STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Articles 17 and 27 of the New York State Environmental Conservation Law (ECL) and Article 12 of the New York State Navigation Law, Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) Parts 361, 372, 374, and 613,

RULING

- by –

DEC Case No.
CO 5-20200117-7

LEROY SNOW,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department or DEC) commenced this action by serving a notice of hearing and complaint against respondent Leroy Snow (respondent) on February 1, 2020 (*see* affidavit of service of Sean Dewey, sworn to January 20, 2021) for alleged violations of Navigation Law article 12, ECL articles 17 and 27, and 6 NYCRR parts 361, 372, 374 and 613 at respondent's motor vehicle repair shop located at 3093 Broad Street, Port Henry, New York (facility). Respondent did not answer the complaint (s*ee* December 15, 2020, letter from Justin Stenerson to Chief Administrative Law Judge James McClymonds).

Staff subsequently filed a motion for order without hearing pursuant to 6 NYCRR 622.12 on December 15, 2020. Service of the notice of motion and supporting papers on respondent was made by certified mail (*see* 6 NYCRR 622.3[a][3]) and was received by respondent on December 18, 2020 (*see* affirmation of Justin Stenerson, Esq., dated January 25, 2021). In the motion, Department staff also requests renumbering Cause of Action IX to Cause of Action VI, renumbering Cause of Action XI to Cause of Action VII and withdrawing Causes of Action V and VI as renumbered. (There were no causes of action numbered XIII or X in the original complaint.) (*See* Motion for Order Without Hearing at 2.) This request is essentially a motion to amend the complaint pursuant to 6 NYCRR 622.5, and it is granted.

On July 19, 2022, I requested additional information from Department staff, on notice to respondent, which staff provided on August 9, 2022.

The complaint alleges respondent violated the following:

1. Cause of Action I:
    - 6 NYCRR 613-4.4(d)(1) by failing to report a petroleum spill now designated as Spill No. 1903482 (complaint ¶ 9[a]);
    - 6 NYCRR 613-1.9 by having an unregistered used oil tank associated with the used oil burner (complaint ¶ 9[b]);
    - 6 NYCRR 613-4.2(a)(3) by failing to properly label the unregistered used oil tank and various containers (complaint ¶ 9[c]);
    - 6 NYCRR 613-2.2(a)(4); 613-3.2(a)(4); and 613-4.2(a)(4) by failing to color code the unregistered used oil tank (complaint ¶ 9[d]);
    - 6 NYCRR 613-4.3(a)(1)(i); 613-4.3(b)(1) by failing to perform monthly inspections on the unregistered used oil tank (complaint ¶ 9[e]); and
    - 6 NYCRR 613-4.3(e) by failing to maintain or failing to keep sufficient monthly inspection reports (complaint ¶ 9[f]).
2. Cause of Action II:
    - 6 NYCRR 374-2.3(c)(3) by discharging and continuing to discharge petroleum at the facility (complaint ¶ 10[a]);
    - 6 NYCRR 374-2.3(c)(5) by failing to timely notify the Department of the discharge of petroleum, failing to remediate the petroleum contamination and allowing the discharged petroleum to remain on site (complaint ¶ 10[b]);
    - 6 NYCRR 374-2.3(c)(2)(i) and 374-2.3(c)(4) by failing to properly inventory, label, store, use or dispose of containers of used oil (complaint ¶ 10[c]); and
    - 6 NYCRR 374-3.2(d)(1)(i) by storing unlabeled lead acid batteries outside on the ground (complaint ¶ 10[d]).
3. Cause of Action III:
    - 6 NYCRR 361-7.3(a)(1) by failing to register the facility as a vehicle dismantling facility with the Department (complaint ¶ 11[a]);
    - 6 NYCRR 361-7.4(e) by improper storage of used oil (complaint ¶ 11[b]); and
    - 6 NYCRR 361-7.4(f) by improper storage of lead acid batteries (complaint ¶ 11[c]).
4. Cause of Action IV:
    - 6 NYCRR 372.2(a)(2) by generating solid waste and failing to make a determination if the waste is hazardous (complaint ¶ 15[a]).
5. Cause of Action V is withdrawn.
6. Cause of Action VI (renumbered) is withdrawn.

