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

In the Matter

- of -

the Alleged Violations of Articles 17 and 19 of the Environmental Conservation Law, Article 12 of the Navigation Law, and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

- by -

GASCO-MERRICK ROAD GAS CORP. and
JUAN M. ROMERO,

Respondents.

DEC Case No. D1-1155-11-04

DECISION AND ORDER
OF THE COMMISSIONER

June 2, 2008

DECISION AND ORDER OF THE COMMISSIONER

Staff of the New York State Department of Environmental Conservation ("DEC" or "Department") commenced this administrative enforcement proceeding against respondents Gasco-Merrick Road Gas Corp. and Juan M. Romero, by service of a notice of hearing and complaint both dated December 30, 2004. Staff subsequently served an amended complaint dated September 2, 2005.[1]

By its amended complaint, Department staff alleges that respondents operated a petroleum bulk storage facility ("facility" or "site"), located at 3215 Merrick Road, Wantagh, New York, in violation of numerous provisions of the Environmental Conservation Law ("ECL"), Navigation Law article 12, and regulations promulgated pursuant thereto. Specifically, the amended complaint alleges that respondents failed to:

(1) properly reconcile inventory records for the underground storage tanks at the facility;
(2) maintain inventory records for a period of at least five years;
(3) properly secure all shear valves (a discharge prevention device);
(4) check the monitoring wells;
(5) keep all gauges, valves and other equipment for spill prevention in good working order;
(6) maintain leak monitoring records at the facility for a period of at least one year;
(7) properly label the storage tanks;
(8) maintain the leak detection system;
(9) maintain the stage I vapor recovery system;
(10) maintain the stage II vapor recovery system;
(11) timely conduct a five-year test of the stage II vapor recovery system and maintain the results at the facility;
(12) timely report petroleum spills; and

[1] As originally pleaded, the complaint named Reshma Realty, Inc. and Lalita Kapour as additional respondents; however, Department staff is no longer pursing these respondents as part of this proceeding. Accordingly, only Gasco-Merrick Road Gas Corp. and Juan M. Romero are named as respondents in the amended complaint.

(13) remediate petroleum discharges at the site.

Respondents filed an answer, dated April 19, 2005 and a supplemental answer, dated August 15, 2005 (collectively, the "answer"). Respondents did not further supplement their answer in response to staff's amended complaint.

By their answer, respondents generally deny Department staff's allegations or deny having knowledge or information sufficient to form a belief as to the veracity of the allegations. Respondents also raise the following seven affirmative defenses:

(1) all contamination at the site predates respondents' involvement with the site and, therefore, the landlord is solely liable;

(2) the Department lacks jurisdiction to enforce Navigation Law article 12;

(3) the proper forum for matters relating to Navigation Law article 12 is State court and respondents have a constitutional right to a trial by a jury;

(4) the doctrine of accord and satisfaction precludes the Department from obtaining the relief sought;

(5) under the express provisions of the lease for the facility, the landlord assumed all liability in relation to the underground storage tanks;

(6) respondents have been out of possession of the premises since 2004 and have no access, authority, right, or liability for doing any remedial or repair work at the site; and

(7) pursuant to the terms of an order on consent executed by the Department, a former respondent in this proceeding was released from liability and the Department failed to reserve its rights against the captioned respondents.

Staff filed a statement of readiness, dated June 2, 2005, requesting that a hearing date be scheduled. The matter was assigned to Administrative Law Judge ("ALJ") Kevin J. Casutto and a hearing was held on August 30, 2005 at the Department's Region 1 offices in Stony Brook, New York. Following the submission of post-hearing briefs, the hearing record was closed on November 21, 2005.

The ALJ prepared the attached hearing report recommending that respondents be adjudged to have violated each provision of law and regulation alleged by staff and dismissing

all of respondents' affirmative defenses. I adopt the ALJ's hearing report as my decision in this matter and concur with his recommendations, subject to my comments herein.

First Affirmative Defense

By their first affirmative defense, respondents assert that the contamination at the site predated their involvement with the facility and note that the underground storage tanks underwent tightness testing in early 2004.

The ALJ properly dismisses this defense. First, the vast majority of the violations alleged by Department staff relate to violations of operational requirements. Second, those violations that include allegations of petroleum discharges are supported by evidence of soil contamination and ongoing discharges during respondents' operation of the facility. Staff's hearing testimony, inspection reports and photographic evidence establish, by a preponderance of the evidence,[2] that more than three years after respondents began operations at the site, ongoing discharges occurred at the site with associated soil contamination.

Second and Third Affirmative Defenses

By their second and third affirmative defenses, respondents challenge the Department's jurisdiction relative to violations of Navigation Law article 12. Navigation Law article 12 addresses "the unregulated discharge of petroleum" into the environment (see Navigation Law § 171). In 1985, the Legislature transferred jurisdiction "pertaining to oil spill prevention, control and compensation" under article 12 from the Department of Transportation to the Department of Environmental Conservation (see L 1985, ch 35).

Respondents assert that the proper forum for alleging violations of the Navigation Law is the State Supreme Court and that this administrative enforcement proceeding deprives respondents of their constitutional right to a trial by jury.

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[2] See 6 NYCRR 622.11(b) and (c)(providing that staff bears the burden of proof on all charges and allegations in the complaint and "must sustain that burden by a preponderance of evidence").

The ALJ, citing Matter of DiCostanzo, Decision and Order of the Commissioner, November 23, 2004, dismisses these defenses and notes that the Commissioner of Environmental Conservation has "clearly applied the Navigation Law to impose a penalty in the administrative forum" (Hearing Report, at 12).

I concur with the ALJ's dismissal of these affirmative defenses and hold that the Department's jurisdiction extends to enforcement of Navigation Law article 12. Furthermore, I use this opportunity to more fully set forth the rationale in support of the Department's jurisdiction.[3]

The plain language of the Navigation Law provides the Department with authority to assess penalties for violations of its provisions both administratively and in a court proceeding. Pursuant to section 200(1) of Navigation Law article 13:

> "[a]n action to recover any penalty imposed under the provisions of this chapter, except penalties imposed under article six, may be brought in any court of competent jurisdiction in this state on order of the commissioner and in the name of the people of the state of New York. In any such action all penalties incurred up to the time of commencing the action may be sued for

[3] Prior administrative determinations have taken differing positions relative to the Department's enforcement jurisdiction under the Navigation Law (see e.g. Matter of Locaparra, Decision and Order of the Commissioner, June 16, 2003, Hearing Report, at 8 [noting the Department's jurisdiction has been the subject of "conflicting interpretations by the Department"]; Matter of DiCostanzo, Decision and Order of the Commissioner, November 23, 2004, at 4-6 [stating that staff had "demonstrated its entitlement to summary judgment on the issue of respondent['s] liability for a penalty pursuant to Navigation Law § 192" and expressly providing that half of the penalty assessed under the order would be paid to the Spill Compensation Fund]; and Matter of Blank, Blank and Jacobi, Order of the Commissioner, February 4, 2003, Hearing Report, at fn 2 [stating that pursuant to Navigation Law § 192 "penalties for violations of this law are to be obtained in a court of competent jurisdiction, and this is not such a forum"]). To the extent that any past determinations question the Department's enforcement authority under the Navigation Law, they are overruled.

> and recovered therein and the commencement of an action to recover any such penalty shall not be, or be held to be, a waiver of the right to recover any other penalty" (emphasis added).

By its express terms, section 200(1) allows for both an order of the commissioner and an action brought in the name of the people of the state of New York. Clearly, commencement of a civil action is not the only mechanism available to the Department to impose a penalty under the Navigation Law. By providing an action to "recover" any penalty "imposed" under the Navigation Law, including article 12, the statute contemplates that a penalty may be imposed administratively and, if it is not paid by the respondent, the Commissioner[4] may turn to the courts for recovery. This provision, however, does not require the administrative assessment of a penalty prior to the Department's seeking penalties under the Navigation Law in a court of competent jurisdiction.

Other express provisions of the Navigation Law also support the Department's enforcement authority. Section 191 provides that "[t]he commissioner and the state comptroller are authorized to adopt, amend, repeal, and enforce such rules and regulations pursuant to the state administrative procedure act, as they may deem necessary to accomplish the purposes of this article" (emphasis added). Section 195 provides that "[t]his article, being necessary for the general health, safety, and welfare of the people of this state, shall be liberally construed to effect its purposes." Read together, these provisions

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[4] Pursuant to Navigation Law § 2(2), the term "commissioner" under the Navigation Law "shall mean the commissioner of parks, recreation and historic preservation." However, Navigation Law § 2 also provides that the definitions therein apply "unless otherwise expressly stated, or unless the context of the language or subject matter indicates a different meaning or application was intended." Section 172(6) of article 12 of the Navigation Law defines "commissioner" to mean "the commissioner of the department of environmental conservation." Because the Commissioner of Environmental Conservation is charged with enforcing article 12 of the Navigation Law, where enforcement of article 12 is concerned, the term "commissioner" in Navigation Law § 200(1) in article 13 means the Commissioner of Environmental Conservation.

demonstrate that the Department has statutory authority to enforce the Navigation Law and establish penalties thereunder, and that this enforcement authority is to be liberally construed.

The courts have not been asked to consider the Department's enforcement authority under article 12 of the Navigation Law. Nevertheless, existing caselaw supports the conclusion that the Department has authority to assess penalties under article 12.

Of particular relevance is the decision in Grossman v Hilleboe (16 AD2d 893 [1st Dept 1962]), where the court upheld the authority of the Commissioner of Health to determine liability and assess a penalty against an alleged violator of the Public Health Law, despite the lack of express authority to assess a penalty. The relevant statute provided that any person who violates the Public Health Law "shall be liable to the people of the state for a civil penalty not to exceed fifty dollars for every such violation" (id. at 894). The dissent noted that the statute expressly provided that "the penalty was recoverable by means of an action to be brought by the Attorney General" and that there was no provision in the Public Health Law or elsewhere expressly granting the Commissioner of Health the authority to "assess or fix a penalty" (id.). The majority in Grossman, however, noted that the Public Health Law granted "the Commissioner of Health broad powers to enforce the public health law and to conduct hearings" (id. at 894 [internal citations and quotation marks omitted]). The majority concluded that it was "within the competence of the [Commissioner of Health] to institute the proceeding, make the determination and assess the penalty" (id. at 893).

