NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Articles 15, 17, 19, 25 and 27 of the Environmental Conservation Law ("ECL") of the State of New York, Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") Parts 215, 360, 608 and 661, and Article 12 of the Navigation Law

RULING

by

DEC Case No. R2-20131206-527

EDKINS SCRAP METAL CORP., EDKINS AUTO SALES, INC., 2319 RICHMOND TERRACE CORP., BENEDETTO DICOSTANZO, MARIA DICOSTANZO, and HELENE IACONO,

Respondents.

Appearances of Counsel:

-- Edward F. McTiernan, Deputy Commissioner and General Counsel (Jessica Steinberg Albin of counsel), for staff of the Department of Environmental Conservation

-- Felix T. Gilroy, for respondents Edkins Scrap Metal Corp., Edkins Auto Sales Inc., 2319 Richmond Terrace Corp. and Benedetto DiCostanzo

-- The Luthmann Law Firm, PLLC (Richard A. Luthmann of counsel), for respondents Maria DiCostanzo and Helene Iacono

In this administrative enforcement proceeding, New York State Department of Environmental Conservation (DEC or Department) staff charges respondents Edkins Scrap Metal Corp., Edkins Auto Sales, Inc., 2319 Richmond Terrace Corp., Benedetto DiCostanzo, Maria DiCostanzo and Helene Iacono with placing fill, including solid waste, into the navigable waters of the State, tidal wetlands and tidal wetlands adjacent areas, as well as operating a commercial non-water-dependent business within

the tidal wetland and adjacent area, without a permit on properties owned or operated by respondents in Staten Island, Richmond County. The parties have filed various motions addressed to the alleged violations including Department staff's motion for an order without hearing and respondents' cross motions to dismiss or otherwise deny staff's motion and set the matter for hearing. This ruling addresses the parties' various motions and requests.

Proceedings

On August 25, 2014, Department staff served respondents with a motion for order without hearing in lieu of complaint, dated August 20, 2014, and filed the motion with the Office of Hearings and Mediation Services. Department staff alleges that respondents violated ECL articles 15, 17, 19, 25 and 27, 6 NYCRR parts 215, 360, 608 and 661 and Navigation Law article 12. In support of its motion, Department staff submitted a supporting affirmation of Jessica Steinberg Albin, dated August 25, 2014 (with Exhibits A-N attached), and supporting affidavits of John Cryan, sworn to July 25, 2014; Steven Sangesland, sworn to July 11, 2014; Melissa Cohen, sworn to July 25, 2014; and George Stadnik, sworn to August 5, 2014 (with Exhibit 1 attached). The exhibit list is attached to this hearing report.

In support of its motion for order without hearing, Department staff provided the exhibits noted in the attached exhibit list including the deeds to the properties in question and various inspection reports, notices of violations and photographs.

Respondents Edkins Scrap Metal Corp., Edkins Auto Sales Inc., 2319 Richmond Terrace Corp. and Benedetto DiCostanzo, through counsel, Felix T. Gilroy, Esq., filed a notice of appearance and opposition to staff's motion for order without hearing, dated November 4, 2014, and cross-moved for an order denying Department staff's motion and relief requested, and dismissing staff's motion, or in the alternative, that a hearing be held to determine the factual issues and on the affirmative defenses pleaded by respondents. The notice of cross motion, dated November 3, 2014, was supported by affirmation of Mr. Gilroy, dated November 3, 2014 (containing specific and general denials and nine affirmative defenses) and the supporting affidavit of Benedetto DiCostanzo, sworn to November 5, 2014.

Respondents Maria DiCostanzo and Helene Iacono, through counsel, Richard A. Luthmann, Esq., opposed staff's motion and cross-moved for an order denying Department staff's motion and relief requested, and dismissing staff's application or in the alternative, that a hearing be held to determine the matter. The notice of cross motion, dated November 4, 2014, was supported by the affirmation of Mr. Luthmann, dated November 4, 2014 (containing specific and general denials and nine affirmative defenses) and the supporting affidavit of Maria DiCostanzo, sworn to November 4, 2014.

The Luthmann and Gilroy Affirmations are identical in their denials, admissions and affirmative defenses. Exhibits attached to the respondents' submissions are listed in the attached exhibit list.

Department staff opposed respondents' cross motions by affirmation of Ms. Albin, dated November 20, 2014, and affidavits of George Stadnik, sworn to November 19, 2014 and Steven Sangesland, sworn to November 20, 2014. In addition, staff moved to strike all of respondents' affirmative defenses. Staff provided additional exhibits as listed in the attached exhibit list.

By correspondence from Mr. Luthmann dated November 23, 2014, respondents Maria DiCostanzo and Helene Iacono requested leave to amend and supplement papers. In the same letter, respondents provided amended language for Ms. DiCostanzo's affidavit, provided a copy of new evidence (a September 23, 2014 letter from DEC staff with a September 10 and September 17 inspection report) and responded to Department staff's opposition to the cross motions and motion to strike respondents' affirmative defenses.

By email dated November 25, 2014, Chief Administrative Law Judge James T. McClymonds advised the parties that the matter had been assigned to me.

By correspondence from Ms. Albin dated November 25, 2014, Department staff opposed respondents' November 23, 2014 request and objected to respondents providing the amendment, evidence and arguments before leave was granted. Staff requested a ruling on staff's motion for order without hearing.

In return, Mr. Luthmann by letter dated December 1, 2014 represented that Mr. Gilroy adopts the arguments made in Mr. Luthmann's November 23, 2014 correspondence. Mr. Luthmann

further argued that the affidavits in support of staff's opposition to the cross motions present new evidence; raise new issues of fact requiring a response; and demonstrate that staff's motion for order without hearing is defective.

I. Summary of the Parties' Positions

A. Department Staff

Department staff's motion for order without hearing constitutes the complaint in this matter. In the motion, Department staff alleges that respondents violated the ECL and Department regulations over the course of thirty-two years. The Albin Affirmation contains nine causes of action, each related to violations noted during specific inspections.[1]

1. The site and ownership

Department staff alleges the violations occurred on the site, which staff defines as the six parcels of land identified in the motion as Richmond County Tax Block 1070 Lots 62, 65, 68, 71 and 79 and Block 1105 Lot 1. Lot 62 is owned by respondent Benedetto DiCostanzo; Lots 65, 71 and 79 are owned by respondents Benedetto DiCostanzo, Maria DiCostanzo and Helene Iacono as tenants in common; Lot 68 is owned by respondent Edkins Auto Sales, Inc.; and Lot 1 is owned by respondent 2319 Richmond Terrace Corp.

Staff alleges that the site abuts the Kill Van Kull and that the Kill Van Kull is a navigable waterway and a Class SD Saline Surface Water. Staff also alleges that the site is mapped as a tidal wetland and contains tidal wetland adjacent area.

2. Wetlands Violations

Staff asserts that respondents violated ECL 25-0401 and 6 NYCRR part 661. Staff alleges that respondents placed fill in a regulated tidal wetland and tidal wetland adjacent area without a permit. In addition, staff alleges respondents operated a commercial non-water-dependent business in a tidal wetland and tidal wetland adjacent area without a permit. These violations

[1] Department staff organized its causes of action by the dates of specific inspections and the violations noted on those dates rather than by the types of violations. For purposes of discussion, I organize this report by the types of violations.

were noted by inspections conducted on December 13, 1982 (first cause of action – second and third counts); March 25, 1985 (second cause of action – second and third counts); October 11, 1988 (third cause of action – second and third counts); January 25, 1991 (fourth cause of action – second and fifth counts); June 26, 1991 (fifth cause of action – third, fourth and sixth counts); October 19 and 20, 1992 (sixth cause of action – second, sixth and eighth counts); April 5, 2012 (seventh cause of action – third and fourth counts); March 22, 2013 (eighth cause of action – second and third counts) and August 8, 2013 (ninth cause of action – second and third counts).