7. Cause of Action VII (renumbered):

- New York State Navigation Law § 173[1] by discharging petroleum at the facility (complaint ¶¶ 16, 20, 22);
- New York State Navigation Law § 175 by failing to timely report the discharge at the facility to the department (complaint ¶ 21);
- New York State Navigation Law § 176 by failing to timely remediate the contamination caused by the discharge (complaint ¶ 21); and
- New York State Navigation Law § 181 by allowing the petroleum contamination to remain on site (complaint ¶ 21).

Department staff's notice of motion and motion for order without hearing were supported by: the affirmation of Justin Stenerson, Esq. dated December 15, 2020 (Stenerson affirmation); the affidavit of Russell B. Mulvey sworn to August 21, 2020, marked as Exhibit A (Mulvey affidavit), attaching four exhibits; the affidavit of Patrick M. Kane sworn to December 8, 2020, marked as Exhibit B (Kane December 2020 affidavit), attaching two exhibits; and Exhibit C, consisting of twenty-nine photographs. (*See* Appendix A.) Staff also submitted the Notice of Hearing and Complaint, dated January 29, 2020; Affidavit of Service of the Notice of Hearing and Complaint, showing personal service on February 1, 2020, sworn to January 20, 2021; and affirmation of Justin Stenerson regarding service of the Motion for Order Without Hearing, dated January 25, 2021. On August 9, 2022, in response to my request for additional information, staff filed a second affidavit of Patrick Kane, sworn to on August 9, 2022 (Kane August 2022 affidavit) with two exhibits. (S*ee generally* Appendix A.) Respondent has not filed a response to staff's motion, although a response was due within twenty days following receipt of the motion (*see* 6 NYCRR 622.12[c]).

Department staff requests that the Commissioner issue an order: (1) finding that respondent violated the regulations and statutes as set forth above; (2) imposing a civil penalty of $45,000; (3) directing respondent to correct the violations as set forth in the complaint, including investigation and remediating all areas of petroleum contamination under an approved work plan, and to bring the facility into compliance with all relevant ECL and NYCRR provisions immediately; (4) either register as a vehicle dismantling facility pursuant to 6 NYCRR 361-7.3 or bring the facility into compliance per 6 NYCRR 361-7.4; and (5) granting such other and further relief as may be deemed just and appropriate (*see* Stenerson affirmation at 17-18, Wherefore Clause).

FINDINGS OF FACT

1. Respondent Leroy Snow (respondent) owns and operates a motor vehicle repair shop known as Leroy's 24 Hour Towing and Repair located at 3093 Broad Street, Port Henry, New York (facility) (*see* Mulvey affidavit ¶ 7; Kane August 2022 affidavit ¶ 5; and deed from Barbara S. Carlson to Leroy K. Snow dated January 2, 2009, and recorded as

[1] Although the complaint cites Navigation Law § 193 in ¶ 20, it is clearly a typographical error. The complaint alleges that Navigation Law § 173 prohibits the discharge of petroleum in ¶ 16 and that respondent violated § 173 in ¶ 22.

Document Number 2009-0000006 on January 2, 2009, B. 1594, P. 307, in the Clerk's Office for Essex County, New York [Exhibit A to Kane August 2022 affidavit]).

2. At all relevant times. Russell B. Mulvey was a licensed professional engineer in the Division of Environmental Remediation in Region 5 of the DEC (*see* Mulvey affidavit ¶ 1).

3. Mr. Mulvey supervised and conducted inspections of petroleum bulk storage (PBS) facilities and directed the investigation and cleanup of petroleum spills and other contamination requiring complex remediation (*see* Mulvey affidavit ¶ 2).

4. Patrick M. Kane is an engineer in the Division of Materials Management in Region 5 of the DEC (*see* Kane December 2020 affidavit ¶ 1).

5. Mr. Kane supervises and conducts inspections of vehicle dismantling facilities, metal processing facilities, solid waste management facilities, hazardous waste management facilities and generators of refuse, solid waste, hazardous waste, and universal waste (*see* Kane December 2020 affidavit ¶ 2).