The parallel between the statute at issue in Grossman and that at issue here is particularly appropriate. Both the Department of Environmental Conservation and the Department of Health have broad authority to enforce their respective regulations.[5]

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[5] With regard to the Department's authority, see e.g. ECL 3-0301(1) ("the commissioner shall have power to . . . [i] Provide for prevention and abatement of all water, land and air pollution . . . [m] Prevent pollution through the regulation of the storage, handling and transport of solids, liquids and gases which may cause or contribute to pollution . . . [x] Exercise and

Further, DEC has a long history of administering enforcement hearings and assessing penalties against those adjudged to be in violation of laws under its purview. To paraphrase Grossman, it would be anomalous to hold that it is "within the competence of the Department to institute a proceeding, make a determination and assess a penalty" in all other matters entrusted to its purview, but to deny the same with regard to article 12 of the Navigation Law.

Also relevant is the decision in Matter of Johnson Orchards & Farms, Inc. (70 Misc 2d 647 [Sup Ct, Albany County, 1972]). In that matter, the petitioner sought to restrain the DEC Commissioner from conducting a hearing concerning an alleged violation of one of the articles of the Public Health Law (the functions of the Commissioner of Health under that article had been transferred to DEC on July 1, 1970). The petitioner argued that, although the Public Health Law granted DEC authority to take action to prevent or abate pollution, it did not grant DEC jurisdiction to conduct a hearing and assess penalties (id. at 648). After first noting that the statute must be read as a whole and that it provided for fact finding in relation to the amount of the penalties to be assessed, the court upheld the Department's authority to conduct enforcement hearings and concluded it was "apparent that the administrative body has jurisdiction to inquire into, and factually determine, the subject matter" (id. at 649).

The statutory provision at issue in Johnson Orchards is now codified at ECL 71-1929, which establishes civil penalties

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perform such other functions, powers and duties as shall have been or may be from time to time conveyed or imposed by law, including, but not limited to, all the functions, powers and duties assigned and transferred to the department"); ECL 3-0301(2) ("the department, by and through the commissioner, shall be authorized to . . . [g] Enter and inspect any property or premises for the purpose of investigating either actual or suspected sources of pollution or contamination or for the purpose of ascertaining compliance or noncompliance with any law, rule or regulation which may be promulgated pursuant to this chapter. . . . [h] Conduct investigations and hold hearings and compel the attendance of witnesses and the production of accounts, books, documents, and nondocumentary evidence by the issuance of a subpoena").

for violations of requirements pertaining to water pollution control, including requirements under the State Pollutant Discharge Elimination System ("SPDES"). In pertinent part, ECL 71-1929 states that "the penalties provided [herein] shall be recoverable in an action brought by the Attorney General." The practice commentaries following ECL 71-1929 cite Johnson Orchards and note that although ECL 71-1929(3) states that the penalty "shall be recoverable in action brought by the Attorney General, it is clear that, the penalty may also be assessed by the Commissioner in the first instance" (Weinberg, Practice Commentaries, McKinney's Cons Laws of NY, Book 17½, ECL 71-1929).

The Court of Appeals has also recognized the broad scope of the Department's authority under the Navigation Law. In Matter of Consolidated Edison Co. of N.Y., Inc. v Department of Envtl. Conservation (71 NY2d 186 [1988]), the Court cited Navigation Law § 191 and noted that article 12 of the Navigation Law "conferred upon the Commissioner the power to adopt such regulations as he deems necessary to accomplish the purposes of the Act" (id. at 194 [internal citation and quotation marks omitted]). As previously noted, section 191 provides the Commissioner and the State Comptroller with authority not only to adopt, but to "amend, repeal, and enforce such rules and regulations pursuant to the state administrative procedure act, as they may deem necessary to accomplish the purposes of this article" (emphasis added). The Court noted that "[t]he stated policy goals of [article 12] could hardly be accomplished if the agency charged with fulfilling these goals was without power to regulate the prevention of petroleum pollution" (id.). Although the issue before the Court concerned the Department's authority to adopt rules rather than its authority to enforce them, the decision supports a broad view of both the Department's authority under the Navigation Law and of the powers necessary for the Department to fulfill its legislative mandate.

The legislative history and purpose of Navigation Law article 12 also support the conclusion that the Department has the power to determine liability and assess penalties for violations of its provisions. As noted earlier, the State Legislature transferred article 12 of the Navigation Law to the Department in 1985. Specifically, effective October 13, 1985, "[a]ll powers, functions, duties and obligations of the commissioner of transportation and the department of transportation . . . under article 12 of the Navigation Law [were] transferred to the commissioner of environmental

conservation and the department of environmental conservation, respectively" (L 1985, ch 35). This included the transfer of "[a]ll rules, regulations, acts, determinations, orders and decisions of the commissioner of transportation . . . in force at the time of such transfer" (id.).

At the time article 12 and its implementing regulations were transferred to the Department, the Legislature would have been aware of the Department's comprehensive administrative enforcement and hearings process and the Department's broad authority to enforce the laws and regulations under its purview. Allowing the Department to bring its enforcement capabilities to bear upon violators of article 12 of the Navigation Law is entirely consistent with the legislative intent to foster the "protection and preservation of [the State's] lands and waters" and to "promote[] the health, safety and welfare of the people of this state" (Navigation Law § 170).

Had the Legislature intended to restrict or deprive the Department of its historical role of enforcing the laws and regulations within its purview, it was within the Legislature's prerogative to do so. It did not. Rather, the Legislature transferred to the Department a public welfare statute that, by its express terms, "shall be liberally construed to effect its purposes" (Navigation Law § 195).

In the instant proceeding, Department staff alleges that respondents violated Navigation Law § 176 by failing to remediate petroleum discharges at the site. Pursuant to Navigation Law § 176(2), "cleanup and removal procedures after each discharge shall be conducted in accordance with environmental priorities and procedures established by the department." Further, 17 NYCRR 32.5(b), which was transferred from the Department of Transportation to DEC along with the Navigation Law, states that "[t]he person responsible for causing a discharge which is prohibited by section 173 of the Navigation Law shall also take those measures or actions necessary for the cleanup and removal of the discharge."

Here, the same facts and circumstances that gave rise to liability for violations under the ECL also gave rise to liability under article 12 of the Navigation Law. It would be clearly inefficient for the Department to hold hearings and assess penalties for allegations pertaining to ECL violations, but to be restrained from doing the same for allegations arising

under the Navigation Law. Further, such a result would not advance the purposes of the Navigation Law.

Moreover, the requirement that a discharger undertake affirmative measures to remediate a petroleum discharge is an express and significant obligation imposed by Navigation Law § 176 and 17 NYCRR 32.5(b). To conclude that the Department lacks the authority to assess penalties for violations of this obligation would seriously undermine the deterrent effect such penalties carry and would hamper the Department's enforcement efforts.

Respondents, in their challenge to the Department's enforcement jurisdiction under Navigation Law article 12, appear to rely on Navigation Law § 192, which provides, in part:

> "Any person who . . . violates any of the provisions of this article or any rule promulgated thereunder or who fails to comply with any duty created by this article shall be liable to a penalty of not more than twenty-five thousand dollars for each offense in a court of competent jurisdiction" (emphasis added).

The argument advanced by respondents is that, because this provision states that a violator shall be liable "in a court of competent jurisdiction" and does not expressly state that the Department may assess a penalty in the first instance, the Department lacks the authority to assess penalties under the Navigation Law. In addition to respondents' argument, I have also considered Navigation Law § 187, which provides, in part: "The administrator shall recover to the fund moneys disbursed for the following purposes: 1. Costs incurred by the fund in the cleanup and removal of a discharge . . . 2. Costs incurred by the fund in the payment of claims for direct and indirect damages . . . and 3. All penalties assessed pursuant to this article" (emphasis added).[6]

By their express terms, however, neither section 192 nor section 187 precludes the Department from assessing penalties or otherwise enforcing article 12 of the Navigation Law. Consistent with section 192, the Department may administratively

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[6] See Navigation Law § 172(1)(defining the term "administrator").

assess penalties in accordance with its authority under the Navigation Law and, in the event that the respondent fails to pay, such penalties may be recovered "in a court of competent jurisdiction." This approach is the common practice where a penalty is assessed under an order of the DEC Commissioner but is not paid by the respondent.

Similarly, Navigation Law § 187 does not preclude the Department from assessing a penalty in the first instance. It provides only that, after a penalty has been "assessed," the administrator "shall recover to the fund" the amount assessed.

In sum, the Department is expressly authorized to institute administrative proceedings to enforce Navigation Law article 12 and assess penalties pursuant to the plain language of Navigation Law § 200(1). This section provides that, on order of the Commissioner, a penalty imposed under the Navigation Law may be recovered in a court of competent jurisdiction. The Department's authority to assess penalties is further supported by the express terms of Navigation Law § 191 which provide that the Commissioner is "authorized to adopt . . . and enforce such rules and regulations . . . necessary to accomplish the purposes of this article."

Such authority is also consistent with the Court of Appeals decision in Consolidated Edison wherein, after citing Navigation Law § 191, the Court states that the purposes of the Act "could hardly be accomplished if the agency charged with fulfilling these goals was without power to regulate the prevention of petroleum pollution" (Consolidated Edison, 71 NY2d at 194). The caselaw and the express terms of the Navigation Law support the conclusion that the Department's enforcement authority is to be "liberally construed to effect [the purposes of Navigation Law article 12]" (Navigation Law § 195).

For the reasons discussed herein, I concur with the ALJ's determination that the Department may administratively enforce article 12 of the Navigation Law and assess penalties against respondents for violations thereof.[7]

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[7] Respondents' assertion that this administrative proceeding deprives them of their right to demand a trial by jury pursuant to the United States and New York State Constitutions is also rejected. Where a matter is properly before an

Remaining Affirmative Defenses

As to the remaining affirmative defenses raised by respondents, I adopt the ALJ's rationale for the dismissal of each.

Recommended Relief

I also adopt the ALJ's recommendations concerning Department staff's requested relief. As noted in the hearing report, given the large number of violations and the continuing nature of many of those violations, the maximum penalty authorized by statute for respondents' violations is in the tens of millions of dollars. Staff seeks only a fraction of the penalty available by statute and its rationale for the penalty sought is more than sufficient.

