

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violations of Article 12 of the New York Navigation Law and Part 32 of Title 17 of the Official Compilation of the Codes, Rules and Regulations of the State of New York,

ORDER

DEC Case No.
LER5-15-022017

- by -

**RAYMOND LARUSSA d/b/a A&D HOME
HEATING,**

Respondent.

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department or DEC) that respondent Raymond LaRussa d/b/a A&D Home Heating violated Navigation Law § 175 and 17 NYCRR 32.3 when, on October 23, 2015, after discharging petroleum at a residence located at 111 Beecher Road, Village of Granville, Washington County, New York (site), he failed to report the discharge. Department staff also alleged that respondent failed to contain and clean up the discharge in violation of Navigation Law § 176 and 17 NYCRR 32.5.

Department staff seeks a Commissioner's order:

- (a) finding that respondent committed the violations alleged;
- (b) imposing on respondent a civil penalty in the amount of twenty thousand dollars (\$20,000), comprising of seven thousand five hundred dollars (\$7,500) for the violation of Navigation Law § 175 and 17 NYCRR 32.3 (by failing to notify the Department of a discharge of petroleum) and twelve thousand five hundred dollars (\$12,500) for the violation of Navigation Law § 176 and 17 NYCRR 32.5 (by failing to immediately undertake all reasonable steps to contain the discharge); and,
- (c) granting such other and further relief as may be deemed just and proper under the circumstances.

Administrative Law Judge (ALJ) Lisa A. Wilkinson of the Department's Office of Hearings and Mediation Services was assigned to this matter and, on May 10, 2017, convened a hearing in the Department's Region 5 offices in Warrensburg, New York. ALJ Wilkinson prepared the attached hearing report, recommending that I hold respondent liable for the charges pleaded in Department staff's complaint and impose a civil penalty of twenty thousand dollars

(\$20,000) upon respondent. I adopt the ALJ's findings and conclusions of law as my decision in this matter, subject to my comments below.

Respondent Raymond LaRussa operated a home heating oil delivery business known as A&D Home Heating in Granville, New York (*see* Hearing Report at 3 [Finding of Fact No. 2]). On October 23, 2015, at approximately 2:00 p.m., respondent made a delivery of 200 gallons of number 2 fuel residential heating oil to an aboveground fuel oil storage tank (tank) located at 111 Beecher Road in the Village of Granville, Washington County (*see* Hearing Report at 3 [Finding of Fact No. 3]). The tank, which was located in the basement of the residence, had a capacity of 275 gallons (*id.*)

During the delivery, the tank was overfilled, causing heating oil to spray out of the vent line, and under a deck (*see* Hearing Report at 3 [Finding of Fact No. 5]). Respondent was aware of the spill around the outside deck at the time of the delivery and left the residence in order to obtain absorbent material to address it (*see* Hearing Report at 3 [Findings of Fact Nos. 6, 7]).

Respondent however failed to report the spill to the DEC as required by law (*see* Hearing Exhibit 8; transcript [tr] at 179-180, 196).

At approximately 3:20 p.m., respondent returned to the residence and became aware that heating oil was leaking out of the tank and onto the basement floor (*see* Hearing Report at 3-4 [Finding of Fact No. 8]). Respondent placed an eighteen (18) gallon tub under the tank to collect the heating oil and left the residence to obtain additional supplies and equipment to address the spill (*id.*). When respondent returned to the residence at approximately 4:50 p.m., the tub he had previously placed under the tank was almost full (*id.* at 4 [Finding of Fact No. 9]). Respondent continued to pump heating oil out of the tub and out of the tank into two fifty-five (55) gallon drums and left the site at approximately 7:00 p.m. (*see* Hearing Report at 4 [Findings of Fact Nos. 9, 11]).

The homeowner reported the spill to the DEC at 9:19 p.m. (*see* Hearing Exhibit 8).¹

When Department staff arrived at the residence at 11:00 p.m. on October 23, 2015, the heating oil tank was still leaking, the tub that respondent had placed under the leaking tank was overflowing and heating oil was covering areas of the basement floor as well as wicking up into the woodwork and paneling (*see* Hearing Report at 5 [Findings of Fact Nos. 15-19]). The Department's spill contractor conducted initial spill response activities (*see* Hearing Report at 5-6 [Findings of Fact Nos. 21, 22]). Respondent's insurance company subsequently engaged a contractor (Response Environmental, Inc.) which undertook an extensive remediation project that involved collecting core soil samples beneath the basement and outside the residence, excavating the basement floor and removing over 300 tons of contaminated soil below the floor and from the exterior of the residence (*see* Hearing Report at 6-7 [Findings of Fact Nos. 27-34]).

¹ At the adjudicatory hearing, respondent testified that, prior to his departure from the residence at 7:00 p.m. on October 23, 2015, the homeowner informed him that "he called the DEC but that they were busy in Comstock" on another site (*see* tr at 207).

Liability

Navigation Law § 173(1) prohibits the discharge of petroleum, which includes the heating oil at issue here (*see* Navigation Law § 172[15]). Any person who causes a discharge of petroleum must immediately notify the Department, but in no case later than two hours after the discharge (*see* Navigation Law § 175 and 17 NYCRR 32.3).

In this case, Department staff proved by a preponderance of the evidence that respondent failed to report the spill he caused at the site. Respondent, who owned and operated a heating oil delivery business, should have been fully aware of the reporting obligations in the event that a discharge occurred. Respondent's contention that he did not have the telephone number for the DEC spill hotline is not a defense and, in his occupation, it would be expected that he would have the hotline number immediately available.

The law also requires a person who is responsible for a discharge of petroleum to take immediate steps to contain, cleanup and remove the discharge (*see* Navigation Law § 176[1]) and 17 NYCRR 32.5). Respondent made efforts to address the discharge but, notwithstanding those efforts, the damage to the residence and the impacts to the surrounding environment were substantial (*see* Hearing Report at 6-7 [Findings of Fact Nos. 27-35]). Even though respondent was in the heating oil delivery business, he did not have any spill containment material on hand and needed to leave the site to obtain this material. Although he subsequently returned with containment material, he later departed from the site with the spill still unresolved.

