    b. 6 NYCRR 596.2(j)(3) for failing to label tank 1 with the design capacity and working capacity of the tank
    c. 6 NYCRR 598.1(k)(1) for failing to maintain the spill prevention report at the Facility;
    d. 6 NYCRR 598.1(k)(2)(i) for failing to include registration application and certificate in the spill prevention report;
    e. 6 NYCRR 598.1(k)(2)(iii) for failing to include a copy of a current facility site map in the spill prevention report;
    f. 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;
    g. 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;
    h. 6 NYCRR 598.1(k)(2)(x) for failing to include a spill response plan in the spill prevention report;

i. 6 NYCRR 598.4(b)(7) for failing to include written site procedures in the spill prevention report;
j. 6 NYCRR 598.4(b)(8) for failing to label fill ports;
k. 6 NYCRR 598.5(c)(1) for failing to equip the CBS tanks with secondary containment systems in accordance with 6 NYCRR 599.9;
l. 6 NYCRR 598.5(e) for failing to install spill prevention methods at the pumps and valves for the CBS tanks;
m. 6 NYCRR 598.7(b)(2) for failing to conduct a comprehensive annual inspection;
n. 6 NYCRR 598.7(c)(1) for failing to conduct a five-year inspection during the last five years;
o. 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;
p. 6 NYCRR 599.17(b)(1) for failing to install overfill prevention systems for the CBS tanks; and
q. 6 NYCRR 599.17(c) for failing to install a transfer area secondary containment system.

2. Department staff's Motion is denied on the third cause of action insofar as it alleges that a violation of 6 NYCRR 596.2(j)(3) for tank 2. This issue will be set for hearing.

3. Respondents' Cross Motion to dismiss the Complaint is denied in its entirety.

4. A determination on the civil penalty and remedial relief requested in staff's Motion is reserved pending further proceedings in this matter.

Accordingly, Department staff's Motion is granted in part and otherwise denied, and respondents' Cross Motion is denied. The Office of Hearings and Mediation Services will schedule a conference call with the parties in the near future to discuss further proceedings in this matter.

_____/s/_____
Lisa A. Wilkinson
Administrative Law Judge

Dated: January 18, 2019
Albany, New York

MOTION PAPERS

Matter of Cordlandt Club Inc. and Val Santucci
Case No. R3-20171003-174

The following papers were considered on this ruling:

Department Staff Motion for Order Without Hearing

- Notice of notion dated October 4, 2018
- Affirmation of Ashley Welsch dated October 4, 2018 in support of motion for order without hearing attaching
    - Complaint dated March 9, 2018 attaching
        - Exhibit A - NYS Department of State entity information for Cortlandt Racquet Club, Inc.
        - Exhibit B – Westchester County real property record
        - Exhibit C – NYS DEC CBS program facility information report for Cortlandt Racquet Club, Inc.
        - Exhibit D – 2017 Spill Prevention Report
        - Exhibit E – Notice of Violation dated September 6, 2017 issued to Val Santucci and Cortlandt Racquet Club, Inc.
        - (unnumbered) – Hazardous Substance Bulk Storage Application
    - Answer dated April 9, 2018 (see below for attached exhibits).
- Affidavit of Edward L. Moore, P.E., sworn to October 2, 2018 attaching
    - Exhibit A - Hazardous Substance Bulk Storage Application
    - Exhibit B – Chemical Bulk Storage Certificate
    - Exhibit C - NYS DEC CBS program facility information report for Cortlandt Racquet Club, Inc.
    - Exhibit D – Email from Edward L. Moore to KLENT @PREMIERE ATHLETIC CLUB.COM
    - Exhibit E - Notice of Violation dated September 6, 2017 issued to Val Santucci and Cortlandt Racquet Club, Inc.
    - Exhibit F – Letter from Rodney L. Aldrich P.E. to Edward L. Moore, P.E. dated September 13, 2017
    - Exhibit G – Email from Edward L. Moore to Rodney Aldrich dated September 14, 2017
    - Exhibit H - Letter from Rodney L. Aldrich P.E. to Edward L. Moore, P.E. dated October 24, 2017
    - Exhibit I – Email from Edward Moore to Sterling Environmental and Premiere Athletic Club re NOV dated October 24, 2017