In their closing brief, respondents make a belated attempt to reduce the proposed penalty on the basis of their inability to pay. While the Department's Civil Penalty Policy (DEE-1) provides for such a reduction, it also provides that "[a]n unsupported or inadequately supported claim of inability to pay should not be accepted." Here, respondents have raised the issue of their inability to pay without presenting any credible

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administrative agency, the Supreme Court has held that the Seventh Amendment guaranty of trial by jury is not applicable to administrative proceedings (see, e.g., Atlas Roofing Co., Inc. v Occupational Safety and Health Review Commn., 430 US 442, 450 [1977] [holding that "[in] cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact[,] the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible"]; see also Losey v Roberts, 677 F Supp 101, 106 [NDNY 1986] [noting that "jury trials would be incompatible with the whole concept of administrative adjudication"]). Respondents offer no basis for concluding that the right to trial by jury under the New York State Constitution (see NY Const, art I, § 2) should be interpreted any differently than the federal constitutional right (see Montgomery v Daniels, 38 NY2d 41, 67 [1975] [noting that the State and federal right to trial by jury have been consistently interpreted]).

supporting documentation and, therefore, their claim must be rejected.

Additionally, both the injunctive relief and the requirement that respondents pay the State's costs associated with the investigation and remediation of the site, as recommended by the ALJ, are authorized and appropriate.[8]

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

I. During their operation of the facility from June 2001 through December 2004, respondents Gasco-Merrick Road Gas Corp. and Juan M. Romero are adjudged to have committed the following violations:

A. Failure to reconcile the inventory records for the facility's underground storage tanks, as required by 6 NYCRR 613.4(a) and ECL 17-1007.

B. Failure to maintain inventory records for the facility for a period of at least five years in violation of 6 NYCRR 613.4(c).

C. Failure to properly secure four of the shear valves at the facility in violation of 6 NYCRR 613.3(d).

D. Failure to check monitoring wells at the facility in violation of 6 NYCRR 613.5(b)(3).

E. Failure to keep all gauges, valves and other equipment for spill prevention in good working order as required by 6 NYCRR 613.3(d). Respondents failed to

[8] See e.g. ECL 71-1941, providing, in part, that the "owner of or a person in actual or constructive possession or control of more than one thousand one hundred gallons, in bulk, of any liquid including petroleum which, if released, would or would be likely to pollute the lands or waters of the state . . . shall be liable to the people of the state of New York for the actual costs incurred by or on behalf of the people of the state for the removal or neutralization of such liquid."

keep sumps, spill buckets and other spill prevention equipment in good working order.

F. Failure to maintain leak monitoring records at Respondents' facility for a period of at least one year, as required by 6 NYCRR 613.5(b)(4).

G. Failure to properly label one tank at the facility in violation of 6 NYCRR 614.3(a)(2).

H. Failure to maintain the leak detection system at the facility in violation of 6 NYCRR 613.5(b)(3). Respondents failed to maintain the facility's automatic tank gauge system and did not reconcile tank inventory to ensure prompt detection of leaks.

I. Failure to maintain the stage I vapor recovery system in violation of 6 NYCRR 230.2.

J. Failure to maintain the stage II vapor recovery system in violation of 6 NYCRR 230.2.

K. Failure to perform dynamic back pressure, liquid blockage and leak tests before commencing operation of the facility's stage II vapor recovery system in violation of 6 NYCRR 230.2(k).

L. Failure to timely report petroleum spills at the facility in violation of 6 NYCRR 613.8 and Navigation Law § 175.

M. Failure to remediate petroleum discharges at the facility in violation of Navigation Law § 176 and 17 NYCRR 32.5.

II. For the violations set forth above, respondent Gasco-Merrick Road Gas Corp. is assessed a civil penalty in the amount of seventy-five thousand dollars ($75,000). The civil penalty shall be due and payable within thirty (30) days after service of this order upon respondent. Payment shall be made in the form of a cashier's check, certified check or money order payable to the order of the "New York State Department of Environmental Conservation" and delivered to the attention of Benjamin A. Conlon, Esq. at the following address: New York State

Department of Environmental Conservation, Office of General Counsel, 625 Broadway, Albany, New York 12233-5500.

III. For the violations set forth above, respondent Juan M. Romero is assessed a civil penalty in the amount of fifty thousand dollars ($50,000). The civil penalty shall be due and payable within thirty (30) days after service of this order upon respondent. Payment shall be made in the form of a cashier's check, certified check or money order payable to the order of the "New York State Department of Environmental Conservation" and delivered to the attention of Benjamin A. Conlon, Esq. at the following address: New York State Department of Environmental Conservation, Office of General Counsel, 625 Broadway, Albany, New York 12233-5500.

IV. Within thirty (30) days after service of this order upon respondents, respondents shall provide Department staff with an approvable investigation and remediation plan for petroleum contamination at the site. The plan shall provide for the immediate commencement of site investigation activities upon approval of the plan by staff. Upon written notice from Department staff, respondents shall commence remedial activities at the site in accordance with the approved remediation plan, including any staff-approved modifications thereto. Within five (5) business days of the completion of the remedial activities required under the plan, respondents shall furnish Department staff with written documentation to demonstrate that such activities were completed in accordance with the approved plan.

V. Within thirty (30) days of respondents' receipt of an invoice from the Department for costs incurred by the Department in relation to the investigation and remediation of respondents' discharges at the facility, respondents shall remit payment in accordance with such invoice.

VI. All communications from respondents to the Department concerning this order shall be made to Benjamin A. Conlon, Esq., New York State Department of Environmental Conservation, Office of General Counsel, 625 Broadway, Albany, New York 12233-5500.

VII. The provisions, terms and conditions of this order shall bind respondents Gasco-Merrick Road Gas Corp. and Juan M. Romero, and their agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By: _____
Alexander B. Grannis
Commissioner

Dated: June 2, 2008
Albany, New York

TO: Marvin E. Kramer, Esq.
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STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1550

In the Matter

- of -

Alleged violations of the New York Environmental Conservation Law Article 17 (Water Pollution Control) and 19 (Air Pollution Control) and of the New York Navigation Law Article 12 (Oil Spill Prevention, Control and Compensation) and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York, by:

GASCO-MERRICK ROAD GAS CORP.,
AND
JUAN M. ROMERO,

RESPONDENTS.

NYSDEC CASE NO.
D1-1130-11-04

HEARING REPORT

- by -

/s/

_____
Kevin J. Casutto
Administrative Law Judge

PROCEEDINGS

This Hearing Report addresses allegations that four respondents, Gasco-Merrick Road Gas Corp., Juan M. Romero, Reshma Realty, Inc., and Lalita Kapour, as owners or operators of a petroleum bulk storage facility located at 3215 Merrick Road, Wantagh, New York (a retail gasoline station, the "Gasco site"), violated the Environmental Conservation Law ("ECL"), the Navigation Law ("NL") and related regulations. Alleged violations include failure to report petroleum discharges, failure to conduct tank testing, air pollution control violations recordkeeping violations and related allegations.

Prior to referral of the case to the Office of Hearings and Mediation Services for hearing, respondents Reshma and Kapour entered into an Order on Consent with the New York State Department of Environmental Conservation ("DEC" or the "Department"; Order on Consent, Case No. D1-1155-11-04, dated May 11, 2005). The Department's Central Office Staff ("Staff") initiated this action with a Notice of Hearing and Complaint dated December 30, 2004. In response to the Complaint, the Respondents filed an Answer dated April 19, 2005 which asserted six affirmative defenses. Pursuant to Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") 622.9, Staff filed a Statement of Readiness dated June 2, 2005.

Subsequently, Staff filed an Amended Complaint dated September 2, 2005, against only the Respondents Gasco-Merrick Road Gas Corp., and Juan M. Romero. In response to Staff's Amended Complaint, the Respondents filed a Supplemental Answer dated August 15, 2005 that asserted a seventh affirmative

defense.

By letter dated June 20, 2005, the Respondents requested leave to interpose a cross claim against Reshma Realty, Inc. (Reshma), and Lalita Kapour (Kapour). DEC Staff filed an opposition letter dated June 24, 2005.

In a ruling dated July 21, 2005, the Respondents' motion was denied because the Department's enforcement hearing regulations, 6 NYCRR part 622, do not provide for third party practice. *Matter of Gasco-Merrick Road Gas Corp., and Juan M. Romero*, Ruling (July 21, 2005; DEC No. D1-1155-11-04). However, Respondents were advised that if, in Respondents' view, defense of this administrative proceeding requires examination of Reshma or Kapour, the Respondents may subpoena witnesses to appear for testimony (subject to any objections that may be interposed). *See* 6 NYCRR 622.2(w) and 622.7(d).

An administrative enforcement hearing to consider the allegations in the Amended Complaint was held on August 30, 2005.

Benjamin A. Conlon, Associate Attorney, NYSDEC Office of General Counsel, Division of Environmental Enforcement, 625 Broadway, Albany, New York, represented the Department Staff during the hearing.

The Respondents Gasco-Merrick Road Gas Corp., and Juan M. Romero were represented by Marvin E. Kramer & Associates, P.C., Marvin E. Kramer, Esq., member, 400 Post Avenue, Suite 402, Westbury, New York.

The transcript of the proceedings was received on September 23, 2005. Upon the timely receipt of the parties' closing briefs, the hearing record closed on November 21, 2005.

I. Department Staff's Charges and the Relief Sought

Department Staff allege that the Respondents committed thirteen violations of the ECL, the NL or regulations related thereto, as set forth in Department Staff's Amended Complaint:

1. Respondents failed to properly reconcile the inventory records for the facility's underground storage tanks, as required by 6 NYCRR 613.4(a) and ECL 17-1007. An inspection of Respondents' facility by Department staff on November 8, 2004

revealed that Respondents failed to properly perform inventory reconciliation. (Amended Complaint¶ 14).

2. Respondents failed to properly maintain inventory records for the facility for a period of at least five years in violation of 6 NYCRR 613.4(c). Pursuant to the Department's discovery request, Respondents were required to provide all inventory records for the facility. Respondents failed to provide any inventory records for the facility. (Amended Complaint¶ 15).