The record is clear that respondent violated the statutory and regulatory provisions charged by Department staff.

Civil Penalty

Section 192 of the Navigation Law provides for a civil penalty of up to twenty-five thousand dollars (\$25,000) per day for each violation of the provisions of article 12 of the Navigation Law (in this matter, §§ 175 and 176) or any regulation promulgated thereunder (here, 17 NYCRR 32.3 and 17 NYCRR 32.5).

Department staff requests a civil penalty in the total amount of twenty thousand dollars (\$20,000) for the violations alleged. Respondent testified that his company A&D Home Heating was dissolved on July 6, 2016 (tr at 9). He indicated that he did not have a job for a period of time, was now working for an auto parts company, and his financial ability to pay the penalty was "non-existent" (tr at 263). Respondent further testified that he previously submitted information to Department staff regarding his financial circumstances, but the ALJ noted that the financial information had been provided during settlement negotiations and therefore was not a part of the hearing record (*see* tr at 266-267).² The ALJ provided respondent with an

² Where, at hearing, a pro se respondent states that he or she is financially unable to pay, the ALJ should undertake appropriate efforts to solicit this information. In this instance, the ALJ provided respondent with an opportunity to submit financial information following the hearing. Based on the record, further inquiry at the hearing itself, including a discussion of the release of respondent's financial information that was then in staff's possession, would have been appropriate.

opportunity to submit financial information as part of the hearing record; however respondent failed to do so (*see* tr at 276-277; *see also* e-mail dated July 24, 2017, from ALJ Wilkinson to the parties [with e-mails dated July 21, 2017 and June 29, 2017 (with attached letter) from DEC Attorney Scott Abrahamson to the ALJ and respondent]).³

Upon consideration of the record before me, however, including but not limited to the fact that respondent attempted to undertake containment efforts at the site and the remedial activities that were undertaken, I am assessing a civil penalty in the amount of five thousand dollars (\$5,000), based on the following schedule:

- two thousand five hundred dollars (\$2,500) of the civil penalty shall be due on or before December 31, 2019; and
- the remaining two thousand five hundred dollars (\$2,500) of the civil penalty shall be due on or before June 30, 2020.

This civil penalty is authorized and appropriate under the circumstances in this record.

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

- I. Respondent Raymond LaRussa is adjudged to have violated:
 - A. Navigation Law § 175 and 17 NYCRR 32.3 by failing to report a discharge of petroleum at 111 Beecher Road in the Village of Granville, Washington County, New York; and
 - B. Navigation Law § 176 (1) and 17 NYCRR 32.5 for failing to undertake all reasonable measures to contain the discharge at 111 Beecher Road, Village of Granville, Washington County, New York.
- II. Respondent Raymond LaRussa is hereby assessed a civil penalty in the amount of five thousand dollars (\$5,000) to be paid in the form of a certified check, cashier's check, or money order made payable to the New York State Department of Environmental Conservation, and such penalty is to be submitted according to the following schedule:

- two thousand five hundred dollars (\$2,500) of the civil penalty shall be due on or before December 31, 2019; and

³ Based upon my review, I determined that respondent should be given a further opportunity to submit financial information for the hearing record to support his claim of being financially unable to pay the penalty that staff proposed. Accordingly, I directed the Deputy Commissioner for Hearings and Mediation Services to so advise respondent, which was done by letters dated May 2 and May 9, 2019. Respondent, who has apparently moved out-of-state based on postal information, was given until May 31, 2019 to submit this financial information for the hearing record but failed to submit any information by that date.

--the remaining two thousand five hundred dollars (\$2,500) of the civil penalty shall be due on or before June 30, 2020.

The civil penalty shall be hand-delivered or mailed to the following address:

Scott Abrahamson, Esq.
Office of General Counsel
NYS Department of Environmental Conservation
Region 5
1115 State Route 86
P.O. Box 296
Ray Brook, New York 12977-0296

- III. All questions and correspondence regarding this order shall be addressed to Scott Abrahamson, Esq. at the address referenced in paragraph II of this order.
- IV. The provisions, terms and conditions of this order shall bind respondent Raymond LaRussa and his agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Basil Seggos
Commissioner

Dated: June 27, 2019
Albany, New York

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violations of Article 12 of the New York Navigation Law and Title 17 Part 32 of the Official Compilation of the Codes, Rules and Regulations of the State of New York,

**HEARING
REPORT**

DEC Case No.
LER5-15-022017

- By -

RAYMOND LARUSSA d/b/a A&D HOME HEATING,

Respondent.

PROCEDURAL HISTORY

By notice of hearing and complaint dated February 10, 2016, staff of the New York State Department of Environmental Conservation (Department) commenced this enforcement proceeding against respondent Raymond LaRussa d/b/a A&D Home Heating (respondent) for violations of the Navigation Law.

The complaint alleges that respondent violated Navigation Law § 175 and 17 NYCRR 32.3 by failing to report a discharge of petroleum at a residence located at 111 Beecher Road in the Village of Granville, Washington County, and Navigation Law § 176 (1) and 17 NYCRR 32.5 by failing to take reasonable steps to contain the discharge of petroleum. The complaint seeks an order of the Commissioner holding respondent liable for the alleged violations and assessing a civil penalty against respondent in the amount of \$7,500 for violating Navigation Law § 175 and 17 NYCRR 32.3, and \$12,500 for violating Navigation Law § 176 and 17 NYCRR 32.5.

Department staff personally served respondent with the notice of hearing and complaint on February 12, 2016 (*see* Statement of Readiness, Affidavit of John O. Ellithorpe sworn to February 18, 2016, Exhibit 1 [Ellithorpe Aff]). Respondent answered the complaint (*see* Statement of Readiness, Letter of Raymond P. LaRussa answering complaint dated February 18, 2016 and attended the prehearing conference held on March 10, 2016.

I convened the hearing on May 10, 2017, as scheduled, in the Department's offices in Warrensburg, New York. The Department was represented by Scott Abrahamson, Esq., Assistant Regional Attorney, Region 5. Andrew Frank, an environmental engineer in the Division of Environmental Remediation in the Department's Region 5 office, testified for the

Department. Respondent represented himself and testified at the hearing. Gerard Panza, a retired engineer, also testified on behalf of respondent.