6. On or about July 1, 2019, Department staff received a complaint regarding spills and violations pertaining to used oil storage, the storage and disposal of hazardous wastes, the dismantling of vehicles at the facility, and floor drain maintenance (*see* Mulvey affidavit ¶ 6; Kane December 2020 affidavit ¶ 5).

7. Mr. Mulvey was notified of the spills and reported them. The spills were assigned DEC spill number 1903482 (*see* Mulvey affidavit ¶ 8; Spill Report Form for spill number 1903482 [Exhibit A to Mulvey affidavit]). Respondent never notified the Department of the spills and never took steps to remediate the spills (*see* Mulvey affidavit ¶ 12).

8. On July 3, 2019, Mr. Mulvey, Mr. Kane and other Department staff inspected the facility and observed various violations of the PBS regulations, including an unregistered used oil tank, which lacked labels and color-coding, and various open, unlabeled and damaged containers of used oil and other liquids (s*ee* Mulvey affidavit ¶¶ 9-11; Kane December 2020 affidavit ¶¶ 7, 10; Exhibit C, photos 2, 23, 26, 27). The unregistered used oil tank had not been inspected monthly and inspection records had not been kept (*see* Mulvey affidavit ¶ 10). Mr. Mulvey observed: "Some of the containers caused petroleum releases to occur as precipitation filled the containers, releasing the oil to the ground surface where it migrated and continues to migrate off site." (Mulvey affidavit ¶ 11.)

9. Department staff took photographs during the inspection on July 3, 2019, which were contemporaneous photographs of observations made at the facility by both Mr. Mulvey and Mr. Kane (*see* Mulvey affidavit ¶ 9; Kane December 2020 affidavit ¶ 8; Exhibit C).

10. A review of Department records showed that the facility was not registered with the Department as a vehicle dismantling facility (*see* Kane December 2020 affidavit ¶ 9). The facility is registered with the Department of Motor Vehicles as a motor vehicle repair shop, DMV Facility No. 7080701 (*see* Kane August 2022 affidavit ¶ 6 and Exhibit B thereto).

11. During the July 3, 2019, inspection, Mr. Kane observed used oil improperly stored and lead acid batteries stored outside on the ground, unlabeled and undated (s*ee* Kane December 2020 affidavit ¶ 11). He observed spent aerosol cans strewn about at the facility (*id.* ¶ 12; *see also* Exhibit C, photos 4, 5, 9). Additionally, respondent admitted to Mr. Kane during the July 3, 2019, inspection that he had disposed of spent aerosol cans in cars sent off for scrapping without determining whether they were hazardous (s*ee id*. ¶ 12). Mr. Kane also observed approximately 50 end-of-life vehicles on site (s*ee id*. ¶ 9).

12. On July 19, 2019, Mr. Mulvey drafted a Notice of Violation (NOV) to respondent which set forth some of the violations observed during the inspection on July 3, 2019, specifically violations of 6 NYCRR 613-1.9; 6 NYCRR 613-4.2(a)(3) and 613-4.2(a)(4)[2]; 6 NYCRR 613-4.3(a)(1)(i); 6 NYCRR 613-4.3(b)(1); 6 NYCRR 613-4.3(e); 6 NYCRR 374-2.3(c)(2)(i) & 6 NYCRR 374-2.3(c)(4) stemming from an unregistered used oil tank and violations of Navigation Law article 12 and 6 NYCRR 374-2.3(c)(3) and 374-2.3(c)(5) based on the discharge of oil and improper storage and disposal of used oil containers. The NOV requested corrective actions be completed (*see* Mulvey affidavit ¶ 9; Notice of Violation dated July 19, 2019 [attached to Mulvey affidavit as Exhibit B]).

13. The NOV dated July 19, 2019 was hand delivered to respondent by Environmental Conservation Officer Sean Dewey on July 23, 2019, and emailed on July 26, 2019 (*see* Mulvey affidavit ¶ 13; email to respondent dated July 26, 2019 [attached to Mulvey affidavit as Exhibit D at 3-4]). Respondent did not respond to the July 19, 2019 NOV (*see* Mulvey affidavit ¶¶ 19-20).