3. Respondents failed to properly secure the shear valves at the facility in violation of 6 NYCRR 613.3(d). An inspection of Respondents' facility on November 8, 2004 revealed that all the shear valves at the facility were not properly mounted. (Amended Complaint¶ 16).

4. Respondents failed to check monitoring wells at the facility in violation of 6 NYCRR 613.5(b)(3). An inspection of Respondents' facility on November 8, 2004 revealed that Respondents were not checking the monitoring wells at the facility and had no other functional leak detection measures. (Amended Complaint¶ 17).

5. Respondents failed to keep all gauges, valves and other equipment for spill prevention in good working order, as required by 6 NYCRR 613.3(d). An inspection of Respondents' facility by Department staff on November 8, 2004 revealed that Respondents failed to properly maintain the top sump(s) and/or fill port catch basin(s) associated with tank(s) at the facility, resulting in petroleum accumulation. The failure to remediate or call in a spill report for the petroleum contamination in the spill buckets within 2 hours is a violation of both 6 NYCRR 613.8 and Navigation Law § 175. (Amended Complaint¶ 18).

6. Respondents failed to maintain leak monitoring records at Respondents' facility for a period of at least one (1) year, as required by 6 NYCRR 613.5(b)(4). An inspection of Respondents' facility by Department staff on November 8, 2004 revealed that Respondents failed to maintain leak monitoring records at the facility for a period of at least one (1) year. (Amended Complaint¶ 19).

7. Respondents failed to properly label tanks at the facility in violation of 6 NYCRR 614. An inspection of Respondents' facility on November 8, 2004 revealed that tanks

installed after December 27, 1986 were not properly labeled. (Amended Complaint¶ 20).

8. Respondents failed to maintain the leak detection system at the facility in violation of 6 NYCRR 613. An inspection of Respondents' facility on November 8, 2004 revealed that the leak detection system was not operating properly. (Amended Complaint¶ 21).

9. Respondents failed to maintain the stage I vapor recovery system in violation of 6 NYCRR 230.2. An inspection of Respondents' facility on November 8, 2004 revealed that the stage I system was not properly maintained. (Amended Complaint¶ 22).

10. Respondents failed to maintain the stage II vapor recovery system in violation of 6 NYCRR 230.2. An inspection of Respondents' facility on November 8, 2004 revealed that the stage II system was not properly maintained. (Amended Complaint¶ 23).

11. Respondents failed to timely conduct a 5 year test of the stage II vapor recovery system and maintain the results on site. An inspection of Respondents' facility on November 8, 2004 revealed that the stage II system had not been tested for the past 5 years, and no test results were maintained at the facility. (Amended Complaint¶ 19).

12. Respondents failed to timely report petroleum spills at the facility. An inspection at Respondents' facility on October 6, 2004 and November 8, 2004, revealed that petroleum spills at Respondents' facility had impacted the groundwater and were causing vapor complaints in the storm drains at the street. (Amended Complaint¶ 19).

13. Respondents failed to remediate the petroleum discharges at this facility in violation of ECL § 71-1941 and NL § 176. Due to Respondents' failure, the Department has had to call out a contractor to the Gasco site to remediate the site. (Amended Complaint¶ 29).

Department Staff requests a civil monetary penalty of $50,000.00 for the Respondent Juan M. Romero and an additional civil monetary penalty of $75,000.00 for the Respondent Gasco-Merrick Road Gas Corp, for a total civil penalty of $125,000.00. Staff also seeks a compliance schedule requiring the Respondents to (1) close all tanks at the facility or bring the tanks into

compliance; (2) submit an investigation/remediation plan to investigate and remediate the petroleum releases from the facility; and (3) pay all past oversight and contractual costs incurred by the Department relating to inspections and petroleum spill investigation and remediation conducted by the Department.

II. The Respondents' Answer

The Respondents deny all the alleged violations in the Amended Complaint or deny knowledge and information sufficient to form a belief as to the truth of the alleged violations.

In their Answer and Supplemental Answer, the Respondents assert seven affirmative defenses. These affirmative defenses are summarized below:

1. Respondents took possession of the Gasco site in June 2001 pursuant to an assignment from Meena Inc., the prior tenant, pursuant to a written lease. At the time the Respondents took possession, the soil and ground water at the station already were significantly contaminated with gasoline and motor fuel and monitoring wells had been installed on various portions of the station, indicating prior or on-going site remediation. Upon information and belief, the Department had previously issued a spill number to the subject premises, as to which the Respondents had no prior knowledge. Further, during the occupancy by the Respondents, no known new discharge occurred at the premises.

Approximately 10 to 12 months prior to the issuance of this Complaint, the premises had a tank tightness test approved by an independent company and any ground water or soil contamination at the Gasco site was not caused by the Respondents, but pre-dated the occupancy of the Gasco site by the Respondents. Respondents argued that liability, if any, is solely in the landlord; and that the Respondents have no responsibility for groundwater or soil contamination.

2. This administrative hearing relating to the Department of Environmental Conservation does not have jurisdiction for enforcement of New York State Navigation Law and related regulatory violations or for the imposition of penalties based upon such violations. Instead, the sole jurisdiction for enforcement and civil penalties for violations of the Navigation Law are vested in the Supreme Court of the State of New York.

3. The NYSDEC administrative enforcement hearing process lacks jurisdiction over any of the issues relating to the Navigation Law and the proper forum for said issues is the Supreme Court of the State of New York. The Respondents asserted that they have a right, pursuant to the Constitution of the State of New York and the Constitution of the United States, to demand that the issues raised by the Department Staff's Amended Complaint be tried by a jury in a court of law. Therefore, any and all claims arising under the Navigation Law must be dismissed.

4. The Respondents, Reshma Realty, Inc. and Lalita Kapour, as landlord and principal of the landlord, have agreed to perform all remediation and corrective work necessary at the Gasco site, and to pay all of the reimbursable charges. The Department Staff's demands for relief, therefore, have been or will be fully satisfied pursuant to an agreement of Reshma Realty, Inc. and Lalita Kapour. The doctrine of accord and satisfaction applies to preclude any liability of the Respondents Gasco or Romero.

5. At the time the Respondent Corporation Gasco, first took occupancy of the premises, the conditions set forth in the Amended Complaint which are alleged to have constituted liability already existed. Pursuant to the lease of the premises, dated June 11, 2001, pursuant to which the Respondent Romero occupied the premises through November 30, 2004, a typed-in addendum designated as Article 36 states that, "[t]he gas station is 'as is' except if by law any repairs are to be done on the underground tanks, they shall be the responsibility of the landlord." The conditions which constitute the basis of liability, as set forth in the amended complaint, were solely caused by the landlord. Pursuant to Article 36 of the lease, the landlord had assumed responsibility for liability and remediation of any and all conditions created by, caused by, or as the result of the underground storage tanks. Therefore, the liability of the Respondents Romero and Gasco, if any, should be limited and minimized.

6. The Respondents have been out of possession of the premises since 2004. Accordingly, the Respondents assert they have no access, authority, right, or liability for doing any work at the Gasco site regarding remediation, replacement, cost recovery or any related matters alleged in the amended complaint.

7. The initial Complaint in this matter alleged joint liability among all of the four named Respondents. But, in May 2005, the Department entered into an Order on Consent with the Co-Respondent Reshma, Landlord of the subject premises. The Order on Consent is a settlement agreement relating to the allegations of the Amended Complaint. The Landlord agreed to pay a penalty of $20,000 in connection with the alleged violations at the property, agreed to a comprehensive remediation program and assumed all of the responsibilities with reference thereto. The Order on Consent provided certain assurances by the Co-Respondent Reshma to the Department in the event of non-compliance, constituted an accord and satisfaction of all claims against the Co-Respondent Reshma with only a reservation of rights for the Department to enforce compliance in the event of a default thereunder. By operation of law, the Order on Consent constituted a constructive general release subject to reservation of rights upon a default by Co-Respondent Reshma and the Department did not reserve any rights against any of the other Co-Respondents identified in the initial Complaint. In accordance with the laws of this State, a release without the reservation of rights as against joint and several obligors acts to release all obligors. The Department has now released the Respondent Reshma from this action and by reason of the failure of the Department to reserve its rights against the Respondents Romero and Gasco, said Respondents Romero and Gasco have been released by operation of law.

DISCUSSION

I. The Respondents as Operators of the Gasco Site

Pursuant to 6 NYCRR 612.1(c)(10), a petroleum bulk storage facility is one or more stationary tanks, including any associated intra-facility pipelines, fixtures or other equipment, which have a combined storage capacity of over 1,100 gallons of petroleum at the same site. The Gasco site, located at 3215 Merrick Road, Wantagh, New York (a retail gasoline station), has four single-walled underground petroleum storage tanks; three 6,000 gallon tanks and one 4,000 gallon tank. Therefore, the Gasco site is a petroleum bulk storage facility.

Pursuant to 6 NYCRR 612.1(c)(16), the operator of a petroleum bulk storage facility is any person who leases, operates, controls or supervises a facility. Exhibit 8 is a four-year Lease agreement for the Gasco site between Reshma

Realty, Inc., landlord, and Meena Enterprises, tenant, commencing on December 1, 1999, effective through November 30, 2004. The Lease provides the tenant, Meena Enterprises, with an option to renew the agreement for an additional five-year period.

Exhibit 9 is an Assignment and Assumption of Lease agreement for the Gasco site from Meena Enterprises, Inc., to Juan Romero dated June 11, 2001.

The Amended Complaint identifies Gasco-Merrick Road Gas Corp. and Juan M. Romero as the Respondents. The Respondent Romero stated he has been in the retail gasoline business for four or five years and has operated the Gasco site and three or four other gas stations in addition to the Gasco site (the Gasco site is no longer in operation). Respondent Romero stated that he took possession of the Gasco site from Meena Enterprises, Inc., in April or May 2001, but he did not regularly work at the Gasco site. Instead, the Respondent Romero would work as a gas station attendant when a regularly scheduled employee was not available for his or her shift. The Respondent Romero also admitted that he took a salary from proceeds of the Gasco site and paid his employees in cash.

The Respondent Romero described his operation of the site as follows: the Gasco site sold approximately 1,500 to 2,000 gallons of gasoline and diesel petroleum product per day. Respondent Romero stated that he would purchase petroleum product for the site from an independent wholesaler (J.K. Petroleum) and that he would pay by check or cash.