3. Navigable Water Violations

Staff alleges that respondents violated ECL 15-0505 and 6 NYCRR 608.5 by placing fill, including solid waste, in navigable waters of the State without a permit. These violations were alleged to occur on December 13, 1982 (first cause of action – first count); March 25, 1985 (second cause of action – first count); October 11, 1988 (third cause of action – first count); January 25, 1991 (fourth cause of action – first count); June 26, 1991 (fifth cause of action – first and fifth counts); October 19 and 20, 1992 (sixth cause of action – first and seventh counts); April 5, 2012 (seventh cause of action – second count); March 22, 2013 (eighth cause of action – first and fourth counts) and August 8, 2013 (ninth cause of action – first and fourth counts).

4. Pollution of Marine District Waters

Staff alleges respondents violated ECL 17-0503 by causing waste, which could affect fish and shellfish, to drain into the waters of the State and marine district. This violation was noted by inspections conducted on January 25, 1991 (fourth cause of action – third count) and June 26, 1991 (fifth cause of action – second count).

5. Waste Tire Violations

Staff alleges that respondents violated 6 NYCRR 360-13 by storing more than 1,000 used tires without a permit. This violation was alleged to have occurred on January 25, 1991 (fourth cause of action – fourth count) and October 19 and 20, 1992 (sixth cause of action – tenth count).

6. Navigation Law Violations

Staff alleges that respondents violated Navigation Law §§ 173, 175 and 176 by discharging oil on the site, failing to report the discharge of petroleum and failing to remove the discharge of petroleum. The violations were alleged to occur on October 19 and 20, 1992 (sixth cause of action – third, fourth and fifth counts).

7. Air Pollution Violations

Staff alleges respondents violated 6 NYCRR 215.2 by burning wood, aluminum cans, plastic, glass, scrap metal and car foam seats in an open metal basin. This violation was noted by an inspection conducted on April 5, 2012 (seventh cause of action – first count).

8. Solid Waste Violations

Staff alleges respondents violated ECL 27-0707 and 6 NYCRR part 360 by operating a solid waste transfer facility without a permit. Staff alleged this violation occurred during staff's October 19 and 20, 1992 inspections (sixth cause of action – ninth count).

9. Penalty and Remedial Relief

Staff is seeking a civil penalty in the amount of $361,000 and an order directing respondents to remove all illegally placed fill on and adjacent to the site including the tidal wetlands, tidal wetlands adjacent area and navigable water of the State. Staff also seeks an order that directs respondents to restore the portions of tidal wetlands and tidal wetland adjacent areas that were adversely affected by respondents' unpermitted activities, under the direction of the Department.

B. Respondents

Respondents oppose staff's motion and move to have staff's motion dismissed, or in the alternative request that a hearing be held. As noted above, the Gilroy and Luthmann affirmations contain identical denials, admissions and affirmative defenses. These affirmations constitute respondents' answers. For the most part respondents deny Department staff's allegations, but admit the following: Benedetto DiCostanzo is the president of 2319 Richmond Terrace Corp.; Edkins Auto Sales, Inc. owns the

real property known as Richmond County Tax Block 1070 Lot 68; 2319 Richmond Terrace Corp. owns the real property known as Richmond County Tax Block 1105 Lot 1, which has been leased to Cantalupo Construction Corp. since October 31, 2002.

Respondents deny staff's allegation that respondents Benedetto DiCostanzo, Maria DiCostanzo and Helene Iacono own the real property known as Richmond County Tax Block 1070 Lots 65, 71 and 79. These general denials are contradicted by the affidavit of Maria DiCostanzo wherein she admits ownership of those lots with Benedetto DiCostanzo and Helene Iacono as tenants in common.

Respondents also assert the following nine affirmative defenses. First, failure to state a cause of action upon which relief can be granted. Second, staff's claim is barred or, in the alternative, staff's damages are the result of staff's own breach of fiduciary duty, breach of certain agreements and/or failure to complete the performance required of staff. Third, staff's claims are barred to the extent they were not filed within the applicable statutes of limitations and/or administrative filing periods. Fourth, the claims are barred to the extent staff failed to timely and properly exhaust all necessary administrative, statutory and/or jurisdictional prerequisites for the commencement of this action. Fifth, the claims are barred by the doctrines of waiver and estoppel. Sixth, the claims are barred by the doctrine of laches. Seventh, the sole and/or proximate cause of the damages claimed by staff was and is the willful and intentional acts of persons and/or entities other than the respondents and the collaboration of staff. Eighth, staff and/or its agents failed to preserve and permitted the spoliation of material evidence and this bars recovery from respondents. Ninth, respondents' alleged duties, if any, have been excused by the doctrine of impossibility in that the performance of said obligation is and has been rendered impossible and/or commercially impracticable and/or frustrated as a matter of law.

In support of respondents' cross motions, respondents assert that the properties are not contiguous and that the seventh, eighth and ninth causes of action are ambiguous as they are not clear regarding where, when or what properties were involved in the alleged violations. Furthermore, respondents posit that the violations only appear to relate to the premises owned by 2319 Richmond Terrace Corp. Additionally, respondents

argue the seventh, eighth and ninth causes of action[2] relate to violations that occurred while the properties were under the control of third-party sublessees, Perfetto Enterprises, Inc. and Cantalupo Construction Corp. who already admitted their liability and entered into an order on consent with the Department. Respondents allege that it is the acts of these third-party sublessees that have prevented respondents from addressing violations at the site.

Respondents further argue that discovery is required and that substantive issues of fact and law exist that require a hearing.

In support of respondents' cross motions to dismiss, respondents argue that the causes of action one through six[3] are time barred by the statute of limitations and cite CPLR 213 and 214. Respondents also argue that causes of action one through six are stale and barred by the doctrine of laches. Respondents argue the seventh, eighth and ninth causes of action should be dismissed because the causes of action are vague and ambiguous and do not adequately define the site so as to give notice to respondents about what violations occurred where and when and as against which properties. Respondents argue that the seventh, eighth and ninth causes of action should be dismissed because the violations apply only to the property owned by 2319 Richmond Terrace. Respondents also argue that the seventh, eighth and ninth causes of action should be dismissed because the violations occurred when the properties were under jurisdiction, operation and control of the Perfetto Enterprises, Inc. and Cantalupo Construction Corp. who already admitted liability and entered into an order on consent with the Department requiring them to remediate the site. Respondents further allege that the actions and omissions of Perfetto Enterprises, Inc. and Cantalupo Construction Corp. subsequent to the order on consent have made it impossible for respondents to act with respect to the properties.

[2] The seventh, eighth and ninth causes of action relate to multiple violations allegedly occurring on April 5, 2012, May 22, 2013 and August 8, 2013, respectively.

[3] Causes of action one through six are for multiple violations allegedly occurring on or before October 20, 1992.