14. Mr. Kane prepared another NOV dated July 25, 2019, alleging violations of 6 NYCRR 361-7.3(a)(1); 6 NYCRR 361-7.4(e); 6 NYCRR 374-2.3(c); 6 NYCRR 361-7.4(f); 6 NYCRR 374-3.2(d)(1)(i); 6 NYCRR 372.2(a)(2); ECL 27-2611(3); and ECL 27-1191(1) at this site and another site (Kane December 2020 affidavit ¶¶ 9-13). The record does not indicate whether the July 25, 2019 NOV was delivered to respondent.

15. Between July 26, 2019 and September 3, 2019, Mr. Mulvey sent respondent five emails seeking compliance and information to follow up on the July 19, 2019 NOV. Specifically, on August 6, 2019, Mr. Mulvey sent an email to respondent detailing the items required from respondent, including forms to register a petroleum bulk storage facility and to register as a vehicle dismantling facility (*see* Mulvey affidavit ¶ 14, Exhibit D at 3). Mr. Mulvey spoke to respondent the same day and sent respondent another email confirming that respondent would be submitting a petroleum bulk storage application and vehicle dismantling facility registration (*see* Mulvey affidavit ¶ 15, Exhibit D at 2).

16. On August 6, 2019 and August 16, 2019, respondent and Mr. Mulvey had telephone conversations regarding the lack of communication and lack of corrective action after the July 19, 2019 NOV was issued (*see* Mulvey affidavit ¶¶ 15-17). During the August 16, 2019 telephone call, respondent indicated that he had not taken any corrective action in

[2] Although the July 19, 2019 NOV cited 6 NYCRR 613-4.2(3) and 613-4.2(4), which do not exist, it is clear from the context that the citation was a typographical error, and the NOV was intended to refer to 6 NYCRR 613-4.2(a)(3) and 613-4.2(a)(4). A link to the regulations was provided in the NOV.

response to the July 19, 2019 NOV, that he was too busy, and that he lacked the ability to do paperwork or computer work (*see* Mulvey affidavit ¶ 16).

17. On September 3, 2019, Mr. Mulvey emailed respondent after receiving no submission in response to the July 19, 2019 NOV and requested that the required information be provided immediately (*see* Mulvey affidavit ¶ 19, Exhibit D at 1).

18. Respondent has not taken any corrective action at the facility and all violations remain open and unaddressed (*see* Mulvey affidavit ¶ 20; Kane December 2020 affidavit ¶ 13).

19. Although an incomplete PBS application was returned to respondent, the facility continues to be unregistered as a PBS facility (*see* Mulvey affidavit ¶ 18).

20. Respondent was personally served with a Notice of Hearing and Complaint on February 1, 2020, by Environmental Conservation Officer Sean Dewey (*see* Affidavit of Service dated January 20, 2021.) Respondent did not answer the complaint. (*See* December 15, 2020, letter from Justin Stenerson to Chief Administrative Law Judge James McClymonds.)

21. The Motion for Order without Hearing and supporting documents were served by USPS certified mail and received by respondent on December 18, 2020 (*see* affirmation of Justin Stenerson dated January 25, 2021, and Exhibit A thereto). Respondent did not respond to the Motion for Order without Hearing (*see id.).*

DISCUSSION

Section 622.12(d) of 6 NYCRR provides for an order without hearing "if, upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party." "Summary judgment is to be granted only where it is clear that there are no material issues of fact to be adjudicated" (*Vega v Restani Constr. Corp.*, 18 NY3rd 499, 503 [2012]).

In order to obtain summary judgment under CPLR 3212, a movant must establish the cause of action or defense "sufficiently to warrant the court as a matter of law in directing judgment" in their favor by presenting evidence in admissible form. (CPLR 3212[b]); *see also Zuckerman v City of New York,* 49 NY2d 557, 562 [1980].)

When Department staff moves for a motion for order without hearing, it "bears the initial burden of making a prima facie showing of entitlement to summary judgment as a matter of law with respect to each element of the violations alleged." (*Matter of the Bradley K. Grant and Grant's Gas and Grocery, LLC*; Ruling, October 19, 2018, at 6, citing *Cheeseman v Inserra Supermarkets, Inc.,* 174 AD2d 956, 957-958 [3d Dept 1991]). If the respondent does not oppose the motion, the question is whether Department staff has established entitlement to summary judgment on the violations alleged in the motion (*see Matter of Edelstein*, Order of the Commissioner, July 18, 2014, at 2; *see also Matter of Hunt*, Decision and Order of the Commissioner, July 25, 2006, at 7 n 2 [distinguishing between motion for default and motion for order without hearing]).