In sum, based upon these facts, I conclude that the corporate entity Gasco-Merrick Road Gas Corp., was the operator of the Gasco site at all relevant times herein, and Juan M. Romero, as the principal of Gasco-Merrick Road Gas Corp., also was the operator of the Gasco site at all relevant times herein.

II. Affirmative Defenses

It is the Respondents' burden of proof to establish the elements of an affirmative defense. 6 NYCRR 622.11(b)(2). Respondents have failed to carry that burden of proof with respect to any of the affirmative defenses asserted in their Answer and Supplemental Answer, as discussed below. In sum, the Respondents' seven affirmative defenses are dismissed.

In the Respondents' first and fifth affirmative defenses, the Respondents contend that any ground water or soil contamination at the Gasco site was not caused by the Respondents, but pre-dated the occupancy of the Gasco site by the Respondents. The Respondents further contend that liability is solely in the landlord, due to an assignment from Meena Inc., the prior tenant, to the Respondents. Therefore, the Respondents conclude, they have no responsibility for ground water or soil contamination at the site.

The Respondents contend that groundwater and soil contamination at the site pre-dated occupancy of the site by the Respondents. However, as discussed below, the Respondents failed to operate the site in a manner that would limit the existing contamination or limit future contamination. The evidence in the record shows that during their operation of the Gasco site, the Respondents failed to address several instances of continual or intermittent leaks that were documented by DEC Staff during the inspections of the site, as detailed below. *See generally*, NL § 181(3) and (4).

Pursuant to 6 NYCRR 230.2(k)(1)(ii), owners and operators of Stage II systems must perform dynamic back pressure, liquid blockage and leak tests before commencing operation. The Respondents commenced operation of the Gasco site by June 11, 2001. The Respondents failed to perform leak testing before commencing operation at the Gasco site.

However, the Respondents rely upon Exhibit 10, a Certificate of Underground Storage Tank System Testing for the Gasco site for tightness testing conducted on March 5, 2003, almost two years after the Respondents commenced operation of the site. The Certificate indicates that Crompco Corporation, a Pennsylvania company, conducted the tank tightness test and the underground tank system passed all tank, line and leak detector tests. Crompco, however, replaced several parts. DEC Staff explained generally that even though a system passes the tightness tests, it does not necessarily indicate that there is no leak in that system and that some systems pass the tightness test even when a leak is identified. In view of the evidence adduced at hearing, that is the case with the Gasco site.

In sum, the tank tightness test of March 5, 2003, almost two years after the Respondents commenced operation of the site, does not satisfy the requirements of 6 NYCRR 230.2(k)(1)(ii). The

tank testing requirement is a separate and distinct regulatory requirement from Stage II testing. The Respondents' first and fifth affirmative defenses must be dismissed.

Respondents assert in their second and third affirmative defenses that the Department of Environmental Conservation does not have jurisdiction to conduct this administrative enforcement hearing relating to alleged violations of the New York State Navigation Law (or regulations issued pursuant thereto), nor does the Department have jurisdiction to impose administrative penalties based upon such violations. Instead, the Respondents contend, the sole jurisdiction for enforcement and civil penalties for violations of the Navigation Law is vested in the Supreme Court of the State of New York. Therefore, the Respondents conclude, all claims arising under the Navigation Law must be dismissed.

As has been noted previously, NL § 192 provides that any person who violates any of the provisions of Article 12 of that law (which includes NL §§ 173 and 176) shall be liable to pay a penalty of not more than $25,000.00 for each offense "in a court of competent jurisdiction." This language has been subject to conflicting interpretations by the Department. On the one hand, it has been interpreted to preclude imposition of Article 12 penalties in the administrative forum. In other instances, Article 12 penalties have been imposed in the administrative forum. *See Matter of Locaparra,* Decision and Order of the Commissioner, DEC Case No. 3-20000407-39, 2003 WL 21633072 (June 16, 2003) at 12 (Ruling of ALJ); *see also Matter of Avila, et al.,* Ruling on Motion for Order Without Hearing, DEC Case No. R2-20030422-102, 2005 WL 1848471 (August 3, 2005), at 4.

In *Locaparra,* the Commissioner found that on March 14, 2000, the respondent "violated ECL § 17-0501 and Navigation Law § 173. . ." The Commissioner imposed upon the respondent, "a penalty of $7,500.00 for his violations of ECL § 17-0501 and Navigation Law § 173. . ." *Locaparra* at 5. However, the Commissioner stated, ". . . I, like the ALJ, reach no conclusion concerning the Commissioner's authority to assess penalties under Article 12 of the Navigation Law. The issue was not raised by the parties and is not properly before me." *Locaparra* at 4. The $7,500.00 penalty assessed for "violations of ECL § 17-0501 and Navigation Law § 173" were less than the maximum authorized penalty available for the ECL § 17-0501 violation alone.

Subsequently, in *Matter of DiCostanzo, et al.*, Decision and Order of the Commissioner, DEC Case No. R2-20020924-299, 2004 WL 2678540 (N.Y.S. Department of Environmental Conservation; November 23, 2004), the Commissioner clearly applied the Navigation Law to impose a penalty in the administrative forum. In *DiCostanzo,* the Commissioner again imposed a civil penalty "pursuant to ECL 71-1929 and Navigation Law §192", but went further and specified that, "Department Staff shall allocate fifty percent of the penalty received to the General Fund and fifty percent to the Environmental Protection and Spill Compensation Fund. *DiCostanzo*, 2004 WL 2678540 at 4. Pursuant to Navigation Law § 179 *et seq.*, violations of NL Article 12 are paid to the Environmental Protection and Spill Compensation Fund. Pursuant to ECL § 71-0211(1), violations of ECL 71-1929 are paid to the General Fund. Therefore, as DEC Staff has noted, in *DiCostanzo*, the Commissioner implicitly has recognized the Department's administrative authority to assess civil penalties pursuant to NL Article 12 in an administrative forum. Respondents' second and third affirmative defenses must be dismissed.

In the Respondents' fourth and seventh affirmative defenses, the Respondents contend that the doctrine of accord and satisfaction applies to preclude any liability of the Respondents Gasco or Romero. It is uncontroverted that Reshma Realty, Inc. (landlord of the Gasco site), and Lalita Kapour (principal of the landlord) have entered into an Order on Consent agreement (described *supra*) with the Department. Pursuant to the Order on Consent, Reshma and Kapour have agreed to perform all remediation and corrective work necessary at the Gasco site and to pay all of the reimbursable charges. Respondents contend that the Department Staff's demands for relief in this enforcement action have been or will be fully satisfied pursuant to the Order on Consent agreement of Reshma Realty, Inc. and Lalita Kapour with the Department. The Respondents conclude that the doctrine of accord and satisfaction applies to preclude any liability of the Respondents Gasco or Romero.

Additionally, the Respondents erroneously contend that by operation of law the Order on Consent constituted a constructive general release subject to reservation of rights upon a default by Co-Respondent Reshma. In this defense, the Respondents contend that in the Order on Consent the Department failed to reserve any rights against any other Co-Respondents identified in the initial Complaint. The Respondents contend that due to this

omission, by operation of law, the Department created a release without the reservation of rights as against joint and several obligors, thereby creating a release of all obligors. The Respondents erroneously conclude that because the Department has released Reshma (and Kapour) from this action, with no reservation of rights against the Respondents Romero and Gasco, the Respondents Romero and Gasco have been released by operation of law. However, as DEC Staff has noted, the Order on Consent is not a contract and does, in fact, include a reservation of rights.

The fourth and seventh affirmative defenses must be dismissed. The Respondents are mistaken that doctrine of accord and satisfaction applies in this matter. Instead, the Respondents, as operators, and Reshma and Kapour as owners, are jointly and severally responsible for the site pursuant to the ECL and the NL. Neither the lease agreement nor the Order on Consent change their joint and several responsibilities under the ECL or the NL. It is a separate matter, however, whether the Respondents may have recourse in a collateral judicial proceeding for subrogation using either the Order on Consent or the lease agreement; this need not be addressed further in this proceeding.

Lastly, in their sixth affirmative defense, the Respondents contend that they have been out of possession of the Gasco site since 2004 and consequently have no access, authority, right, or liability for doing any work at the Gasco site regarding remediation, replacement, cost recovery or any related matters alleged in the AC. However, DEC Staff has stated that the landlord (Reshma and Kapour) would allow the Respondents such site access. The Respondents' sixth affirmative defense must be dismissed.

III. The Inspection and Enforcement History of the Gasco Site

On October 5, 2004, DEC Staff conducted an inspection of the Gasco site, in response to a citizen complaint of odors emanating from the site. Also participating in the site inspection were representatives of the Nassau County Department of Public Works (NCDPW) and local Fire Marshals. The Gasco site has four underground petroleum bulk storage tanks, one 4,000 gallon tank and three 6,000 gallon tank. Five monitoring wells had been installed at the Gasco site previously.

DEC Staff returned to the Gasco site on October 6, 2004 for

further inspection. On November 8, 2004, DEC Staff conducted a third inspection of the Gasco site, as part of a three-day retail gasoline station compliance "sweep" program. The result of these inspections form the factual basis for the violations. These facts as to the condition of the site, remain uncontroverted in the record.

Following the site inspections, on December 3, 2004 DEC Staff held a compliance conference to discuss the alleged violations with the owner(s) or operator(s) of the site. The compliance conference was conducted at the NYSDEC Region 1 Headquarters. At the conclusion of the compliance conference, DEC Staff ordered the Respondent Romero to empty the underground petroleum storage tanks at the site. Staff explained that they ordered the tanks closed because it was apparent that the Respondent Romero lacked the technical knowledge to operate the tanks properly. However, on December 3, 2004, Staff issued no written order to close the tanks; only a verbal instruction to the Respondent Romero.