II. Discussion

A. Respondents' Request to Amend the Affidavit of Maria DiCostanzo and to Supplement Respondents' Papers and Response to Staff's Motion to Strike

Respondents Maria DiCostanzo and Helene Iacono's request for leave to amend paragraph 8 of the affidavit of Maria DiCostanzo to read: "I am not an owner of the Premises at Richmond County Tax Block 1070 Lots 62 or 68 nor am I an owner of Richmond County Tax Block 1105 Lot 1" is granted without need to serve a corrected affidavit, as I am deeming the affidavit corrected by this ruling.

Respondents Maria DiCostanzo and Helene Iacono also request leave to supplement respondents' papers, first due to Mr. Luthmann's lack of knowledge of the facts related to this matter, second due to the discovery of new evidence and third due to staff's affidavits in opposition to respondents' cross motions constituting new evidence. Mr. Luthmann then proceeds to supplement respondents' arguments in the event respondents' request is granted. Department staff opposes this request. Respondents are permitted to reply to staff's opposition to respondents' cross motions by leave of the ALJ. (See 6 NYCRR 622.6[c][3].) Accordingly, in the interest of judicial economy, I grant respondents' request as submitted. No further supplement will be entertained.

The additional evidence provided by respondents, the results of an inspection performed by DEC's Division of Materials Management personnel related to the vehicle dismantling operations, has no bearing on this proceeding. This inspection was limited to compliance with requirements of ECL 27-2303 (Vehicle Dismantling Facilities).[4] Nothing contained in this new evidence requires further analysis or raises a material issue of fact related to the violations alleged by staff herein. If anything, it supports staff's allegations that a commercial non-water-dependent business has been operating within the tidal wetlands and tidal wetlands adjacent area without a permit in violation of 6 NYCRR 661.5(b)(48).

[4] There are two titles numbered 23 contained in ECL article 27. There are no specific regulations applicable to vehicle dismantling facilities. As noted in the inspection report, compliance and violations are limited to ECL article 27 title 23.

Turning to respondents' argument that Department staff's affidavits submitted in opposition to respondents' cross motions constitute new evidence requiring a supplemented response and a hearing, I disagree for the following reasons. The Stadnik affidavit reiterates portions of his previous affidavit, confirms the type and location of the violations he witnessed and provides the orders on consent related to Block 1105 Lot 1. These are the same orders identified by, complained about and used as a defense by the respondents.

The Sangesland affidavit, on the other hand, refers to a March 20, 2001 inspection and provides a photograph regarding that inspection. Staff's motion, however, contains no causes of action related to a March 20, 2001 inspection or any references thereto. Even if the Sangesland affidavit contains new evidence, it has no bearing on this proceeding.[5] Therefore, further discovery and a hearing on the contents of the Sangesland affidavit are not required to determine this matter.

B. Staff's Motion For Order Without Hearing

1. Staff's Burden

A contested motion for order without hearing will be granted if, upon all the papers and proof, the cause of action (or defense) is established such that summary judgment can be granted under the CPLR. (See 6 NYCRR 622.12[d].) In this instance, Department staff must establish its causes of action sufficiently to warrant directing judgment in its favor as a matter of law and do so by tendering evidentiary proof in admissible form. It is Department staff's initial burden to make a prima facie showing of entitlement to summary judgment for each element of the violations alleged by staff. I conclude that in this proceeding staff has only partially met its initial burden.

2. The Site and Ownership

Staff's papers demonstrate that respondents Edkins Auto Sales, Inc., 2319 Richmond Terrace Corp., Benedetto DiCostanzo, Maria DiCostanzo and Helene Iacono own properties on Staten Island bordered by Richmond Terrace on the south and the Kill Van Kull on the north. (See Exhibits A, B, C, D, E, and F

[5] The March 20, 2001 inspection was part of a previous enforcement proceeding. (See Matter of DiCostanzo and Edkins Scrap Metal Corp., Ruling of ALJ, May 21, 2003.)

attached to the Albin Affirmation dated August 25, 2014.) From east to west ownership is as follows: Benedetto DiCostanzo owns property known as Richmond County Tax Block 1070 Lot 62 (deed dated August 18, 1988); Benedetto DiCostanzo, Maria DiCostanzo and Helene Iacono own property known as Richmond County Tax Block 1070 Lot 65 (deed dated December 18, 1995); Edkins Auto Sales Inc. owns property known as Richmond County Tax Block 1070 Lot 68 (deed dated August 15, 1974); Benedetto Costanzo, Maria DiCostanzo and Helene Iacono own property known as Richmond County Tax Block 1070 Lot 71 and 79 (deeds dated September 17, 2011); 2319 Richmond Terrace Corp. owns property known as Richmond County Tax Block 1105 Lot 1 (deed dated October 31, 2002). Department staff has made a prima facie showing of these respondents' ownership of their respective parcels.

As noted above, Department staff defines the site as including these six parcels[6] and staff has demonstrated that these six parcels abut the Kill Van Kull.[7] Department staff requests that the undersigned take official notice that the Kill Van Kull is a navigable water and a Class SD Saline Surface Water; and take official notice of the tidal wetland designation on the site. I take judicial notice (see 6 NYCRR 622.11[a][5]), however, that the Kill Van Kull is, as a matter of law, a navigable water of the State of New York, pursuant to ECL article 15, title 5 and 6 NYCRR part 608, and a regulated tidal wetland pursuant to ECL article 25 and 6 NYCRR part 661. (See Matter of Mezzacappa Brothers, Inc., Sam Mezzacappa and Frank Mezzacappa, Order of the Commissioner, December 17, 2010 at 1; Tidal Wetlands Map No. 572-498.) The Kill Van Kull is a Class SD Saline Surface Water. (See 6 NYCRR 701.14 and 890.6[15].)

Department staff alleges upon information and belief that respondent Edkins Scrap Metal Corp. operated a scrap metal facility on Block 1070 Lots 62, 65, 68, 71 and 79 at the time of the violations. None of the exhibits or affidavits provides any support for this allegation. Therefore, staff has failed to make a prima facie showing against respondent Edkins Scrap Metal Corp.

[6] Department staff asserts that these six parcels are contiguous to one another, and respondents assert they are not. This is an argument with no legal significance in this proceeding, nor does it present an issue of fact material to the outcome on the present motions.

[7] Each of the six parcels includes lands under water. (See Exhibits A, B, C, D, E and F.)

3. Tidal Wetlands Violations

In addition to ownership of the respective lots, staff's papers demonstrate that fill and solid waste have been placed in the tidal wetland and tidal wetland adjacent areas along and on each of the six parcels without a permit, and that the violations continue to date. (See Exhibits H, I, J, K, L, M and N attached to the Albin Affirmation dated August 25, 2014; Stadnik Affidavit sworn to August 5, 2014 at ¶¶ 4-9 and Exhibit 1; and Cryan Affidavit sworn to July 25, 2014 at ¶¶ 4 and 6.) Staff's papers also demonstrate that a commercial non-water-dependent business was operating on the six parcels without a permit. (See Stadnik Affidavit sworn to November 19, 2014 at ¶ 6 and Cryan Affidavit sworn to July 25, 2014 at ¶¶ 4 and 6.)