Pursuant to 6 NYCRR 622.12(a), staff has supported its motion for an order without hearing with the affirmation of Justin Stenerson, Esq., the affidavit of Russell B. Mulvey, a licensed professional engineer at the Region 5 office in the Division of Environmental Remediation, two affidavits of Patrick M. Kane, an engineer at the Region 5 office in the Division of Materials Management, and the exhibits attached to the affidavits and described in Appendix A. Both affiants conducted an inspection at the facility, and Mr. Mulvey had several conversations with the respondent after issuing the July 19, 2019 NOV.

First Cause of Action

In the first cause of action, Department staff alleges that respondent violated several regulations governing petroleum bulk storage (PBS) facilities. Specifically, the complaint alleges that respondent:

- failed to report a petroleum spill now designated as Spill No. 1903482, in violation of 6 NYCRR 613-4.4(d)(1);

- had an unregistered used oil tank associated with a used oil burner, in violation of 6 NYCRR 613-1.9;[3]

- failed to properly label the unregistered used oil tank and various containers of used oil, in violation of 6 NYCRR 613-4.2(a)(3);

- failed to color code the unregistered used oil tank, in violation of 6 NYCRR 613-2.2(a)(4); 613-3.2(a)(4); 613-4.2(a)(4);

- failed to perform monthly inspections on the unregistered used oil tank, in violation of 6 NYCRR 613-4.3(a)(1)(i) and 6 NYCRR 613-4.3(b)(1); and

- failed to maintain or failed to keep sufficient monthly inspection reports, in violation of 6 NYCRR 613-4.3(e).

Department regulations governing management of used oil require that "[a]ll aboveground and underground used oil tank systems, regardless of tank size, must be in compliance with Part 613 of this Title." (6 NYCRR 374-2.3[c][2].) Therefore, the respondent's oil tank associated with the used oil burner within the facility is subject to the PBS regulations found in part 613 of 6 NYCRR.

[3] The complaint also alleges violations of 6 NYCRR 613-4.2(3) & (4) (sic); 6 NYCRR 613-4.3(b)(1) and 6 NYCRR 613-4.3(e) in ¶ 9(b) for failing to register the used oil tank. The citation to 6 NYCRR 613-4.2(3) & (4) are incorrect and the violation of 6 NYCRR 613-4.2(a)(3) is properly pled in ¶ 9(d). The allegations regarding violations of 6 NYCRR 613-4.3(b)(1) and 6 NYCRR 613-4.3(e) are properly pled in paragraph 9(e) and (f), respectively. The Stenerson affirmation clarifies that the failure to register is a violation of 6 NYCRR 613-1.9 and omits the additional regulations cited in the complaint for failure to register. (*See* Stenerson affirmation ¶ 31.)

1. Violation of 6 NYCRR 613-4.4(d)(1)- Reporting

Reporting a petroleum spill is required within two hours of discovery pursuant to 6 NYCRR 613-4.4(d)(1); which provides:

> "Response to spills and overfills.
>
> (1) A facility must report every spill to the Department's Spill Hotline (518-457-7362) within two hours after discovery, contain the spill, and begin corrective action in accordance with the requirements of Subpart 613-6 of this Part except if the spill meets the following conditions:
>
> (i) It is known to be less than five gallons in total volume;
> (ii) It is contained and under the control of the spiller;
> (iii) It has not reached and will not reach the land or waters of the State; and
> (iv) It is cleaned up within two hours after discovery."