At the hearing I directed Department staff to provide respondent with a copy of the Department's Civil Penalty Policy and a copy of the video that Andrew Frank took on October 23, 2015 in the basement of the residence where the spill allegedly occurred. I provided respondent an opportunity to submit comments on the video and on the application of the Department's Civil Penalty Policy to the alleged violations, including information to support his claim that he could not afford to pay the civil penalty sought by Department staff. Respondent submitted comments via email on May 29, 2017 discussing the video, the volume of fuel that leaked from the tank, the condition of the tank, and the homeowner's alleged malfeasance. Mr. Abrahamson submitted a response to respondent's comments by letter dated June 7, 2017.

By email dated June 19, 2017, Mr. Abrahamson requested that he be given until June 29, 2017 to submit proposed corrections to the transcript. I granted Mr. Abrahamson's request. I provided respondent with a copy of the transcript and advised him that he could also submit proposed corrections by June 29th.

By letter dated June 29, 2017, Mr. Abrahamson submitted proposed corrections to the hearing transcript, which I accepted with one modification. He also requested that I leave the record open until July 21, 2017, to provide respondent another opportunity to submit financial records to support his claim of inability to pay. I granted the request. Mr. Abrahamson advised respondent by letter the same day that the Department had not received any financial records from him and that the record would remain open until July 21, 2017 so he could submit that information. Respondent did not submit additional information. On July 24, 2017, I granted Mr. Abrahamson's request to close the record.

Department staff offered 19 exhibits and respondent offered 18 exhibits, all of which were received into evidence. A chart of exhibits is attached to this report.

As set forth below, this report recommends that the Commissioner issue an order holding respondent liable for the charges pleaded in the complaint and imposing a civil penalty in the amount of twenty thousand dollars (\$20,000).

FINDINGS OF FACT

The following facts are found based upon the preponderance of evidence presented at the hearing (*see* 6 NYCRR 622.11[c]).

1. Issa and Cheryl Najjar owned the land, improvements, and real property located at 111

Beecher Road in Granville (property) from December 8, 2003 until December 21, 2015. On December 21, 2015, the Najjars transferred and conveyed title to the property to the Federal National Mortgage Association (FNMA) as part of an agreement to resolve the Najjar's default on a promissory note held by FNMA and secured by the mortgage on the property. (*See Exhibit 19.*)

2. As of October 23, 2015, respondent Raymond LaRussa owned and operated a home heating oil delivery business, known as A&D Home Heating, located at 30 Columbus Street, Granville, New York (*see Exhibit 8 and Exhibit 17 at 1*).
3. On Friday October 23, 2015, at approximately 2:00 p.m., respondent made a delivery of 200 gallons of number 2 fuel residential heating oil (oil) to an aboveground fuel oil storage tank (tank) located at 111 Beecher Road in Granville, Washington County (the "residence" or "111 Beecher Road"). The tank was an above ground tank located in the basement of the residence with a capacity of 275 gallons. (*See Exhibit 17, at 1.*)
4. To initiate the delivery, respondent secured a hose to the fill port located outside of the residence and entered 200, the number of gallons to be delivered, into a preset meter located in his truck (*see Testimony of Raymond LaRussa, Tr at 176, 212*).
5. During the delivery, the tank in the basement overfilled and oil sprayed out of the vent line and onto plastic sheeting that was placed under the deck in the front of the residence. Oil came out of the vent and onto the decking area around the fill and vent area, staining the deck and the siding of the house. (*See Testimony of Andrew Frank, Tr at 74-75; Exhibit 10.*)
6. Respondent told Mr. Najjar that he would get some Speedy Dry, an absorbent, to clean up the oil. Respondent told Mr. Najjar, in response to his question, not to use water to rinse the oil under the deck because it would spread the oil. (*See Testimony of Raymond LaRussa, Tr at 202.*)
7. Respondent left the Najjar residence at approximately 2:30 p.m. to go to the Tractor Supply store to get Speedy Dry. When respondent returned to his home to get additional equipment, there was a message on his answering machine from Mr. Najjar, time stamped at 3:01 p.m. Mr. Najjar said that there was a mess in his basement. (*Testimony of Raymond LaRussa, Tr at 202-203.*)
8. Mr. LaRussa returned to the residence at approximately 3:20 p.m. and found oil on the floor of the basement as well as a stream of oil coming out of the tank. Respondent put an 18 gallon plastic tub that he found in the basement under the tank to contain the spilling oil. Respondent left the residence a second time to go to his house to get a

transfer pump, to his office building to get two 55 gallon drums, and to Tractor Supply to get more Speedy Dry. (LaRussa Testimony, Tr at 203-204.)

9. Respondent returned to the residence at approximately 4:50 p.m. and found at least 50 gallons of oil covering the basement floor (LaRussa Testimony, Tr at 201, 205). He pumped the oil in the 18 gallon plastic tub, which was almost full, into a 55 gallon drum, and placed the plastic tub back under the tank. Respondent then pumped oil out of the tank. As the tub filled up, he pumped the oil into the 55 gallon drum, and then returned to pumping the oil out of the tank. Mr. Najjar was not present at this time. (Testimony of Raymond LaRussa, Tr at 201-205.)
10. Mr. Najjar returned to the residence around 6:30 p.m. Respondent advised Mr. Najjar that the tub should be able to hold the oil remaining in the tank above the leak and that the tank would eventually stop leaking. Respondent told him that if the tub got full, Mr. Najjar should use one of the five gallon buckets he had in the basement to contain the oil. (Testimony of Raymond LaRussa, Tr at 207.)
11. Before respondent left the residence at approximately 7:00 p.m., he told Mr. Najjar to tell DEC that one of the 55 gallon drums had a pinhole in it and should not be righted (*id.* at 208).
12. Andrew Frank, an environmental engineer in the Division of Environmental Remediation, works primarily on emergency spill response in a four county area of Region 5. He has worked for the Department for 18 years. Mr. Frank manages the Department's investigation of spills, and addresses the impacts of a spill and the scope of the clean-up that is required. In the case of spills in residential basements, Mr. Frank determines whether the spill is migrating out of the structure. He also addresses the indoor quality of the living space where the spill occurred, because it is usually unlivable for a period of time. Mr. Frank was the on-call spill responder on October 23, 2015. (*See* Testimony of Andrew Frank, Tr at 11-13.)
13. According to Mr. Frank, residential heating oil is a type of petroleum (see Testimony of Andrew Frank, Tr at 28).
14. James M. Coyne was the dispatcher on duty on the Department's spill hotline on October 23, 2015. Mr. Coyne received a call from Mr. Najjar at 9:19 p.m. Mr. Najjar reported a spill at 111 Beecher Road at 9:19 p.m. due to equipment failure caused by a hole in the tank. Mr. Najjar reported that the amount of oil spilled was unknown. Mr. Coyne recorded the information in the Department's spills database and spill number 1507725 was assigned to the spill. (*See* Testimony of Andrew Frank, Tr at 16-17; *see also* Exhibit 8.)