It has been held in numerous wetlands proceedings that the owners are responsible for the acts of their agents. (See Matter of Francis, Hearing Report at 12, adopted by Order of the Commissioner, April 26, 2011; Matter of Valiotis, Hearing Report at 7-8, adopted by Order of the Commissioner, March 25, 2010.)[8]

Whether or not the owners actually placed fill in the tidal wetlands is irrelevant. Respondents did not have a permit to place fill or solid waste in the tidal wetlands or the tidal wetlands adjacent area, and respondents are the fee owners of their respective lots comprising the site. I agree with prior analysis that the benefits derived from filling in these areas (such as increasing the size of respondents' lots available for commercial activities), as well as the benefits derived from the commercial activities at the site (such as operating a commercial non-water-dependent business), inure to the respondents as fee owners. (See Matter of Francis, Hearing Report at 12, adopted by Order of the Commissioner, April 26, 2011) Respondents have not provided any evidence that they are not the fee owners, or that they held permits to place fill in or operate a commercial non-water-dependent business in the tidal wetlands and tidal wetlands adjacent areas. Absent that or any other evidence to the contrary, I conclude that a reasonable inference may be drawn that the filling and the commercial non-water dependent business was done and conducted

[8] When a respondent is not the owner of the site, Department staff must demonstrate that respondent performed the work or directed its performance. (See Matter of Pfennig, Hearing Report at fn 5, adopted by Order of the Commissioner, May 27, 2010.) Department staff failed to demonstrate that respondent Edkins Scrap Metal Corp. performed the work or directed its performance.

at the direction, or with the consent, of respondents Edkins Auto Sales, Inc., 2319 Richmond Terrace Corp., Benedetto DiCostanzo, Maria DiCostanzo and Helene Iacono, the fee owners.

Accordingly, Department staff has made a prima facie showing of entitlement to summary judgment on the issue of liability against respondents Edkins Auto Sales, Inc., 2319 Richmond Terrace Corp., Benedetto DiCostanzo, Maria DiCostanzo and Helene Iacono (as to their respective lots) on the following causes of action and counts:

Seventh Cause of Action – third and fourth counts;
Eighth Cause of Action – second and third counts; and
Ninth Cause of Action – second and third counts.

Department staff's showing, however, does not support the allegations of the tidal wetland violations contained in the first, second, third, fourth, fifth or sixth causes of action. The support for the first two causes of action is limited to the premises known as 2239 Richmond Terrace. (See Albin Affirmation Exhibits H and J.) The support for the third cause of action, though dispositive, cannot be alleged against respondents that did not own their respective lots in 1988. Staff offered no proof regarding the allegations of the fourth cause of action. The Cohen affidavit supporting the fifth and sixth causes of action does not adequately describe the premises that were inspected,[9] and the exhibits provided in support of the sixth cause of action do not adequately describe the parcels.[10]

4. Navigable Water Violations

Staff's papers demonstrate that fill and solid waste have been placed in the navigable waters of the State along and on each of the six parcels without a permit, and that the violations continue to date. (See Exhibits H, I, J, K, L, M and N attached to the Albin Affirmation dated August 25, 2014;

[9] The Albin affirmation describes the addresses of the lots comprising the site as 2229-2319 Richmond Terrace. This is supported in part by Exhibits B, D, F, G, H, I, J, and K. The Cohen, Sangesland, Stadnik and Cryan affidavits erroneously identify the addresses of the site as 2319-2655 Richmond Terrace. The Stadnik and Cryan affidavits also identify the site using the correct Block and Lot references. The Sangesland Affidavit only identifies the five lots in Block 1070 as comprising the site. The Cohen affidavit only identifies the site by the erroneous street addresses – 2319-2655 Richmond Terrace.

[10] Exhibit K, Notices of Violation – violation location identified as "Edkins scrape [sic] yard along waterway"; Exhibit L, six photographs of location identified as "Edkins".

Stadnik Affidavit sworn to August 5, 2014 at ¶¶ 4-9 and Exhibit 1; and Cryan Affidavit sworn to July 25, 2014 at ¶¶ 4 and 6.)

I conclude that the owner liability analysis applicable to wetlands violations in this proceeding also applies to the navigable water violations alleged by staff. I, therefore, conclude that a reasonable inference may be drawn that the placement of fill and solid waste in navigable waters was done and conducted at the direction, or with the consent, of respondents Edkins Auto Sales, Inc., 2319 Richmond Terrace Corp., Benedetto DiCostanzo, Maria DiCostanzo and Helene Iacono, the fee owners.

Accordingly, Department staff has made a prima facie showing of entitlement to summary judgment on the issue of liability against respondents Edkins Auto Sales, Inc., 2319 Richmond Terrace Corp., Benedetto DiCostanzo, Maria DiCostanzo and Helene Iacono (as to their respective lots) on the following causes of action and counts:

Seventh Cause of Action – second count;
Eighth Cause of Action – first and fourth counts; and
Ninth Cause of Action – first and fourth counts.

For the reasons stated above, Department staff has not made out a prima facie case for the navigable water violations in the remaining causes of action.

5. Pollution of Marine District Waters

Staff's allegations that respondents violated ECL 17-0503 by causing waste, which could affect fish and shellfish, to drain into the waters of the State and marine district is contained in the fourth and fifth causes of action. There is no supporting evidence for the allegations of the fourth cause of action, and the Cohen affidavit provided in support for the fifth cause of action does not adequately describe the premises inspected. As such, Department staff has not met its burden of making a prima facie showing of entitlement to summary judgment on each element of these violations.

6. Waste Tire Violations[11]

Staff's allegations that respondents violated 6 NYCRR 360-13 by storing more than 1,000 waste tires without a permit are

[11] Department staff's reference to used tires is inaccurate. The Department regulates the storage of waste tires.

contained in the fourth cause of action (fourth count) and sixth cause of action (tenth count). As previously stated, there is no supporting evidence for the allegations of the fourth cause of action, and the support for the sixth cause of action does not adequately describe the premises inspected. Furthermore, staff does not offer a photograph or an affidavit demonstrating that more than 1,000 waste tires were witnessed on the site. Such a bare allegation does not constitute a prima facie showing of entitlement to summary judgment on these alleged violations.

7. Navigation Law Violations

Staff's allegations that respondents violated Navigation Law §§ 173, 175 and 176 by discharging oil on the site, failing to report the discharge of petroleum and failing to remove the discharge of petroleum are alleged in the sixth cause of action (third, fourth and fifth counts). As previously stated, the support for the sixth cause of action does not adequately describe the premises inspected. As such, Department staff has not met its burden of making a prima facie showing of entitlement to summary judgment on each element of these violations.

8. Air Pollution Violations

Staff alleges that respondents violated 6 NYCRR 215.2 by burning wood, aluminum cans, plastic, glass, scrap metal and car foam seats in an open metal basin. This violation was noted by inspections conducted on April 5, 2012 (seventh cause of action – first count). The support for this allegation is contained in the July 11, 2014 affidavit of Steven Sangesland at paragraph 5. As the affidavit does not provide the location of the tank being utilized for burning wood, I conclude that Department staff has not made a prima facie showing of entitlement to summary judgment on this violation.

9. Solid Waste Violations

Staff's allegation that respondents violated ECL 27-0707 and 6 NYCRR part 360 by operating a solid waste transfer facility without a permit is alleged in the sixth cause of action (ninth count). Again, the support for the sixth cause of action does not adequately describe the premises inspected. In addition, staff does not offer a photograph or an affidavit demonstrating that a solid waste transfer facility was operating at the site. As such, Department staff has not met its burden

of making a prima facie showing of entitlement to summary judgment on each element of these violations.