Department staff has made a prima facie showing that as of the date of the July 3, 2019, inspection of the facility, respondent was an owner[4] and operator[5] of Leroy's 24 Hour Towing and Repair, and failed to report a petroleum spill designated as Spill No. 1903482, as required by 6 NYCRR 613-4.4(d)(1) (*see* Findings of Fact [FOF] 1, 7; Mulvey affidavit ¶¶ 7, 12; Kane August 2022 affidavit ¶ 5 and Exhibit A thereto). Even if an oil spill has been reported by a third party, the discharger has responsibility to report the spill under the similar provisions of Navigation Law § 175. (*See Matter of R. Patnode Plumbing & Heating, LLC, and Richard W. Patnode,* Order of the Commissioner, May 15, 2019, at 2, adopting Ruling and Hearing Report at 13.) The report on July 1, 2019, did not absolve respondent of this reporting responsibility.

2. Violation of 6 NYCRR 613-1.9 - Registration

6 NYCRR 613-1.9 provides in pertinent part:

> "(a) General. The facility owner must obtain an initial or revised registration certificate from the Department prior to the first receipt of petroleum into a new or replaced tank system. The facility owner must ensure that the registration information identified in subdivision (e) of this section remains current and accurate."

Staff has established that respondent is the owner of the facility (*see* Exhibit A to Kane August 2022 affidavit; FOF 1) and that the facility is not registered (*see* FOF 10; Kane December 2020 affidavit ¶ 9). Respondent has violated 6 NYCRR 613-1.9 by failing to register.

[4] "Facility owner means any person who has legal or equitable title to the real property of a facility." 6 NYCRR 613-1.3(w).

[5] "Operator means any person who leases, operates, controls, or supervises a facility." 6 NYCRR 613-1.3(ao). 6 NYCRR 613-1.2(d) provides that "[a]ny provision of this Part that imposes a requirement on a facility imposes that requirement on every operator and every tank system owner at the facility, unless expressly stated otherwise."

3. Violation of 6 NYCRR 613-4.2(a)(3) - Labeling

Staff alleges that respondent violated 6 NYCRR 613-4.2(a)(3) for failure to properly label oil tanks. Section 613-4.2(a)(3) of the PBS regulations, regarding general operating requirements, provides:

> "(3) Every AST[6] must be marked (for example, with stenciled letters) with the tank registration identification number, as well as the tank design and working capacities."

Department staff has established a prima facie showing that on the date of the July 3, 2019 inspection, respondent had failed to properly label the unregistered used oil tank as well as other oil containers. (*See* FOF 8; Mulvey affidavit ¶¶ 9-10, Exhibit C, photos 2, 7-16, 19-23, 29.) The respondent is liable for violation of 6 NYCRR 613-4.2(a)(3) for failure to properly label the used oil tank associated with the oil burner and the other used oil containers.

4. 6 NYCRR 613-2.2(a)(4); 613-3.2(a)(4); 613-4.2(a)(4) - Color coding

The complaint cites three subsections of the PBS regulations for the color-coding violation. The applicable subsection is 6 NYCRR 613-4.2(a)(4), which provides in pertinent part:

> "Every AST system must be color coded in accordance with API RP 1637 at or near the fill port. If an AST system contains petroleum that does not have a corresponding API color code, the facility must otherwise mark the AST (for example, with stenciled letters) to identify the petroleum currently in the AST system."

The complaint also cites 6 NYCRR 613-2.2(a)(4) and 6 NYCRR 613-3.2(a)(4) which provide similar color-coding requirements for underground storage tanks (USTs). In the affirmation supporting the motion for order without hearing, Department staff refers to 6 NYCRR 613-4.2(a)(4), but not 6 NYCRR 613-2.2(a)(4) or 613 NYCRR 613-3.2(a)(4) for this violation (Stenerson affirmation ¶ 33). There is no allegation regarding an underground storage tank; hence there is no liability based on 6 NYCRR 613-2.2(a)(4) or 6 NYCRR 613-3.2(a)(4). However, Department staff has made a prima facie showing that on the date of the July 3, 2019 inspection, the unregistered used oil tank was not color coded. (*See* Mulvey affidavit ¶ 9 and Exhibit C, photos 1-2). Therefore, a prima facie case has been made that a violation of 6 NYCRR 613-4.2(a)(4) occurred.

5. Violation of 6 NYCRR 613-4.3(a)(1)(i); 613-4.3(b)(1); 613-4.3(e) – Inspection

The Department's PBS regulations, 6 NYCRR 613-4.3, provide in part:

> "(a) Specific requirements for Category 1, 2, and 3 AST systems.
> (1) Tank systems.