15. Mr. Frank received the spill report from Mr. Coyne at approximately 9:30 p.m. on October 23, 2015. Mr. Frank spoke to Mr. Najjar who told him that he had a fuel delivery earlier in the day from A&D Home Heating, that the tank in the basement was still leaking, and that oil covered a portion of the basement. Mr. Najjar told Mr. Frank that he could not contain the spill. Mr. Frank called the Department's spill contractor, National Vacuum Environmental Services Corp. (National Vacuum), and arranged to meet Mr. Najjar at the residence at 11:00 p.m. when the contractor was expected to arrive. (*See* Testimony of Andrew Frank, Tr at 18-19.)
16. Mr. Frank went to the basement with Mr. Najjar when he arrived at the residence at 11:00 p.m. and took four photographs in the basement. The next day he took two photographs outside of the residence. (*See* Exhibits 10, 11, 12, 13, 14 and 15.)
17. Mr. Frank testified that he observed a 275 gallon oil tank leaking from a seam about two-thirds the way down on the tank and that a tote placed underneath the tank had captured some fuel oil, but was full and overflowing. Mr. Frank concluded that the leaking fuel was home heating oil as indicated by the liquid in the tub. Mr. Frank photographed the tank and tub of oil and also took a video recording of the same which showed the tub filled with oil and oil brimming over the top of the tub where the rim of the tub was not visible. (Testimony of Andrew Frank, Tr at 25-28; Exhibits 8 [spill report] and 9 [photograph]).
18. Mr. Frank observed oil contamination across a majority of the floor in a room in the basement that was walled off from the equipment room and used as a bedroom. The oil is indicated by red staining around the floor and Mr. Frank could smell it. (*See* Testimony of Andrew Frank, Tr at 30; Exhibit 12.)
19. Mr. Frank also observed oil product wicking from the floor into the wood finish of the walls. Mr. Frank placed absorbent material over some of the pooling product until National Vacuum arrived. (*See* Testimony of Andrew Frank, Tr at 31; Exhibit 14.)
20. Mr. Frank returned to the residence on October 24, 2015, and observed that oil had sprayed out of the vent and onto the siding of the house and the decking around the fill and vent area in the front of the house. That portion of the siding impacted by the oil spill exhibited discoloring compared to the areas not impacted by the oil spill. (*See* Testimony of Andrew Frank, Tr at 32-33; Exhibits 10.)
21. National Vacuum conducted initial response actions on October 23 and October 24, including recovering oil from the basement floor, removing oil-impacted household items from the basement, and installing a ventilation fan to reduce fuel oil odors in the

residence (*see* Exhibit 17, at 1).

22. National Vacuum recovered most of the oil from the floor using vacuum techniques, pads and absorbents, and pumped all of the oil out of the tank and into secured drums. As of October 24, 2015, the tank was no longer leaking (*see* Testimony of Andrew Frank, Tr at 39).
23. Respondent attempted to contact his insurance agent on October 23, 2015, the day of the spill, however, his agent had left the agency. He eventually called his insurance company directly. (*See* Testimony of Raymond LaRussa, Tr at 209-210).
24. Mr. Najjar advised Mr. Frank that respondent had called his insurance company. During Mr. Frank's visit, Paul Renouf of Response Environmental, Inc. (REI) called Mr. Najjar on behalf of respondent's insurance company. Mr. Najjar turned his phone over to Mr. Frank who spoke to Mr. Renouf. Mr. Renouf advised Mr. Frank that REI would be taking over the management of the environmental response (*see* Testimony of Andrew Frank, Tr at 38-39, Exhibit 8).
25. Mr. Frank had previously worked with Mr. Renouf and REI on spill remediation projects, and met with Mr. Renouf on October 26, 2015 (*see* Testimony of Andrew Frank at 86-87).
26. REI conducted a site inspection of the basement at 111 Beecher Road, including the living area, the tank and the boiler room where it was located, a bedroom, and a storage area on October 26, 2015. REI observed oil staining on the bottom 1 foot to 1.5 feet of all of the basement's partition walls, except for one wall. In addition, REI observed that the vinyl flooring in the area impacted by the release was degraded. (*See* Exhibit 17, at 2.)
27. From October 26, 2015 forward, REI directed clean up and remediation activities at the residence. REI directed National Vacuum to remove all impacted partition walls, the vinyl flooring, and the concrete flooring. From November 9-10, 2015, REI and National Vacuum conducted an assessment of the sub-slab soils by coring through the basement floor in twelve locations and took soil samples below the basement floor. Fuel oil and a petroleum sheen were observed in several of the bore holes. REI identified an area of significantly impacted stone and soils below the basement floor measuring 10 feet by twenty-four feet. The impacted area included the location of the tank, three steel support posts, a water tank and the hot water furnace. (*See* Testimony of Andrew Frank, Tr 89-90; Exhibit 17, at 2.)
28. REI hired a company that does structural reinforcement for excavations to remove a

section of the concrete floor above the impacted soil and remove the impacted stone and soil below the floor (*see* Testimony of Andrew Frank, Tr at 41; Exhibit 17, at 2).