10. Penalty and Relief Requested

With respect to those violations that staff has made a prima facie showing on liability, staff's submissions do not adequately demonstrate the extent and duration of the violations on each of the respective lots comprising the site. Moreover, absent a showing that the respondents performed the work or directed its performance, the liability of the lot owners is limited to the violations occurring on or adjacent to their respective lots. As such, Department staff has not met its burden of making a prima facie showing of entitlement to summary judgment on the penalty and relief requested.

11. Summary

In total, Department staff has made a prima facie showing against respondents Edkins Auto Sales, Inc., 2319 Richmond Terrace Corp., Benedetto DiCostanzo, Maria DiCostanzo and Helene Iacono on the following violations:

a. ECL 25-0401 and 6 NYCRR 661.8 and 661.5(b)(30) for placing fill in a regulated tidal wetland and tidal wetland adjacent area without a permit (Seventh cause of action – third count; Eighth cause of action – second count; and Ninth cause of action – second count);

b. ECL 15-0505 and 6 NYCRR 608.5 for placing fill in the navigable waters of the State without a permit (Seventh cause of action – second count; Eighth cause of action – first and fourth counts; and Ninth cause of action – first and fourth counts); and

c. 6 NYCRR 661.5(b)(48) for operating a commercial non-water-dependent business in a tidal wetland and tidal wetland adjacent area without a permit (Seventh cause of action – fourth count; Eighth cause of action – third count; and Ninth cause of action – third count).

C. Respondents' Opposition to Staff's Motion for Order Without Hearing

1. Respondents' Burden on Opposing Staff's Motion for Order Without Hearing

Inasmuch as Department staff has made a prima facie showing on the tidal wetland and navigable water violations noted above, the burden shifts to respondents to raise triable issues of fact. Respondents opposing staff's motion for an order without hearing must also lay bare their proof. The New York State Court of Appeals has "repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." (Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) General denials are insufficient to raise an issue of fact on a summary judgment motion. (See Gruen v Deyo, 218 AD2d 865, 866 [3rd Dept 1995]; Bronowski v Magnus Enterprises, Inc., 61 AD2d 879 [4th Dept 1978].)

2. Respondents' Opposition to Staff's Motion

Respondents refer to their collective opposition to staff's motion as cross-motions to deny staff's motion. A cross-motion is not required to oppose staff's motion; therefore, a separate ruling on such is not required. In short, respondents' papers are reviewed to determine whether respondents have provided evidentiary proof in admissible form sufficient to require a trial of material questions of fact. Respondents provide general denials to the allegations regarding the navigable water and tidal wetlands violations. (See e.g. Affirmation of Felix T. Gilroy, dated November 3, 2014 at ¶¶ 15, 16, 17, 18, 19, 20, 21, 22 and 23 and Affirmation of Richard A. Luthmann dated November 4, 2014 at ¶¶ 16, 17, 18, 19, 20, 21, 22, 23 and 24.) These general denials are not sufficient to overcome staff's prima facie showing on those violations.

Respondents also claim that the tidal wetlands and navigable water violations alleged in the seventh, eighth and ninth causes of action appear to be violations attributable to Perfetto Enterprises Co., Inc. and Cantalupo Construction Corp., which are the subject of the Department's orders on consent attached to the Stadnik Affidavit, sworn to November 19, 2014,

as Exhibits B and C. I disagree. The evidence submitted by staff in support of those tidal wetland and navigable water violations, namely the affidavits of George Stadnik, indicates that the violations were noted on each of the six lots and in two instances were viewed from the eastern property line of the site. Block 1105 Lot 1, the subject of the aforementioned orders, is the westerly most lot of the site.

To the extent that respondents argue that the orders on consent address the same violations occurring on Block 1105 Lot 1 as those in the instant proceeding, I conclude that respondents have raised a material question of fact requiring further proceedings on the seventh, eighth and ninth causes of action relating to Block 1105 Lot 1 and respondent 2319 Richmond Terrace Corp.

In sum, Department staff has established its entitlement to summary judgment on the issue of liability on a portion of the seventh cause of action (second, third and fourth counts), and the eighth and ninth causes of action against respondents Edkins Auto Sales, Inc., Benedetto DiCostanzo, Maria DiCostanzo and Helene Iacono. Department staff's motion should be otherwise denied on the remaining counts and causes of action and the relief requested by staff.

D. Respondents' Cross Motions to Dismiss Staff's Motion

Respondents' notices of cross motion also request that Department staff's motion for order without hearing be dismissed. Respondents alleged several grounds for dismissing staff's motion. Respondents argue that the first through sixth causes of action are time barred by the statute of limitations (CPLR 213 and 214) and by the doctrine of laches.

Respondents argue that the violations that staff alleged occurred since April 2012 (the seventh, eighth and ninth causes of action) are vague and ambiguous and do not adequately define the site so as to give notice to the respondents of which violations were observed on the respective lots. Respondents also argue that those violations apply only to the premises (Block 1105 Lot 1) owned by 2319 Richmond Terrace Corp. Respondents further argue that those violations occurred when the applicable properties were under the jurisdiction, operation and control of the third-party sublessees – Perfetto Enterprises, Inc. and Cantalupo Construction Corp. - who already admitted their liability as to the properties. Lastly,

respondents argue with respect to those violations that the Department has already entered into an order on consent with Perfetto Enterprises, Inc. and Cantalupo Construction Corp. to remediate the site, and that due to the actions and omissions of Perfetto Enterprises, Inc. and Cantalupo Construction Corp., it has become impossible for respondents herein to act with respect to the subject properties.

1. Statute of Limitations

It is well settled that the CPLR statute of limitations provisions only apply to civil judicial proceedings. Neither CPLR 213 nor CPLR 214 has been incorporated into 6 NYCRR Part 622. In short, the limitation periods established by the CPLR are not applicable to this administrative enforcement proceeding. (See Matter of Stasack, Ruling of the Chief ALJ, December 30, 2010 at 9.) Respondents have failed to identify any other applicable statute of limitations, therefore, respondents' motions to dismiss the first through sixth causes of action on statute of limitations grounds pursuant to CPLR 3211(a)(5) are denied.

2. Laches

Laches is not a recognized ground for dismissing a cause of action nor does it fit within one of the enumerated grounds of CPLR 3211(a). Accordingly, respondents' motions to dismiss the first through sixth causes of action based on the doctrine of laches are denied.

3. Vagueness and ambiguity

In arguing that staff's pleadings relating to the violations alleged to have occurred since April 2012 are vague and ambiguous and do not adequately define the site so as to give notice to the parties, respondents are actually arguing that Department staff has failed to state a claim on those causes of action. (See CPLR 3211[a][7].) I disagree.

In reviewing respondents' motions to dismiss based on a failure to state a cause of action, the material facts alleged in the complaint and in any submissions in opposition to the motion to dismiss are accepted as true. (See CPLR 3211; 511 West 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 152 [2002]; Sokoloff v Harriman Estates Dev. Corp., 96 NY2d 409, 414 [2001].) "Moreover, Department Staff must be accorded 'the benefit of every possible favorable inference.'" (Matter of Town

of Virgil, ALJ Ruling, June 25, 2008 at 4 [quoting Sokoloff, at 414].)

As stated above, Department staff has made out a prima facie showing on the tidal wetland and navigable water violations expressed in the seventh, eighth and ninth cause of action. The pleadings, exhibits and affidavits placed each of the respondents on notice that the violations alleged occurred on each lot. Therefore, respondents' motions to dismiss the seventh through ninth causes of action for failure to state a claim are denied.