The Respondent Romero's testimony at hearing only underlines DEC Staff's conclusion that the Respondent was an operator of the Gasco site, and further, that he lacks the technical knowledge to operate the Gasco site or any other retail gasoline station. The Respondent Romero stated that he never used the Veeder Root automatic tank gauge system; never checked the fill caps; never used or maintained any daily checklists; and knew nothing about the monitoring wells at the Gasco site and never checked them. He stated that a contractor changed the filters at the Gasco site, and that he (Romero) was never present during a filter change. The Respondent Romero stated that neither he nor any employee of the Gasco site ever reported a petroleum leak or spill during his operation of the site. The Respondent Romero stated that he had no knowledge of requirements for Stage I or Stage II vapor recovery prior to the 2004 DEC inspections of the Gasco site. He admitted having no knowledge of petroleum spill reporting requirements, prior to the October and November 2004 DEC Staff inspections.

The Respondent Romero stated he retained sales tax records only for two or three months. He would compute sales tax liability for the site by assuming that petroleum product sold at the Gasco site for a given period equaled approximately the amount of product he purchased for the site during that period. He stated that he kept no ten-day inventory records and no

payroll for operation of the site.

The Respondents do not challenge the factual evidence in the record that establishes the violations, but instead interpose affirmative defenses and contend that the Respondent Romero was not an operator of the site.[1]

IV. The Thirteen Alleged Violations

Finding of Fact (FF) 1. The Respondent Juan M. Romero commenced operation of the Gasco site on June 11, 2001 pursuant to an Assignment and Assumption of Lease agreement with the landlord, Reshma Realty, Inc., and the prior tenant (assignee) Meena Enterprises, Inc.

FF 2. In his operation of the Gasco site, the Respondent Juan M. Romero formed the closely held corporation Gasco-Merrick Road Gas Corp.

FF 3. The Respondent Juan M. Romero is the principal of the corporate Respondent Gasco-Merrick Road Gas Corp.

FF 4. Prior to commencing operation of the site, the Respondent Romero had completed two years of college education at Bronx Community College.

FF 5. The Respondent Gasco-Merrick Road Gas Corp., is a corporation authorized to do business in the state of New York. At all times relevant herein, the Respondent Gasco-Merrick Road Gas Corp., through its principal, Respondent Juan M. Romero, maintained offices for the transaction of business at 3215 Merrick Road, Wantagh, New York (the "Gasco site"). The Respondents Romero and Gasco operated the Gasco site at least from June 11, 2001 through December 2004.

FF 6. The Gasco site has a combined total petroleum product storage capacity exceeding 1,100 gallons. The Gasco site is a retail gasoline station with four single-walled underground petroleum storage tanks; three 6,000 gallon tanks and one 4,000 gallon tank.

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[1] As set forth above, Respondent Romero was an operator of the site.

FF 7. The Respondent Juan M. Romero is charged in his personal capacity regarding operation of the Gasco site.

Conclusion of Law (CL) 1: Pursuant to 6 NYCRR 612.1(c)(10), at all times relevant in this report, the Gasco site is a petroleum bulk storage facility.

A. That Respondents failed to properly reconcile the inventory records for the facility's underground storage tanks, as required by 6 NYCRR 613.4(a) and ECL 17-1007. (Amended Complaint¶ 14).

FF 8. The Respondents failed to properly perform inventory reconciliation.

FF 9. During the November 8, 2004 Gasco site inspection, DEC Staff found that no 10-day tank reconciliation records existed for the site. DEC Staff determined that the Veeder-Root TLS 250 automatic tank gauge system was not operating.

FF 10. Petroleum delivery inventory records did not match the Veeder Root system.

FF 11. Moreover, at the December 3, 2004 compliance conference, the Respondent Romero produced no ten-day inventory records. The Respondent Romero explained that he kept only petroleum product delivery receipt records for the facility.

FF 12. The only records the Respondents maintained were the facility registration and the daily "stick" records.

Ruling and CL 2: During their operation of the Gasco site, Respondents failed to properly reconcile the inventory records for the facility's underground storage tanks, as required by 6 NYCRR 613.4(a) and ECL 17-1007. (Amended Complaint¶ 14).

B. Respondents failed to properly maintain inventory records for the facility for a period of at least five years in violation of 6 NYCRR 613.4(c). (Amended Complaint¶ 15).

FF 13. Pursuant to 6 NYCRR 613.4(c), inventory monitoring records must be maintained and made available for Department inspection for a period of not less than five years.

FF 14. Respondents were required to provide all inventory records for the facility, pursuant to a discovery request of the Department Staff. The Respondents failed to provide any inventory records for the facility.

FF 15. In addition, the facts summarized above regarding the first alleged violation also support a finding of violation on this allegation.

FF 16. No inventory records were available during the inspections (other than the daily "stick" records) and Respondent Romero failed to produce any ten-day inventory records and stated during the conference that he never kept such records.

Ruling and CL 3: During their operation of the Gasco site, Respondents failed to properly maintain inventory records for the facility for a period of at least five years in violation of 6 NYCRR 613.4(c). (Amended Complaint¶ 15).

C. Respondents failed to properly secure the shear valves at the facility in violation of 6 NYCRR 613.3(d). (Amended Complaint¶ 16)

FF 17. Pursuant to 6 NYCRR 613.3(d), the operator of a petroleum bulk storage facility must keep all gauges, valves and other equipment for spill prevention in good working order.

FF 18. The shear valve is a safety device located at the bottom of each retail gasoline (or other petroleum product) dispenser pump. If a car were to strike the dispenser pump, the shear valve would shear off, stopping the flow of gasoline (or other petroleum product). In the event of a fire at the gas station, a fusible link in the shear valve would melt and stop the flow of gasoline.

FF 19. An inspection of Respondents' facility on November 8, 2004 revealed that some of the shear valves at the facility were not properly mounted.

FF 20. During the November 8, 2004 inspection, DEC Staff observed that four shear valves were improperly mounted.

FF 21. Regarding the diesel pump dispenser, the shear valve and fittings were glossy and wet, indicating a continuous leak.

FF 22. The Respondent Romero stated he does not know what a shear valve is and neither he nor his employees have ever inspected the shear valves at the Gasco site.

Ruling and CL 4: On November 8, 2004, Respondents failed to properly secure four shear valves at the facility in violation of 6 NYCRR 613.3(d)[2]. (Amended Complaint¶ 16)

D. Respondents failed to check monitoring wells at the facility in violation of 6 NYCRR 613.5(b)(3). (Amended Complaint¶ 17).

FF 23. Pursuant to 6 NYCRR 613.5(b)(3), the operator of a petroleum bulk storage facility must monitor for traces of petroleum at least once per week, all monitoring systems must be inspected monthly, and monitoring systems must be kept in proper working order. If any monitoring system fails to function effectively, it must be repaired within 30 days, and any tank or piping system with a networking monitoring system must be tested for tightness within one year and retested every five years thereafter until the tank is permanently closed.

FF 24. An inspection of Respondents' facility on November 8, 2004 revealed that Respondents and their employees never checked the five monitoring wells at the facility during their operation of the Gasco site.

FF 25. The Gasco site has no other working leak detection system (aside from the ten-day reconciliation records requirement, with which Respondents failed to comply).

FF 26. Moreover, Respondent Romero stated he did not even know that monitoring wells existed on the site, until the DEC Staff inspectors showed him where the wells were located.

Ruling and CL 5: During their operation of the Gasco site, Respondents failed to check monitoring wells at the facility in violation of 6 NYCRR 613.5(b)(3). (Amended Complaint¶ 17).

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[2] Because staff could not identify which photographs go with which pumps, I find only 4 violations, not five as alleged.

E. Respondents failed to keep all gauges, valves and other equipment for spill prevention in good working order, as required by 6 NYCRR 613.3(d). (Amended Complaint¶ 18).

FF 27. Pursuant to 6 NYCRR 613.3(d), the operator of a petroleum bulk storage facility must keep all gauges, valves and other equipment for spill prevention in good working order. Pursuant to 6 NYCRR 613.8, any person with knowledge of a spill, leak or discharge of petroleum must report the incident to the Department within two hours of discovery. The results of any inventory record, test or inspection which shows a facility is leaking must be reported to the Department within two hours of the discovery. Notification must be made by calling the telephone hotline (518) 457-7362. *See also* Navigation Law § 175.

FF 28. During the October 6, 2004 Gasco site inspection, DEC Staff noted that all monitoring wells exhibited a petroleum odor; one well had a trace of petroleum product in it, and another well (the southern-most monitoring well) had 1/4 inch of floating petroleum product in it.

FF 29. The petroleum odor and floating petroleum product in monitoring wells at the Gasco site are indicative of either a leak in the underground tank system or overfill from the rusted-out spill buckets. Either circumstance results from the Respondents' failure to keep spill prevention equipment in good working order.

FF 30. An inspection of Respondents' facility by DEC Staff on November 8, 2004 revealed that Respondents failed to properly maintain the shear valve and containment sump associated with the diesel tank at the facility, resulting in a continual diesel fuel petroleum leak and resulting in soil contamination in the area of the rusted-out spill bucket.

FF 31. The Respondent Romero stated he did not know whether a petroleum spill underneath a sump must be reported to the Department. Regarding the Gasco site, neither Respondent Romero nor his employees ever reported any petroleum spill.

FF 32. Photographic exhibits of the site taken on November 8, 2004, show the following: Photo Exhibit 5L depicts an ongoing leak at the diesel grade petroleum dispenser. Photo Exhibits 5D

and E depict petroleum contamination and Photo Exhibit 5D depicts a pump filter turned upside down.

Ruling and CL 6: Respondents' failure to keep all gauges, valves and other equipment for spill prevention in good working order, as documented on November 8, 2004, is a violation of 6 NYCRR 613.3(d). (Amended Complaint¶ 18).

Ruling and CL 7: Respondents' failure to remediate or notify the DEC Staff of petroleum spills within 2 hours by calling in a spill report for the petroleum contamination in the spill buckets is a violation of 6 NYCRR 613.8 and Navigation Law § 175.

F. Respondents failed to maintain leak monitoring records at Respondents' facility for a period of at least one (1) year, as required by 6 NYCRR 613.5(b)(4). (Amended Complaint¶ 19).

FF 33. An inspection of Respondents' facility by Department staff on November 8, 2004 revealed that Respondents failed to maintain any leak monitoring records at the facility.

FF 34. The only records Respondents maintained were the facility registration and the daily "stick" records.

Ruling and CL 8: During their operation of the Gasco site, Respondents failed to maintain leak monitoring records at Respondents' facility for a period of at least one (1) year, as required by 6 NYCRR 613.5(b)(4). (Amended Complaint¶ 19).