29. Oil had migrated from the basement floor into the ground at the point where the concrete floor was poured against the foundation walls, known as the seams. A passive drain on the side wall of the basement also allowed the oil to migrate out of the basement into the surrounding environment. (*See* Testimony of Andrew Frank, Tr at 39; Exhibit 17 at 3.)
30. As a result of the petroleum contamination found in the core samples, REI decided to excavate a substantial portion of the concrete foundation and the contaminated material underneath the foundation. (*See* Testimony of Andrew Frank, Tr at 89-90; Exhibit 17.)
31. The excavation work involved drilling through the basement foundation to find the petroleum product, making saw cuts in the slab, jackhammering out the floor, disposing of that material and then using a vacuum truck to excavate the material underneath the foundation that was impacted by the spill. REI used a photoionization detector to get data on the extent of the contamination present and determine when the cleanup point had been reached. (*See* Testimony of Andrew Frank, Tr at 90-91; Exhibit 17 at 2-3.)
32. After the concrete foundation was removed, REI found a passive drain that was a pipe conduit that went from one side of the wall to the other side of the wall below the top of grade of the basement floor that had allowed the oil to migrate through the pipe and into the surrounding soils outside the house. The pipe was open at both ends, allowing petroleum that migrated below the foundation to go through the pipe and into the soil outside the house. (*See* Testimony of Andrew Frank, Tr at 91-92; Exhibit 17 at 2-3.)
33. REI determined that approximately 50 gallons of fuel was released as a result of the oil spill (*see* Exhibit 17 at 3).
34. A total of 316.49 tons of impacted soil was removed during excavation, including 14.38 tons below the basement floor and 302.11 tons from the exterior of the residence (*see* Exhibit 17 at 3; Testimony of Andrew Frank, Tr at 92-93).
35. Respondent's insurance policy expired in July 2016. The insurance company would not renew respondent's policy because it had to pay \$195,000 to remediate the spill at 111 Beecher Road. Respondent could not obtain insurance coverage from any company after his policy expired and is no longer in the business of delivering fuel oil. (*See* Testimony of Raymond LaRussa, Tr at 211.)

DISCUSSION

First Cause of Action: Failure to Report a Spill

The Navigation Law and the Department's implementing regulations mandate that any person who causes a discharge must immediately notify the Department, in no case later than two hours after the discharge occurred. The failure to timely notify the Department constitutes a violation and subjects the discharger to liability under section 192 of the Navigation Law. (*See* Navigation Law § 175 and 17 NYCRR 32.5.)

The parties do not dispute that an oil spill occurred at 111 Beecher Road on October 23, 2015 during respondent's delivery of home heating oil to the residence, between 2:00 p.m. and 2:30 p.m. Mr. Frank testified that the oil came out of the vent at the time of the delivery, making respondent the spiller (Testimony of Andrew Frank, Tr at 75 and Exhibit 8). Respondent testified that after he had pumped approximately 196 to 198 gallons of fuel into the tank, the oil overflowed and sprayed onto the siding of the house, the deck and the black plastic sheeting under the deck. (*See* Testimony of Raymond LaRussa Tr at 200-202, 212-213, 221 and Exhibit 8.)

The spill report and the affidavit of Jeffrey Coyne establish that Mr. Najjar, the homeowner, reported the spill to the Department at 9:19 p.m. that evening. The call was made approximately seven hours after the spill occurred, and six hours after respondent returned a second time to the residence at 3:20 p.m. and discovered that the oil tank in the basement was actively leaking and spilling oil onto the basement floor. (*See* Exhibits 8 and 15; Testimony of Andrew Frank, Tr at 16-17.)

Respondent acknowledged that he did not report the spill to the Department's spill hotline (*See* Testimony of Raymond LaRussa, Tr 198-199). He testified that he initially thought that the spill was confined to the plastic sheeting underneath the deck, where the fill port was located, and that he could contain it with some absorbent material. Respondent stated that he was in "panic mode" when he returned to the house at 3:20 p.m. and discovered the tank was actively leaking in the basement, and he was "not thinking of looking up the DEC's number and wasting time while this guy's tank was spilling oil all over the floor" (Testimony of Raymond LaRussa, Tr at 198-199). Respondent testified that he did not have the phone number of Department's spill hotline on hand, there was no cell phone service on Beecher Road, he did not have a smart phone to access the internet to look up the phone number of the spill hotline, and the homeowner did not have a landline. He also testified that calling the fire department would have been futile because they do not clean up fuel spills. When respondent left the residence for the second time at approximately 7:00 p.m. that evening, he thought the homeowner had already

called the Department and would call again. (*See* Testimony of Raymond LaRussa, Tr at 224-230.)

The Navigation Law and the Department's regulations require responsible parties to report an oil spill to the Department within a prescribed timeframe (*see* Navigation Law § 175 and 17 NYCRR 32.3). There are no exceptions. Having caused a spill at 111 Beecher Road by overfilling the oil tank, respondent was obligated under the Navigation Law § 175 and 17 NYCRR 32.3 to report it to the Department within two hours. The proof adduced at the hearing, including respondent's own admissions, demonstrates by a preponderance of the evidence that respondent did not call the spill hotline as he was required to perform. Department staff is entitled to judgment on the first cause of action.

Second Cause of Action: Failure to Contain the Spill

In the second cause of action, Department staff charges that respondent failed to take reasonable steps to contain the spill in violation of Navigation Law § 176 and 17 NYCRR 32.5. Department staff contends that reporting a spill to the Department's spill hotline is a necessary containment measure that respondent failed to do. Staff's argument has merit.

The Legislature enacted the Navigation Law in recognition that protecting and preserving the State's lands and waters is essential to the public health and welfare, and that the discharge of petroleum threatens the State's environment and economy and must be promptly addressed (*see* Navigation Law § 170). The purpose of the statute is to "prevent the unregulated discharge of petroleum which may result in damage to lands, waters or natural resources of the state by authorizing the [Department] to respond quickly to such discharges and effect prompt cleanup and removal of such discharges" (Navigation Law § 171; *see State v Green* 96 NY2d 403, 406 [2001]; *Guidice v Patterson Oil*, 51 Misc. 3d 313 [Sup Ct, New York County 2016])). "Any person responsible for discharging petroleum . . . must immediately contain such discharge" (Navigation Law § 176). Pursuant to the implementing regulations, "[a]ny person responsible for causing a discharge . . . shall take immediate steps to stop any continuation of the discharge and shall take all reasonable containment measures to the extent he is capable of doing so" (17 NYCRR 32.5[a]). A "discharge" includes "any intentional or unintentional action or omission resulting in" the spilling of petroleum (Navigation Law § 172 [8]). As the Court of Appeals has observed, "[n]othing in the statutory language requires proof of fault or knowledge" to establish liability for a discharge (*State v Green*, 96 NY2d at 406-407).