4. The violations only apply to the property owned by Respondent 2319 Richmond Terrace Corp.

Respondents' argument that the violations contained in the seventh, eighth and ninth causes of action apply only to the premises (Block 1105 Lot 1) owned by respondent 2319 Richmond Terrace Corp. is not a recognized ground for dismissing a cause of action nor does it fit within one of the enumerated grounds of CPLR 3211(a). To the extent that respondents may be pleading that the department has failed to state a cause of action, as stated above, staff has made a prima facie showing on the tidal wetland and navigable water violations contained in those causes of action occurred on all the lots. Respondents' motions to dismiss on this ground are denied.

5. The violations occurred when the applicable properties were under the jurisdiction, operation and control of third-parties

Respondents' argument that the violations contained in the seventh, eighth and ninth causes of action occurred when the applicable properties were under the jurisdiction, operation and control of the third-party sublessees – Perfetto Enterprises, Inc. and Cantalupo Construction Corp. - who already admitted their liability as to the properties is an argument that the causes of action should be dismissed based on documentary evidence pursuant to CPLR 3211(a)(1). As such, the documentary evidence must conclusively establish a defense to the asserted claims as a matter of law. (See Leon v Martinez, 84 NY2d 83, 88 [1994].)

The orders on consent between the Department and Perfetto Enterprises, Inc. and Cantalupo Construction Corp. expressly state: "The property that is the subject of this Order on Consent is located at 2319 Richmond Terrace, Staten Island, New

York also known as Richmond County block 1105, lot 1 (the 'Site')." (See Affidavit of George Stadnik, sworn to November 19, 2014, Exhibit B, paragraph 6; Exhibit C, paragraph 5.) The orders only apply to one of the six parcels that are subjects of this proceeding. The orders also do not foreclose the Department from establishing that others not a party to the orders may be liable for the violations enumerated in this proceeding. In short, the orders do not conclusively establish a defense to the asserted claims as a matter of law. Respondents' motions to dismiss based on documentary evidence are denied.

6. Impossibility of Performance

Respondents argue that because of the aforementioned orders on consent wherein Perfetto Enterprises, Inc. and Cantalupo Construction Corp. are obligated to take corrective action at 2319 Richmond Terrace (Block 1105 Lot 1), and due to the actions and omissions of Perfetto Enterprises, Inc. and Cantalupo Construction Corp., it has become impossible for respondents herein to act with respect to the subject properties. If this argument is couched as an argument for dismissal based on a defense founded on documentary evidence (see CLPR 3211[a][1]), it is not supported by the terms of the orders. Otherwise, this argument does not constitute grounds for dismissal. Respondents' motions to dismiss based on impossibility of performance due to the act or omissions of Perfetto Enterprises, Inc. and Cantalupo Construction Corp. are denied.

E. Staff's Motion to Strike Respondents' Affirmative Defenses

Department staff moves to strike the nine affirmative defenses pleaded in respondents' papers. (See Albin affirmation dated November 20, 2014 at paragraph 5.) Staff's motion is actually a motion to dismiss affirmative defenses (compare CPLR 3024[b] and 3211[b]) and as such is governed by the standards governing motions to dismiss defenses under CPLR 3211(b). (See Matter of Truisi, Ruling of the Chief ALJ, April 1, 2010, at 10-11.) Motions to dismiss may challenge the pleading on its face (fails to state a defense) or may seek to establish, with supporting evidence, that a claim or defense lacks merit as a matter of law (see id. at 10).

Staff does not support its motion with evidentiary material. Therefore, respondents' affirmative defenses will be examined to determine whether defenses are stated. The mere

conclusory statement of a defense, however, is insufficient. Respondents must plead the elements of each of their affirmative defenses even though, on a motion to dismiss the defenses, respondents' answers will be liberally construed, the facts alleged accepted as true, and the respondents afforded every possible inference. (See Matter of Truisi, supra at 10 [citing Leon v Martinez, 84 NY2d at 87; Butler v Catinella, 58 AD3d 145, 148 (2d Dept 2008)]; Matter of ExxonMobil Oil Corp., ALJ Ruling, Sept. 13, 2002, at 3.)[12] A motion to dismiss affirmative defenses will be denied if the answer, taken as a whole, alleges facts giving rise to a cognizable defense. (See Matter of Truisi, at 10 [citing Foley v D'Agostino, 21 AD2d 60, 64-65 (1st Dept 1964)].) Moreover, "if there is any doubt as to the availability of a defense, it should not be dismissed." (See Matter of Truisi, at 10 [internal citation omitted].) In addition, affidavits submitted in opposition to the motion may be used to save an inartfully pleaded, but potentially meritorious, defense (see Faulkner v City of New York, 47 AD3d 879, 881 [2d Dept 2008].)

The affirmative defenses stated in respondents' answers are merely conclusions of law with no facts alleged in support of the legal conclusions. Therefore, the submissions must be searched to determine if the affirmative defenses have been stated. The submissions include the affirmations of counsel, affidavits of respondents and respondents' answers and cross motions.

That part of Mr. Luthmann's correspondence of November 23, 2014 requesting leave to amend and supplement constitutes a motion and is part of the record. The remainder of his letter is legal argument opposing staff's motion to strike. As such, the contents of the legal argument, even statements of evidentiary or factual character, will not be considered or included in a liberal construction of respondents' answers. (See Matter of Truisi, at 12, ruling a memorandum of law "is not evidentiary and, therefore, is insufficient to remedy the lack of factual assertions in the answer".) In short, if respondents wished to provide further facts or allegations in support of their affirmative defenses, the place to do so was in the answer or an affidavit of one of the respondents, not in an attorney's correspondence.

[12] Section 622.4(c) of 6 NYCRR reads: "The respondent's answer must explicitly assert any affirmative defenses together with a statement of the facts which constitute the grounds for each affirmative defense asserted."

1. First Affirmative Defense – Failure to state a cause of action upon which relief can be granted

Department staff argues that an affirmative defense of failure to state a cause of action serves no purpose and when staff moves to strike such a defense, the motion should be granted (citing Matter of Gramercy Wrecking and Environmental Contractors, Ruling of ALJ, January 14, 2008, at 4; Matter of Town of Virgil, Ruling of ALJ, June 25, 2008, at 25.) Matter of Gramercy and its progeny, however, relied upon a rule of practice followed in the Second Department that has since been abandoned. All four Departments now deny motions to dismiss this defense because it amounts to an attempt by the plaintiff to test the sufficiency of its own pleadings. (See Matter of Truisi, at 12; Butler v Catinella, 58 AD3d at 150 [stating the rule in the First, Second and Third Departments]; Salerno v Leica, Inc., 258 AD2d 896 [4th Dept 1999].) I agree with the Chief ALJ's determination in Truisi that this is unnecessary motion practice. I choose to follow the current Appellate Division rule. Staff's motion to dismiss the respondents' first affirmative defense is denied.

2. Second Affirmative Defense – Claims are barred or in the alternative, Petitioner's damages are the result of their own breach of fiduciary duty, breach of certain agreements and/or their failure to complete the performance required of them

Department staff argues that it has no fiduciary duty to respondents and that respondents have not provided any proof to support this affirmative defense. Regardless, it must be determined whether a defense is stated. It is respondents' burden to plead what breach or failure of staff underlies such a defense. Respondents' papers, however, do not provide any support for this defense. Department staff's motion to dismiss the respondents' second affirmative defense is granted.