- Exhibit J - Letter from Rodney L. Aldrich to NYSDEC Spill Prevention & Bulk Storage Program dated December 22, 2017
- Exhibit K – Letter from Andria Daniels (NYSDEC) to Val Santucci & Premier Athletic Club dated January 4, 2018
- Exhibit L - Letter from Rodney L. Aldrich P.E. to Edward L. Moore, P.E. dated January 16, 2018
- Exhibit M - Email from Edward Moore to Sterling Environmental and Premiere Athletic Club dated January 16, 2018
- Exhibit N - Letter from Rodney L. Aldrich P.E. to Edward L. Moore, P.E. dated February 2, 2018, attaching daily field logs and Alpha Analytics Report
- Exhibit O – Premier Athletic Club 2017 Spill Prevention Report

Department Staff Opposition to Cross Motion

- Affirmation of Ashley Welsch in Opposition to Respondents' Motion to Dismiss dated November 26, 2018 attaching
  - Exhibit A – *Matter of RO Acquisition Corp. and Industrial Finishing Products, Inc*. order on consent effective October 17, 2012
- Affidavit of Edward L. Moore sworn to November 24, 2018

Department Staff Objection to Respondents' Sur Reply and Request to Voir Dire Department Staff

- Letter from Ashley Welsch to ALJ Lisa Wilkinson dated December 3, 2018

Respondents

- Answer dated April 9, 2018 attaching
  - Exhibit A – photographs of tanks
  - Exhibit B – Letter from Rodney L. Aldrich to Edward L. Moore dated January 16, 2018
  - Exhibit C – Letter from Rodney L. Aldrich to Edward L. Moore dated February 2, 2018 attaching daily field logs and Alpha Analytics Report
  - Exhibit D – pH Chart

- Affirmation of David A. Engel in opposition to motion for order without hearing and in support of cross motion to dismiss complaint dated November 7, 2018, attaching
  - Exhibit A – *Matter of Sullivan Pools, Inc*. order on consent executed by respondent on August 29, 2017 (incomplete copy)

- Affidavit of Mark P. Millspaugh, P.E., in opposition to motion for order without hearing and in support of cross motion to dismiss complaint, sworn to November 6, 2018 attaching
  - Exhibit A – Mark P. Millspaugh P.E. resume

    - Exhibit B – DER-12: Application Review Policy for PBS and CBS Registration Applications
    - Exhibit C - *Matter of Sullivan Pools, Inc*. order on consent effective August 31, 2017

- Affidavit of Rodney L. Aldrich, P.E., in opposition to motion for order without hearing and in support of cross motion to dismiss complaint, sworn to November 7, 2018 attaching
    - Exhibit - Tank 1 installation
    - Exhibit B- Tank 1
    - Exhibit C- Tank 1
    - Exhibit D - Close of up of label directions for spill
    - Exhibit E - Hazardous bulk storage registration certificate tank 1
    - Exhibit F - Day tank and piping for tank 1
    - Exhibit G - Tank 2
    - Exhibit H- Photograph of Drawing S-1/3 showing drawing title
    - Exhibit I - Photograph Drawing S-1/3 showing drawing date and revision dates
    - Exhibit J - Photograph Drawing S-1/3 showing chlorine tank note
    - Exhibit K - Photograph of tank 2 showing embossed capacity label of 535 gallons
    - Exhibit L - Spill prevention report May 30, 2007
    - Exhibit M - Spill prevention report May 30, 2007 with text of plan
    - Exhibit N - Chemical bulk storage certificate
    - Exhibit O - Spill prevention report July 12, 2011
    - Exhibit P - Spill prevention report May 12, 2017 with text of plan
    - Exhibit Q – Hazardous substance bulk storage application
    - Exhibit R – October 24, 2017 tank closure notification
    - Exhibit S – Site assessment work plan January 16, 2018
    - Exhibit T – Site assessment work plan completed tasks report February 2, 2018

- Letter from David Engel to ALJ Wilkinson dated November 30, 2018 regarding request to voir dire Department witnesses
- Email from David Engel to ALJ Wilkinson dated December 7, 2018 regarding request to voir dire Department witnesses