Mr. Frank testified that reporting a spill to the Department's spill hotline is critical for staff to be able to ascertain the scope of the release, what is being done to contain it, and what must be done to expedite resources to the site to stop, contain, and control the spill, and start the cleanup process. Residential spills are often hazardous to the health of the occupants, public

health, drinking water wells and indoor air quality, according to Mr. Frank, and pose risks to surface and groundwater beyond the property immediately impacted by the spill. If Department staff has information that a spill is quickly migrating, time may be of the essence and staff may call a contractor to the site before staff arrives. Mr. Frank testified that the Department would expect an oil delivery company to report a spill in the first instance because the company may have resources to effectively contain the spill and can advise Department staff of its status. Staff in Region 5 cover four counties and it may take time to reach a spill site and additional time after that to call a contractor and mobilize personnel and resources, so it is critical to have reliable information as soon as possible to start the cleanup process. (*See* Testimony of Andrew Frank at 79-81.)

Had respondent promptly reported the spill, Mr. Frank testified, the Department's spill contractor, who was working on a nearby project, could have responded and would have been able to plug the hole in the tank with the equipment it had on hand. Mr. Frank testified that if respondent had promptly reported the spill the afternoon of October 23rd, a fraction of the discharge would have occurred in and around the basement (*See* Testimony of Andrew Frank, Tr at 42-45, 79-81). The contractor hired by respondent's insurance company conducted an extensive subsurface soil investigation at the residence, found contaminated material, and excavated and removed a substantial portion of the foundation and over 300 tons of contaminated soil. (*See* Finding of Fact Nos. 23-26 and 29-33; Exhibit 17 at 2-3). Mr. Frank has 18 years of experience working for the Department in emergency spills response and investigation. Department staff has proved its case by a preponderance of the evidence.

Respondent contends that he took all reasonable measures he was capable of implementing to contain the spill and therefore did not violate Navigation Law § 176 and 17 NYCRR 32.5(a). He testified that he shut off the fill pipe on his truck once the oil began spraying out of the fill port and left the residence at 2:30 p.m. to purchase absorbent pellets to apply to the area where the oil had sprayed. Respondent thought a few bags of Speedy Dry would be sufficient to absorb the oil that had spilled, which he thought was confined to the deck area outside. (*See* Testimony of Raymond LaRussa Tr at 202, 212-213, 221.) When respondent returned to the residence at 3:20 p.m., he discovered oil was actively leaking from a hole in the tank and spilling onto the basement floor. Respondent placed an 18 gallon plastic tub under the tank to capture the oil and left the residence a second time to get a pump from his house, Speedy Dry at Tractor Supply, and two 55 gallon drums from his storage building. (*See* LaRussa testimony, Tr at 200-203; *see also* Exhibit 8.)

Respondent testified that he worked feverishly to contain the spill from the time he returned to the residence at approximately 4:50 p.m. until he left at 7:00 p.m., alternating between pumping the oil out of the 18 gallon plastic tub as it filled and pumping the oil in the tank into the 55 gallon drums. He claims that after he filled the two 55 gallon drums, he

estimated that an inch and a half to two inches of oil remained in the tank above the leak and could be contained in the 18 gallon plastic tub. Respondent further testified that at about 7:00 p.m., he could no longer tolerate the conditions in the basement due to his asthma and chronic obstructive pulmonary disease and had to stop work. Before he left, respondent advised Mr. Najjar that if the plastic tub filled up, Mr. Najjar should place one of the two or three empty five gallon plastic mud buckets he had in his basement under the leak. According to respondent, Mr. Najjar told him that he had called the Department and that the Department was coming, but was busy in Comstock. Respondent told Mr. Najjar to tell Department staff, when they arrived, that one of the 55 gallon drums had a pinhole in it and should not be righted. (*See LaRussa Testimony, Tr at 205- 208.*)

Despite respondent's actions to control the spill, the spill was not contained. When Mr. Frank arrived at the residence at 11:00 p.m., he observed oil actively leaking from the tank into the plastic tub and spilling over the side of the tub (*see Testimony of Andrew Frank, Tr at 27 and Exhibit 9*), oil covering the majority of a bedroom floor in the basement (*see Testimony of Andrew Frank, Tr at 30 and Exhibit 12*), and oil wicking up from the floor into the wood finish of the walls and absorbent material placed over some of the pooling product (*see Testimony of Andrew Frank, Tr at 30-31 and Exhibits 13 and 14*). Mr. Frank testified that he could smell the product in the basement (*id.*; *see also Testimony of Raymond LaRussa, Tr at 207*). The following day, Mr. Frank found both the deck and the siding of the house stained where the oil came out of the vent, sprayed onto the siding and onto the decking around the fill and vent area (*see Testimony of Andrew Frank, Tr 32-34 and Exhibits 10 and 11*).

Respondent attributes the extensive contamination Mr. Frank observed in the basement to the intentional or negligent acts of Mr. Najjar and prior damage to the oil tank (*see Testimony of Raymond LaRussa, Tr at 181*). Respondent speculated that Mr. Najjar intended to cause the spill, insisting on a 200 gallon delivery even though he knew his home was in foreclosure and he had to vacate his residence. Respondent further asserts that Mr. Najjar filed a fraudulent insurance claim and collected \$28,000 for living expenses and personal property damage as a result of the spill incident (*see id.*). Mr. Najjar is, apparently, living in Oklahoma and was not available to testify at the hearing (*see Hearing Record, Tr at 49, 68*).