3. Third Affirmative Defense – The claims are barred by the statute of limitations and/or administrative filing period

As discussed above, the CPLR statute of limitations provisions are not applicable to administrative proceedings. There are no administrative filing periods associated with these proceedings identified by respondents. Staff's motion to dismiss the respondents' third affirmative defense is granted.

4. Fourth Affirmative Defense – The claims are barred to the extent that Petitioner failed to timely and properly exhaust all necessary administrative, statutory and/or jurisdictional prerequisites for the commencement of this action

Respondents have not through their answer, affirmations, or affidavits stated any elements of this defense. It is respondents' burden to plead what administrative, statutory or jurisdictional prerequisites have been ignored by staff. Having failed to plead any jurisdictional prerequisites, respondents' fourth affirmative defense is dismissed.

5. Fifth Affirmative Defense – Petitioner's claims are barred in whole or part by the doctrines of waiver and estoppel

The fifth affirmative defense states two defenses, waiver and estoppel. Respondents have not plead any elements of a waiver defense. Moreover, waiver is never a valid defense against the state because public officials cannot waive law enforcement on behalf of the public. (See Matter of Town of Southold, Ruling of ALJ, March 17, 1993.)

Turning to the estoppel doctrine, it is generally held that estoppel may not be used against a governmental entity when it 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].) Equitable estoppel is not available against the Department unless it is determined that the Department was guilty of improper conduct upon which the opposing party justifiably relied. (See Matter of Forest Creek Equity Corp. v Department of Envtl. Conservation, 168 Misc2d 567, 571 [Sup Ct Monroe County 1996].) Further, estoppel may not be used when the party invoking the doctrine should have been aware of statutory requirements through diligent research. (See Waste Recovery Enterprise LLC, supra at 769.)

Mr. Luthmann argues that respondents have shown reasonable reliance on the consent order between DEC and Perfetto Enterprises Co., Inc. and Cantalupo Construction Corp. to support respondents' estoppel defense. Even liberally construing respondents' papers, however, respondents have not alleged any affirmative misconduct of the Department that respondents relied upon in support of this defense. Absent that, the defense cannot stand. Respondents' fifth affirmative

defense of waiver and estoppel is dismissed.

6. Sixth Affirmative Defense – The claims are barred in whole or part by the doctrine of laches;

The general rule of law states that a laches defense is unavailable against a State agency acting in a governmental capacity to enforce a public right. (See Matter of Cortlandt Nursing Home v Axelrod (66 NY2d 169, 177 n 2 [1985], cert denied 476 US 1115 [1986]; Matter of Grout, Ruling of Chief ALJ, December 14, 2014 at 12.) Therefore, respondents' sixth affirmative defense is dismissed in part.

The analysis, however, continues in order to determine whether a defense based on Cortlandt has been stated. Cortlandt addresses the State Administrative Procedure Act (SAPA) § 301 requirement that the parties in an adjudicatory proceeding shall be afforded an opportunity for hearing within reasonable time. Respondents do not reference Cortlandt anywhere in their answering papers. Cortlandt is only referenced in Mr. Luthmann's legal argument responding to staff's motion to dismiss the defense. The record, however, is searched to determine whether the elements of a Cortlandt defense are pleaded. To do so, respondents must allege not only a relevant delay, but also injury to the respondents' private interests, and a significant and irreparable prejudice to respondents' defense of the proceeding resulting from the delay (see Cortlandt, 66 NY2d at 177-178, 180-181; see also Matter of Giambrone, Decision and Order of the Commissioner, March 1, 2010, at 11-13, confirmed in relevant part sub nom Matter of Giambrone v Grannis, 88 AD3d 1272, 1273 [4th Dept 2011]; Matter of Stasack, Ruling of the Chief ALJ on Motion for Clarification and To Strike Affirmative Defenses, Dec. 30, 2010, at 9).

Liberally construing respondents' papers, respondents claim they are prejudiced by the twenty-two to thirty-two year delay in bringing the first six causes of action. (See Affidavit of Maria DiCostanzo at paragraph 10.) Respondents claim that due to the passage of time that some of respondents' records were lost or destroyed due to hurricane Sandy. (See Affidavit of Benedetto DiCostanzo at paragraph 9.) These assertions adequately allege a potential significant and irreparable prejudice to respondents' defense of the proceeding. Respondents claim to have already incurred expenses related to the violations at the site. Respondents also allege that, with the Department's knowledge, respondents entered into contracts of sale that addressed environmental issues on the site, but

those contracts ended in litigation. Read liberally, this states a potential injury to respondents' private interests caused by the delay. Respondents sufficiently allege a Cortlandt defense to provide notice to staff of respondents' assertions supporting this defense. Department staff's motion to dismiss the respondents' sixth affirmative defense is otherwise denied.

> 7. Seventh Affirmative Defense - the sole and/or proximate cause of the damages claimed by staff was and is due to the willful and intentional acts of persons and/or entities other than the respondents and the collaboration of staff

Respondents' seventh affirmative defense constitutes a denial, not an affirmative defense. Defenses that are actually denials pleaded as defenses are not affirmative defenses on which a respondent bears the burden of proof and are not subject to dismissal on a motion to strike affirmative defense. (See Matter of Truisi, Chief ALJ Ruling on Motion to Strike or Clarify Affirmative Defenses, April 1, 2010, at 5, 11; Matter of Route 52 Property, LLC, Decision of the Chief ALJ, March 14, 2012, at 19, 22.) Accordingly, the motion to dismiss the respondents' seventh affirmative defense is denied.

> 8. Eighth Affirmative Defense - staff and/or its agents failed to preserve and permitted the spoliation of material evidence and this bars recovery from respondents

As a statement of alleged fact, respondents' defense supports the Cortlandt defense discussed above. While respondents' papers provide little support for this as a separate defense, should this allegation be proven during the discovery process, respondents may move for dismissal of staff's remaining causes of action. (See CPLR 3124 and 3126.) Accordingly, staff's motion to dismiss the eighth affirmative defense is denied.

9. Ninth Affirmative Defense - respondents' alleged duties, if any, have been excused by the doctrine of impossibility in that the performance of said obligation is and has been rendered impossible and/or commercially impracticable and/or frustrated as a matter of law.

The only support for this defense is respondents' argument that the orders on consent between the Department and Perfetto Enterprises Co., Inc. and Cantalupo Construction Corp. have created "third-party impossibility with respect to any ability to act with respect to the subject properties." (Affidavit of Maria DiCostanzo at paragraph 13.) Respondents are not parties to the orders on consent. The orders do not affect respondents' rights or duties relating to their respective properties. As previously stated, those orders only apply to one parcel of land – Block 1105 Lot 1 - and any utility such a defense may have would be limited to violations occurring on that parcel. Moreover, the defense of impossibility of performance is limited to contract actions and is "applied narrowly, due in part to judicial recognition that the purpose of contract law is to allocate the risks that might affect performance and that performance should be excused only in extreme circumstances." (See Kel Kim Corporation v Central Markets, Inc., 70 NY2d 900, 902 [1987]). Furthermore, the excuse of impossibility is generally "limited to the destruction of the means of performance by an act of God, *vis major*, or by law". (See 407 E. 61st Garage v Savoy Fifth Ave. Corp., 23 NY2d 275, 281, [1968].) Respondents cite no act of God or legal impediment that prevents respondents from acting in regards to their respective lots comprising the site. Accordingly, respondents failed to state a valid defense, and the motion to dismiss the respondents' ninth affirmative defense is granted.