G. Respondents failed to properly label tanks at the facility in violation of 6 NYCRR Part 614. (Amended Complaint¶ 20).

FF 35. Pursuant to 6 NYCRR 614.3(a)(2), all new underground tanks used in New York State after December 27, 1986 must bear a permanent stencil, label or plate affixed to the tank fill port which contains a statement that "This tank conforms with 6 NYCRR Part 614" and other information specified in 6 NYCRR 614.3(a).

FF 36. An inspection of Respondents' facility on November 8, 2004 revealed one tank installed after December 27, 1986, for which the fill port was not labeled.

Ruling and CL 9: As documented on November 8, 2004, Respondents failed to properly label one tank at the facility in violation of 6 NYCRR 614.3(a)(2). (Amended Complaint¶ 20).

H. Respondents failed to maintain the leak detection system at the facility in violation of 6 NYCRR Part 613. (Amended Complaint¶ 21).

FF 37. Pursuant to 6 NYCRR 613.5(b)(3), the operator of a petroleum bulk storage facility must monitor for traces of petroleum at least once per week; all monitoring systems must be inspected monthly, and monitoring systems must be kept in proper working order; and if any monitoring system fails to function effectively, it must be repaired within 30 days.

FF 38. As noted above, an inspection of Respondents' facility on November 8, 2004 revealed that the Respondents and their employees never checked the five monitoring wells at the facility during their operation of the Gasco site.

FF 39. The Gasco site has no other working leak detection system (aside from the ten-day reconciliation records requirement, with which Respondents failed to comply).

FF 40. Moreover, Respondent Romero stated he did not even know that monitoring wells existed on the site, until the DEC Staff inspectors showed him where the wells were located.

FF 41. Lastly, DEC Staff determined on November 8, 2004 that the Veeder-Root TLS 250 automatic tank gauge system was not operating and that daily "stick" inventory records did not match the Veeder Root system.

Ruling and CL 10: As documented on November 8, 2004, Respondents failed to maintain the leak detection system at the facility in violation of 6 NYCRR Part 613. (Amended Complaint¶ 21).

I. Respondents failed to maintain the stage I vapor recovery system in violation of 6 NYCRR 230.2. (Amended Complaint¶ 22).

FF 42. Pursuant to 6 NYCRR 230.2(f)(3), operators of gasoline storage tanks must replace, repair or modify any worn or

ineffective component or design element to ensure the vapor-tight integrity and efficiency of the stage I vapor collection and vapor control systems.

FF 43. An inspection of Respondents' facility on November 8, 2004 revealed that the stage I vapor recovery system was not properly maintained. DEC Staff noted a damaged cap that did not make a vapor tight seal and therefore could not function properly to contain petroleum vapors.

FF 44. Respondent Romero stated that neither he nor his employees inspected the caps at the Gasco site to ensure a vapor tight seal.

Ruling and CL 11: As documented on November 8, 2004, Respondents failed to maintain the stage I vapor recovery system in violation of 6 NYCRR 230.2. (Amended Complaint¶ 22).

J. Respondents failed to maintain the stage II vapor recovery system in violation of 6 NYCRR 230.2. (Amended Complaint ¶ 23).

FF 45. Pursuant to 6 NYCRR 230.2(g)(1) and (2), daily visual inspections of components of stage II vapor collection systems must be performed to ensure the integrity and efficiency of the system; dispensers with defective stage II components must be removed from service, locked and sealed to prevent vapor loss from operational dispensers until approved replacement parts are installed.

FF 46. An inspection of Respondents' facility on November 8, 2004 revealed that the stage II system was not properly maintained. One dispenser retractor cord was missing. The retractor cord is necessary to hold the dispenser hose in an upright position when not in use, preventing any liquid remaining in the hose from draining back into the tank.

FF 47. A dispenser hose was cracked and weather checked, preventing containment of vapors.

FF 48. On one dispenser hose, the face plate was torn and pieces of the face plate were missing, preventing a vapor-tight seal during the fueling of vehicles.

Ruling and CL 12: As documented on November 8, 2004, Respondents failed to maintain the stage II vapor recovery system in violation of 6 NYCRR 230.2, regarding the retractor cord and two dispenser hoses identified above, three violations of 6 NYCRR 230.2. (Amended Complaint ¶ 23).

K. Respondents failed to timely conduct a 5 year test of the stage II vapor recovery system and maintain the results on site. (Amended Complaint ¶24).

Pursuant to 6 NYCRR 230.2(k)(1)(ii), owners and operators of Stage II systems must perform dynamic back pressure, liquid blockage and leak tests before commencing operation. Based upon an inspection of Respondents' facility on November 8, 2004, DEC Staff concluded that the stage II system had not been tested as required by 6 NYCRR 230.2(k)(1)(ii) and that no test results were maintained at the Gasco site other than the site registration (issued by the Nassau County Fire Marshall). The site registration indicated that the tanks were tightness tested on January 23, 1998. Respondents conducted no tightness testing prior to commencing operation of the Gasco site on June 11, 2001.

As discussed *supra*, regarding Respondents' first and fifth affirmative defenses, the tank tightness test of March 5, 2003, almost two years after Respondents commenced operation of the site, does not satisfy the requirements of 6 NYCRR 230.2(k)(1)(ii), which is a separate and distinct regulatory requirement.

Ruling and CL 13: Respondents violated 6 NYCRR 230.2(k)(1)(ii) by failing to perform dynamic back pressure, liquid blockage and leak tests at the Gasco site before commencing operation on June 11, 2001.

L. Respondents failed to timely report petroleum spills at the facility, in violation of NL § 175, 6 NYCRR 613.8 and ECL § 17-1743. (Amended Complaint¶ 19).

FF 49. Inspections at Respondents' Gasco facility on October 6, 2004 and November 8, 2004, revealed that petroleum spills from the Gasco site had impacted the groundwater and were causing vapor complaints in the storm drains at the street.

FF 50. Respondents are dischargers responsible for the petroleum discharges that occurred during their operation of the

Gasco site, including the discharge evidenced on October 6, 2004 and November 8, 2004.

FF 51. Respondents failed to report these discharges to the DEC Staff immediately, as required by ECL § 17-1743 or within two hours as required by NL § 175 and 6 NYCRR 613.8.

FF 52. 6 NYCRR 612.1(c)(24) defines spill or spillage as meaning "any escape of petroleum from the ordinary container employed in the normal course of storage, transfer, processing or use."

Navigation Law § 172(8) defines a "discharge" as "[a]ny intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of petroleum into the waters of the state or onto the lands from which it might flow or drain into said waters, or into waters outside the jurisdiction of the state when damage may result to the lands, waters or natural resources within the jurisdiction of the state."

Navigation Law §173, entitled "Discharge of Petroleum; prohibition," states that, "[t]he discharge of petroleum is prohibited..."

6 NYCRR 613.8 states that "[a]ny person with knowledge of a spill, leak or discharge of petroleum must report the incident to the Department within (2) hours of discovery..."

ECL § 17-1743 requires any person in actual or constructive possession or control of more than one thousand one hundred gallons, in bulk, of any liquid, including petroleum, which if released, discharged or spilled would or would be likely to pollute the lands or waters of the state including the groundwaters thereof shall, as soon as he has knowledge of the release, discharge or spill of any part of such liquid in his possession or control onto the lands or into the waters of the slate including the groundwaters thereof immediately notify the Department.

ECL § 71-1943 states, "[a]ny person who fails to so notify the department of such release, discharge or spill into the waters of the state as described in section 17-1743 of this chapter, shall, upon conviction, be fined not more than three thousand seven hundred fifty dollars..."

Navigation Law § 175 states that "[a]ny person responsible for causing a discharge shall immediately notify the department pursuant to rules and regulations established by the department, but in no case later than two hours after the discharge. Failure to so notify shall make persons liable to the penalty provisions of section 192 of this article..."

DEC Staff contends that the Respondents are "dischargers" under the Navigation Law. As indicated above, the Navigation Law defines a discharge, in part, as "an intentional or unintentional action or omission." It is the Department Staff's contention that it was the omissions of the Respondents - - in failing to properly install spill buckets, failing to maintain leak detection (including failing to check the monitoring wells), failing to maintain inventory and failing to maintain the stage I and stage II vapor recovery systems - - that resulted in discharges of petroleum into the environment during their operation of the Gasco site. In sum, the Respondents were dischargers under the Navigation Law, responsible for the discharges that occurred during their operation of the Gasco site.

Courts have liberally construed the definition of "discharger" under the Navigation Law. In *White v Regan,* 171 A.D.2d 197 (3rd Dept., 1991), lv. denied, 79 N.Y.2d 754 (Ct. App., 1992) liability was imputed to a landowner that owned tanks from which contamination emanated, notwithstanding that the contamination did not occur while that landowner owned the property. More recently, in *New York v Green,* 96 NY2d 403, the court stated that the language of Navigation Law § 172(8) is sufficiently broad to include landowners who have control over activities occurring on their property, including a landlord, and have reason to believe that their tenants will be using petroleum products.

Here, the evidence shows that Respondents were the operators of the Gasco site and the petroleum storage tanks at the site. They arranged delivery of petroleum products to the tanks and were responsible for the retail sales from dispensers drawing from those tanks.

Respondents failed to maintain the tanks in accordance with the minimum requirements of the law, resulting in unauthorized discharges of petroleum products. One may reasonably conclude that if Respondents had complied with the minimum requirements of

law, they would have been aware of the leaks when the leaks first occurred and could have taken appropriate steps to stop the leaks and investigate and remediate the resulting spills. Instead, due to Respondents' omissions, the leaks continued unabated until the DEC Staff inspections.

The three Department Staff witnesses (Nick Acampora, Brian Donovan, and Gary McPherson) testified at length relating to the releases of petroleum at the facility. The initial spill report related to vapors in the storm drain. As set forth in the Navigation Law definition of "discharge," emitting of petroleum is within the definition. Therefore, DEC Staff persuasively contends, it is irrelevant whether it was the failures of the Stage I or Stage II vapor recovery system, the overfills into the area around the fill ports, or the leakage of oil and diesel fuel under the dispensers that caused the petroleum vapors giving rise to the spill report. Pursuant to the Navigation Law, any and all such releases were required to have been reported to the department by the person(s) responsible for causing the discharge. In this instance, Respondents were the persons responsible for causing the discharges and Respondents were required to report each discharge to the Department.