Respondent and Gerard Panza also asserted that the tank had rusted seams and sustained mechanical impact damage months or years before the spill and did not fail as a result of over pressurization from the oil delivery (*see Testimony of Raymond LaRussa, Tr at 176-177; Testimony of Gerard Panza, Tr at 233-235*). Mr. Panza maintained that the damage was "external inward, not from the inside out. So, the breach of the tank was based on the fact that the tank was old and was damaged probably on installation when they were moving tanks around. It appears actually that it was probably a forklift that probably hit it." (*see Testimony of Gerard Panza, Tr. at 233; Exhibit A-2*). Mr. Panza testified that the damage to the tank was

caused by something hitting the tank and that the oil had to be leaking for hours (*id.* at 234; Exhibit A-3).

In addition, respondent disputed Mr. Frank's account that the extent of the oil contamination he observed on the basement floor and wicking up the walls resulted from the spill. Mr. Panza testified that the amount of oil and extent of damage and amount of oil pooled on the floor was significantly less than Mr. Frank's characterization of the spill (*see* Testimony of Gerard Panza Tr at 238-241). Respondent also disagreed with Department staff's claim that 200 gallons of spilled oil were recovered, asserting that he recovered most of the oil in the 55 gallon drums and plastic tub. (*See* Testimony of Raymond LaRussa, Tr at 178-179.)

None of the arguments raised by respondent affect the determination of his liability under Navigation Law § 176 for failing to take immediate measures to contain the spill, and under 17 NYCRR 32.5(a) for failing to take all reasonable measures he was capable of taking to contain the spill (*see generally Merrill Transport Company v New York*, 94 AD2d 39 [3d Dept 1983], *lv denied* 60 NY2d 555). The facts adduced at the hearing establish that a reportable spill occurred at 111 Beecher Road between 2:00 and 2:30 p.m. as a result of respondent's delivery of oil to the residence, and that the spill was not contained as of 11:00 p.m. when Department staff finally arrived at the scene. At the time of the delivery, oil overflowed from the fill port and sprayed out of the vent pipe on the side of the residence and around the decking (*see* Testimony of Raymond LaRussa, Tr at 212-213; Testimony of Andrew Frank at 37; Exhibits 10 and 11). At 3:20 p.m., respondent observed oil on the basement floor and a stream of oil leaking from the tank onto the floor, which he attempted to contain with an 18-20 gallon plastic tub (*see* Testimony of Raymond LaRussa at 200). Ninety minutes later, at 4:50 p.m., respondent testified that the oil had filled the plastic tub he had placed under the tank at 3:20 p.m. and about fifty gallons of oil was covering the basement floor (*id.* at 205). Respondent did not report the spill and thus delayed the Department's dispatch of spill contractors who could have plugged the tank and contained the spill. When Mr. Frank arrived at the residence at 11:00 p.m. the plastic tub, which respondent had placed under the tank empty at 7:00 p.m., was overflowing with oil (*see* Testimony of Andrew Frank at 27; Exhibit 9).

Mr. Najjar's alleged malfeasance or intentional misconduct is not relevant to whether respondent is liable under Navigation Law § 176 and 17 NYCRR 32.5(a). Nor is the condition of the tank relevant to determining respondent's liability. The Navigation Law requires spillers to take immediate steps to contain the spill, and the Department's regulations require spillers to take all reasonable measures, to the extent they are capable, to contain the spill. Respondent was in the business of delivering home heating oil. He should have had the phone number of the Department's spill hotline readily available and reported the spill on the afternoon of October 23, 2015. As noted above, Department staff and the Department's spill contractor were working nearby and could have responded quickly to contain and mitigate some of the adverse effects of

the spill had respondent reported it that afternoon (*see* Testimony of Andrew Frank, Tr at 42- 43, 79-81). (*See generally Merrill Transport Company v New York*, 94 AD2d at 42 [noting that the Legislature’s failure to include exceptions in the definition of discharge or provide for third-party defenses indicates that the Legislator chose to hold dischargers strictly liable under the Navigation Law]; *Guidice v Patterson Oil*, 51 Misc. 3d at 319 [oil delivery company that overfilled a residential oil tank resulting in a ten gallon spill of oil into the basement and out of the vent pipe into the dirt outside the house held strictly liable for a discharge under the Navigation Law]).

Respondent was, moreover, aware that Mr. Najjar had neither the expertise nor the resources to address the spill (*see* Testimony of Raymond LaRussa, Tr at 202 lines 14-24). Respondent should have remained at the residence, even if he had to temporarily leave the basement due to his health concerns, until emergency response personnel arrived to ensure that the spill was under control. Instead, respondent left the residence not having reported the spill or spoken with Department staff, with an actively leaking oil tank and two 55 gallon drums filled with oil, one of which had a hole in it and could not stand upright. Navigation Law § 176 and 17 NYCRR 32.5(a) do not contain any exceptions to liability relevant to any of the defenses raised by respondent with respect to Mr. Najjar’s culpability or the poor condition of the tank. Indeed, respondent’s insurance company, aware of a spiller’s strict liability under the Navigation Law to report, contain and remediate a spill, paid \$195,000 to remediate the effects of the spill.

In sum, the evidence adduced at the hearing establishes that respondent did not undertake all reasonable measures within the meaning of Navigation Law § 176 and 17 NYCRR 32.5(a) to contain the spill. Department staff is, therefore, entitled to judgment as a matter of law on the second cause of action.

Civil Penalty

Section 192 of the Navigation Law provides for a civil penalty of up to twenty-five thousand dollars (\$25,000) per day for each violation of the provisions of article 12 of the Navigation Law or any regulation promulgated thereunder (*see Matter of Zenith Management LLC*, Order of the Commissioner, June 17, 2016, at 1). Department staff alleged two violations: Navigation Law § 175 and 17 NYCRR 32.3 for failing to report a discharge of petroleum; and Navigation Law § 176 (1) and 17 NYCRR 32.5 for failing to take reasonable steps to contain the spill. The statutory maximum penalty would be \$50,000.