III. RULING

Based upon the foregoing discussion, my rulings on the parties' various motions and requests are as follows.

A. Department staff's August 20, 2014 motion for order without hearing is granted on the issue of liability against respondents Edkins Auto Sales, Inc., Benedetto DiCostanzo, Maria DiCostanzo and Helene Iacono on the following violations:

1. ECL 25-0401 and 6 NYCRR 661.8 and 661.5(b)(30) for placing fill in a regulated tidal wetland and tidal wetland

adjacent area without a permit (Seventh cause of action – third count; Eighth cause of action – second count; and Ninth cause of action – second count);

2. ECL 15-0505 and 6 NYCRR 608.5 for placing fill in the navigable waters of the State without a permit (Seventh cause of action – second count; Eighth cause of action – first and fourth counts; and Ninth cause of action – first and fourth counts); and

3. 6 NYCRR 661.5(b)(48) for operating a commercial non-water-dependent business in a tidal wetland and tidal wetland adjacent area without a permit (Seventh cause of action – fourth count; Eighth cause of action – third count; and Ninth cause of action – third count).

B. Department staff's motion for order without hearing on staff's remaining counts and causes is denied.

C. The civil penalty and relief requested in Department staff's motion for order without hearing is denied.

D. Respondents' cross motions to dismiss Department staff's August 20, 2014 motion are denied.

E. Department staff's motion to dismiss respondents' affirmative defenses is determined as follows:

a. Department staff's motion to dismiss respondents' first affirmative defense is denied.
b. Respondents' second affirmative defense is dismissed.
c. Respondents' third affirmative defense is dismissed.
d. Respondents' fourth affirmative defense is dismissed.
e. Respondents' fifth affirmative defense is dismissed.
f. Respondents' sixth affirmative defense, to the extent the defense is based solely on laches, is dismissed.
g. Department staff's motion to dismiss the respondents' sixth affirmative defense, to the extent the defense is based on Cortlandt, is denied.
h. Respondents' seventh affirmative defense constitutes a denial, and Department staff's motion to dismiss the seventh affirmative defense is denied.
i. Department staff's motion to dismiss the eighth affirmative defenses is denied.
j. Respondents' ninth affirmative defense is dismissed.

F. Respondents Maria DiCostanzo and Helene Iacono’s motion seeking leave to amend the November 4, 2014 affidavit of Maria DiCostanzo is granted and the affidavit is deemed corrected as provided herein.

G. Respondents Maria DiCostanzo and Helene Iacono’s motion seeking leave to supplement respondents’ papers with new evidence and argument in opposition to staff’s motion is granted to the extent that the November 23, 2014 submission provided such evidence and constitutes respondents’ supplemental papers, but otherwise leave is denied.

H. Pursuant to 6 NYCRR 622.12(e), staff's motion papers and respondents' responsive papers are deemed to be the complaint and answer, respectively, for the purposes of this proceeding.

Accordingly, Department staff’s motion for order without hearing is granted in part, as detailed herein. Respondents’ cross motions to dismiss are denied in their entirety. Staff’s motion to dismiss respondents’ affirmative defenses is granted in part, as detailed herein. A conference call will be scheduled after the parties have been served with this ruling to schedule the hearing on the remaining causes of action and relief requested in this matter.

/s/

Michael S. Caruso
Administrative Law Judge

Dated: March 10, 2015
Albany, New York

Exhibit List

NYSDEC
v.
Edkins Scrap Metal Corp., Edkins Auto Sales, Inc., 2319 Richmond Terrace Corp., Benedetto DiCostanzo, Maria DiCostanzo and Helene Iacono

Case No. R2-20131206-527

Department Staff

Affirmation of Jessica Steinberg Albin, dated August 25, 2014

Affidavit of Service of Jessica Steinberg Albin, Esq. sworn to August 25, 2014

A. Copy of a deed, dated August 18, 1988, transferring the real property known as Richmond County Tax Block 1070 Lot 62 to Benedetto DiCostanzo
B. Copy of a deed, dated December 18, 1995, transferring the real property known as Richmond County Tax Block 1070 Lot 65 to Benedetto DiCostanzo, Maria DiCostanzo and Helene Iacono
C. Copy of a deed, dated September 17, 2011, transferring the real property known as Richmond County Tax Block 1070 Lot 71 to Benedetto DiCostanzo, Maria DiCostanzo and Helene Iacono
D. Copy of a deed, dated September 17, 2011, transferring the real property known as Richmond County Tax Block 1070 Lot 79 to Benedetto DiCostanzo, Maria DiCostanzo and Helene Iacono
E. Copy of a deed, dated August 15, 1974, transferring the real property known as Richmond County Tax Block 1070 Lot 68 to Edkins Auto Sales, Inc.
F. Copy of a deed, dated June 2, 1995, transferring the real property known as Richmond County Tax Block 1105 Lot 1 to 2319 Richmond Terrace Corp.
G. Copy of an option for contract sale of the real property known as Richmond County Tax Block 1105 Lot 1 between 2319 Richmond Terrace Corp. (seller) and Cantalupo Construction Corp. (purchaser), dated October 31, 2002
H. Copy of a violation report and two photos, dated December 13, 1982
I. Copy of a notice of violation dated October 11, 1988

J. Copy of two certificates of disposition dated March 26, 1985 and four pictures dated March 25, 1985
K. Copy of two notices of violation dated October 19, 1992
L. Copy of six photographs dated October 20, 1992
M. Copy of two aerial photographs of the site – the 1974 Tidal Wetlands Map No. 572-498 and a 2001 aerial photograph
N. Copy of seven photographs of the site dated April 5, 2012

Affidavit of George Stadnik, sworn to August 5, 2014

1. Copy of a notice of violation dated October 11, 1988.

Affirmation of Jessica Steinberg Albin, dated November 20, 2014

A. Affidavit of service

Affidavit of George Stadnik, sworn to November 19, 2014

B. Order on consent related to the Matter of Perfetto Enterprises Co., Inc. and Cantalupo Construction Corp. (NYSDEC File No. R2-20120501-247 [October 17, 2012] concerning Richmond County Tax Block 1105 Lot 1)
C. Order on consent related to the Matter of Perfetto Enterprises Co., Inc. and Cantalupo Construction Corp. (NYSDEC File No. R2-20130823-363 [January 6, 2014] concerning Richmond County Tax Block 1105 Lot 1)

Affidavit of Steven Sangesland, sworn to November 20, 2014

D. One photograph dated March 20, 2001

Respondents

Respondents Edkins Scrap Metal Corp., Edkins Auto Sales, Inc., 2319 Richmond Terrace Corp. and Benedetto DiCostanzo

1. Copy of a sheriff's legal process report related to 2319 Richmond Terrace Corp. v Cantalupo Construction Corp. (NYC Office of Sheriff Case No. 14018832, September 22, 2014)

Respondents Maria DiCostanzo and Helene Iacono

Affidavit of Maria DiCostanzo, sworn to November 4, 2014

A. Copy of a DEC penalty receipt for payment from Perfetto Enterprises, Co., Inc. dated October 16, 2012)

Correspondence from Richard A. Luthmann, Esq. dated November 23, 2014

A September 23, 2014 letter from DEC staff with a September 10 and September 17, 2014 inspection reports related to Division of Materials Management inspection of vehicle dismantling facility.