The Respondents were responsible for the discharge(s), because they were the parties operating the Gasco site gas station, which was materially out of compliance with the law. DEC Staff reasonably contends that if Respondents had not continued to receive gasoline and diesel fuel deliveries at the site, the tanks might have been emptied so that no release of petroleum could have occurred.

6 NYCRR 613.8 requires that a person have "knowledge" of a spill, leak or discharge of petroleum prior to report such discharge. In this instance, during Respondents' operation of the Gasco site several ongoing releases of petroleum at each of the fill ports occurred. Further, the area under the fuel dispensers at the site were also contaminated with petroleum, indicating that additional spills occurred during Respondents' operation of the site. Had Respondents or their agents inspected the fill ports at this site to ensure the caps on the fill ports were properly maintained (a requirement under the stage I vapor recovery system regulatory program), they would have observed this petroleum contamination and could have taken steps to abate the discharge. DEC Staff contends that any person inspecting the dispensers would have noted the petroleum contamination there.

In contradictory testimony, Respondent Romero stated he checked the fill ports (DEC Staff contends that if he checked, then Respondent Romero must have observed the petroleum contamination; yet he never reported it). Respondent Romero also denied ever opening up the same fill ports. He also stated that "most of the time we saw there are no spills" (With respect to this last statement, DEC Staff contends that if Respondent saw that there were no spills most of the time, it follows logically that he must have observed spills at other times; yet he never reported any spill). Respondent Romero's contradictory testimony only serves to underscore DEC Staff's contention that Mr. Romero is unsuitable and unqualified to operate any retail gas station or any other petroleum bulk storage facility in New York or elsewhere.

Under ECL § 17-1743, both Respondents Romero and Gasco, had actual and constructive possession of over 1100 gallons of petroleum at the Gasco site. During Respondents' operation of the Gasco site, several petroleum leaks occurred at the site and caused groundwater contamination. As to the question of Respondents' knowledge, Respondents knew or should have known of the spills that occurred during their operation of the Gasco site and they failed to report those spill events.

Respondent Romero's attempt to shield himself from liability based upon his ignorance of the law, must fail. Based on his statements, he has operated several gas stations in New York over a period of at least 4 years. Respondent Romero's lack of compliance with even basic legal requirements in operation of the Gasco site cannot be explained away by his purported ignorance of the law. He has completed two years of college, which certainly indicates he is capable of understanding the basic regulatory requirements. Both of the Respondents, Romero and Gasco, failed to report petroleum spills at this site in violation of the NL § 175, ECL § 17-1743 and 6 NYCRR 613.8.

Ruling and CL 14: As documented site inspections on October 6, 2004 and November 8, 2004, during Respondents' operation of the Gasco site Respondents knew or should have known that several petroleum discharges occurred that were required to be reported to the DEC, which they failed to report. In sum, Respondents failed to report these petroleum spills during their operation of the Gasco site in violation of the ECL, Navigation Law and regulations promulgated pursuant thereto.

M. Respondents failed to remediate petroleum discharges that occurred at the Gasco site, in violation of ECL § 71-1941 and NL § 176. Due to Respondents' failure, the Department retained a third-party contractor to remediate contamination at the Gasco site. (Amended Complaint ¶ 29).

ECL § 71-1941 requires the owner or person in actual possession of more than eleven hundred gallons of petroleum, which spills and contravenes standards, to pay a penalty of not more than $3,750 for an initial incident and then up to $750 per day for each day the contravention of standards continues, as well as all costs incurred by the people of the state of New York for the removal or neutralization of such liquid.

Navigation Law § 176 requires that any person discharging petroleum in a manner prohibited by NL section 173 shall immediately undertake to contain such discharge.

Neither the site owner nor Respondents - - site operators - - undertook any measures to contain the discharges and contamination at the site. Therefore, DEC Staff retained National Environmental Management Associates Corporation to perform an accelerated site assessment of the Gasco site, which assessment was conducted on December 31, 2004. The site has not yet been fully investigated or remediated. Respondents have done nothing to investigate or remediate the site or to reimburse the state for expenses related to the site.

> **Ruling and CL 15:** As stated in the previous ruling, during Respondents' operation of the Gasco site, several petroleum spills occurred that should have been reported but were not. Respondents failed to timely report petroleum spills at the facility, in violation of the ECL, Navigation Law and regulations promulgated pursuant thereto. Additionally, Respondents failed to investigate and remediate the petroleum discharges that occurred at the Gasco site, in violation of ECL § 71-1941 and NL § 176.

V. Penalties

DEC Staff has provided a penalty calculation and penalty matrix in their closing brief. I accept DEC Staff's penalty calculation and matrix, reproductions of which are attached to this report respectively as "Appendix A" and "Appendix B" and made a part hereof. The maximum monetary penalty that may be

assessed in this case is in the tens of millions of dollars. In view of the maximum penalties that may be assessed for these violation, the DEC Staff's analysis is, if anything, too lenient in its request for penalties in this matter. As Staff has noted, Respondents' argument that they did not understand the regulatory program and requirements is not credible. Respondent Romero testified that he completed two years of college education. In view of his ability to complete college level work, it is apparent that his failure to comply with the regulatory requirements was not due to his inability to understand the regulatory program, but his lack of motivation to do so.

RECOMMENDATIONS

1. The Commissioner should conclude that Respondents Juan M. Romero and Gasco-Merrick Road Gas Corp., committed the following violations during their operation of the Gasco site from June 11, 2001 through December 2004:

a) During their operation of the Gasco site, Respondents failed to properly reconcile the inventory records for the facility's underground storage tanks, as required by 6 NYCRR 613.4(a) and ECL 17-1007. (Ruling and CL 2; Amended Complaint¶ 14).

b) During their operation of the Gasco site, Respondents failed to properly maintain inventory records for the facility for a period of at least five years in violation of 6 NYCRR 613.4(c). (Ruling and CL 3; Amended Complaint¶ 15).

c) On November 8, 2004, Respondents failed to properly secure four shear valves at the facility in violation of 6 NYCRR 613.3(d). (Ruling and CL 4 [four violations]; Amended Complaint¶ 16)

d) During their operation of the Gasco site, Respondents failed to check monitoring wells at the facility in violation of 6 NYCRR 613.5(b)(3). (Ruling and CL 5; Amended Complaint¶ 17).

e) During their operation of the Gasco site, Respondents failed to maintain leak monitoring records at Respondents'

facility for a period of at least one (1) year, as required by 6 NYCRR 613.5(b)(4). (Ruling and CL 8; Amended Complaint¶ 19).

g) Respondents' failure to remediate or notify the DEC Staff within 2 hours by calling in a spill report for the petroleum contamination in the spill buckets, as documented on November 8, 2004, is a violation of 6 NYCRR 613.8 and Navigation Law § 175. Respondents' failure to keep all gauges, valves and other equipment for spill prevention in good working order, as documented on November 8, 2004, is a violation of 6 NYCRR 613.3(d). (Rulings and CLs 6 and 7; Amended Complaint¶ 18).

h) As documented on November 8, 2004, Respondents failed to properly label one tank at the facility in violation of 6 NYCRR 614.3(a)(2). (Ruling and CL 9; Amended Complaint¶ 20).

i) As documented on November 8, 2004, Respondents failed to maintain the leak detection system at the facility in violation of 6 NYCRR Part 613. (Ruling and CL 10; Amended Complaint¶ 21).

j) As documented on November 8, 2004, Respondents failed to maintain the stage I vapor recovery system in violation of 6 NYCRR 230.2. (Ruling and CL 11; Amended Complaint¶ 22).

k) As documented on November 8, 2004, Respondents failed to maintain the stage II vapor recovery system in violation of 6 NYCRR 230.2, regarding the retractor cord and two dispenser hoses identified above, three violations of 6 NYCRR 230.2. (Ruling and CL 12; Amended Complaint ¶ 23).

l) Respondents violated 6 NYCRR 230.2(k)(1)(ii) by failing to perform dynamic back pressure, liquid blockage and leak tests at the Gasco site before commencing operation on June 11, 2001. (Ruling and CL 13; Amended Complaint ¶24).

m) As documented site inspections on October 6, 2004 and November 8, 2004, during Respondents' operation of the Gasco site Respondents knew or should have known that several petroleum discharges occurred that were required to be reported to the DEC, which they failed to report. In sum, Respondents failed to report these petroleum spills during

their operation of the Gasco site in violation of the ECL, Navigation Law and regulations promulgated pursuant thereto.

n) During Respondents' operation of the Gasco site, more than one spill occurred that should have been reported but was not. Respondents failed to timely report petroleum spills at the facility, in violation of the ECL, Navigation Law and regulations promulgated pursuant thereto. In addition, the Respondents failed to remediate the petroleum discharges that occurred at the Gasco site, in violation of ECL § 71-1941 and NL § 176. (Ruling and CL 15; Amended Complaint ¶29).

3. Based on the discussion provided above (V. Penalties), the Commissioner should assess a civil monetary penalty of Fifty Thousand ($50,000.00) Dollars against Respondent Juan M. Romero and should assess a civil monetary penalty of Seventy Five Thousand ($75,000.00) Dollars against Respondent Gasco-Merrick Road Gas Corp.

4. The Commissioner should direct that Respondents conduct further investigation and remediation at the facility, as necessary, within sixty (60) days of the date of service of the Commissioner's Order upon Respondents. Any further investigation and remediation of the facility should occur pursuant to a plan approved by the Department Staff.

5. Lastly, the Commissioner should direct that Respondents pay to the Department all past oversight and contractual costs incurred by the Department relating to inspections and petroleum spill investigation and remediation conducted by the Department.

Attachments:

APPENDIX A DEC Staff Penalty Calculation ..... (6 pages) (NOT ATTACHED HERE. A HARD COPY IS AVAILABLE BY CONTACTING THE OFFICE OF HEARINGS)

APPENDIX B DEC Staff Penalty Matrix .....(5 pages) (NOT ATTACHED HERE. A HARD COPY IS AVAILABLE BY CONTACTING THE OFFICE OF HEARINGS)