At the hearing, Department staff testified that the penalty amount requested is consistent with the Department's prior practice, as well as its penalty policies and applicable provisions of the Navigation Law. Mr. Frank utilized a spill assessment penalty matrix developed by the Department to implement the Civil Penalty Policy (DEE-1 [1990]) in spills cases. The matrix

generates a ballpark civil penalty estimate. The matrix takes into account the nature of the spill, the associated public health and environmental risks, and aggravating and mitigating factors (*see* Testimony of Andrew Frank, Tr at 96-103 and Exhibit 18). Utilizing the penalty matrix, Mr. Frank arrived at a penalty of \$19,999 (*id.*, Tr at 102).

Mr. Frank testified that spill resulted in actual damage to the environment outside the house as well as public health damage (*id.*, Tr at 103-104). Mr. Frank also testified as to respondent's culpability in terms of his control over the situation, specifically that he could have called the Department's spill hotline and that he could have reasonably foreseen that the damage that spill could cause to the surrounding environment, as well as the house in terms of the basement being uninhabitable (*id.*, Tr at 105-107).

The parties attempted to settle the matter, but ultimately did not reach an agreement. Staff is now seeking a penalty higher than sought during settlement discussions. According to respondent, he cannot afford to pay a \$20,000 civil penalty. Respondent claimed that he had already sent the Department five years of tax returns and his bank account statements and that he had discussed with Department staff that his business had not been doing very well. He said his financial situation has worsened since then and that he works at an auto parts store for \$10.00 per hour and has no ability to pay. I advised respondent that the financial information he previously provided to Mr. Abrahamson was not part of this hearing record, and he would need to provide information as part of the record to sustain an inability-to-pay argument. Mr. Abrahamson clarified that Department staff needed the most recent three years of income tax statements (2014, 2015, and 2016) and a notarized financial disclosure form from respondent to analyze his ability to pay. Respondent objected to having to provide any personal financial information, arguing that he demonstrated that he is not guilty of one of the charges. (*See generally* Hearing Record, Tr at 267-274.)

According to the Department's Civil Penalty Policy: "[t]he ability to pay adjustment will normally require a significant amount of financial information specific to the violator. The burden to demonstrate inability to pay rests with the respondent. If the violator fails to provide sufficient credible information, Department staff should disregard this factor. An unsupported or inadequately supported claim of inability to pay should not be accepted." Thus, respondent has the burden to demonstrate his inability to pay, yet he did not submit any financial information to the Department despite two opportunities to do so. Consequently, I cannot take this factor into account to recommend a reduction of the civil penalty.

The penalty requested by staff is authorized, reasonable and consistent with the purposes and objectives of the Department's penalty policies in light of the statutory maximum, which would authorize a penalty of \$25,000 per day for each violation. As discussed herein, respondent operated a home heating oil delivery business. He should have had the phone

number of the Department's spill hotline readily available and promptly reported the spill. Had respondent reported the spill, the significant adverse consequences that ultimately materialized, as discussed in this report, may have been mitigated.

CONCLUSIONS OF LAW

As discussed above, I conclude that Department staff has established by a preponderance of the evidence that respondent violated Navigation Law § 175 and 17 NYCRR 32.3 by failing to report a discharge of petroleum at a residence located at 111 Beecher Road in the Village of Granville, Washington County, and Navigation Law § 176 (1) and 17 NYCRR 32.5 by failing to take reasonable steps contain the discharge of petroleum.

RECOMMENDATION

Based upon the foregoing, I recommend the Commissioner issue an order:

1. Holding that, based upon the proof adduced at the adjudicatory hearing, respondent violated Navigation Law § 175 and 17 NYCRR 32.3 by failing to report a discharge of petroleum at 111 Beecher Road in the Village of Granville, New York;
2. Holding that, based upon the proof adduced at the adjudicatory hearing, respondent violated Navigation Law § 176 (1) for failing to take immediate measures to contain the spill and 17 NYCRR 32.5(a) for failing to take all reasonable measures he was capable of taking to contain the spill at 111 Beecher Road, Granville, New York; and
3. Assessing a civil penalty in the amount of twenty thousand dollars (\$20,000) within thirty (30) days of service of the Commissioner's order as follows: \$7,500 for violating Navigation Law § 175 and 17 NYCRR 32.3; and \$12,500 for violating Navigation Law § 176 and 17 NYCRR 32.5.

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

EXHIBIT CHART

Matter of Raymond LaRussa d/b/a A&D Home Heating
DEC Case No. LER5-15-022017 May 10, 2017

Exhibit No.	Description	ID'd?	Rec'd?	Offered By	Notes
1	Notice of Hearing and Complaint and Affidavit of Service	✓	✓	Staff	
2	Respondent's Answer	✓	✓	Staff	
3	Department's Discovery Demands	✓	✓	Staff	
4	Hearing date request, second request for response to discovery demands, December 28, 2016	✓	✓	Staff	
5	Statement of Readiness, Affidavit of Service by Certified Mail Return Receipt Requested, by First Class Mail and by email	✓	✓	Staff	
6	Statement of Readiness returned as "UNCLAIMED"	✓	✓	Staff	
7	Affidavit of Service of Statement of Readiness, May 1, 2017	✓	✓	Staff	

Exhibit No.	Description	ID'd?	Rec'd?	Offered By	Notes
8	DEC Spill Report, Spill # 1507725	✓	✓	Staff	
9	Photograph	✓	✓	Staff	
10	Photograph	✓	✓	Staff	
11	Photograph	✓	✓	Staff	
12	Photograph	✓	✓	Staff	
13	Photograph	✓	✓	Staff	
14	Photograph	✓	✓	Staff	
15	Affidavit of Jeffrey M. Coyne	✓	✓	Staff	
16	Affidavit of Richard Rutland	✓	✓	Staff	
17	Report of Response Environmental, Inc.	✓	✓	Staff	

Exhibit No.	Description	ID'd?	Rec'd?	Offered By	Notes
18	DEC Penalty Matrix	✓	✓	Staff	
19	Affirmation of Scott Abrahamson	✓	✓	Staff	
A-1	Photograph	✓	✓	Respondent	
A-2	Photograph	✓	✓	Respondent	
B	Statement of Raymond LaRussa	✓	✓	Respondent	
B1-B-14	Photographs	✓	✓	Respondent	
C	Chart Gage of Amount of Fuel in Tank	✓	✓	Respondent	