[6] "Aboveground storage tank system or AST system means any tank system that is not an underground storage tank system." 6 NYCRR 613-1.3(a).

> (i) Every facility having an AST system must inspect the AST system at monthly intervals in accordance with paragraph (b)(1) of this section.
>
> ….
>
> (b) Inspections of AST systems. Inspections of AST systems must be conducted in accordance with the following:
>
> > (1) Monthly inspections. The inspection must include, as applicable, identification of leaks, cracks, areas of wear, corrosion and thinning, poor maintenance and operating practices, excessive settlement of structures, separation or swelling of tank insulation, malfunctioning equipment, and structural and foundation weaknesses.
> >
> > ….
>
> (e) Inspection and leak detection recordkeeping. Every facility must maintain records demonstrating compliance with all applicable requirements of this section. These records must include the results of monthly and ten-year inspections. Monthly inspection records must be maintained for at least three years. Ten-year inspection records must be maintained for at least ten years. A copy of the results of tank tightness testing must be submitted to the Department within 30 days after performance of the test. At a minimum, the records must list each component tested and describe any action taken to correct an issue."

Department staff has made a prima facie showing that on the date of the July 3, 2019 inspection, respondent had failed to perform monthly inspections of the unregistered used oil tank and to keep inspection records (*see* FOF 8; Mulvey affidavit ¶ 10). Therefore, respondent violated 6 NYCRR 613-4.3(a)(1)(i), 613-4.3(b)(1), and 613-4.3(e).

Accordingly, respondent is liable for violating the following PBS regulations in the first cause of action:

- 6 NYCRR 613-4.4(d)(1);
- 6 NYCRR 613-1.9;
- 6 NYCRR 613-4.2(a)(3);
- 6 NYCRR 613-4.2(a)(4);
- 6 NYCRR 613-4.3(a)(1)(i); 613-4.3(b)(1); and 613-4.3(e).

Department staff's motion for an order without hearing on the six counts contained in the first cause of action is granted.

Second Cause of Action

Department staff alleges that respondent violated Department regulations regarding the management of used oil. Specifically, the complaint alleges that respondent violated:

- 6 NYCRR 374-2.3(c)(3) by discharging petroleum at the facility;
- 6 NYCRR 374-2.3(c)(5) by failing to notify the Department of the discharge of petroleum, failing to remediate the petroleum contamination, and allowing the discharged petroleum to remain on site;
- 6 NYCRR 374-2.3(c)(2)(i) and 374-2.3(c)(4) by failing to properly label, store and dispose of containers of used oil; and
- 6 NYCRR 374-3.2(d)(1)(i) by storing unlabeled and undated lead acid batteries outside on the ground.

1. 6 NYCRR 374-2.3(c)(3) - Condition of units

In paragraph 10(a) of the complaint, Department staff alleges that the storage of "various open, unlabeled, and damaged containers of used oil … (without proper labeling, storage, use and/or disposal) at various locations at the Facility" some of which are "releasing oil to the ground surface" is a violation of 6 NYCRR 374-2.3(c)(3), which states:

> "(3) Condition of units. Containers and aboveground used oil tanks used to store used oil at generator facilities must be:
>
> (i) in good condition (no severe rusting, apparent structural defects or deterioration); and
>
> (ii) not leaking (no visible leaks)."

Staff has established a prima facie showing that there were open, damaged and leaking containers of used oil on the premises during the July 3, 2019 inspection. (*See* FOF 8; Mulvey affidavit ¶¶ 9-11; Kane December 2020 affidavit ¶ 7; Exhibit C, photo 23). Respondent has violated 6 NYCRR 374-2.3(c)(3).

2. 6 NYCRR 374-2.3(c)(5) – Response to releases

6 NYCRR 374-2.3(c)(5) provides:

> "Response to releases.
>
> (i) Any spill, discharge, or release of used oil shall be subject to all applicable provisions of article 12 of the Navigation Law (NL sections 170 through 197) and its implementing rules and regulations, 17 NYCRR Parts 32--33 and Part 611 of this Title, regarding, but not limited to, notification, cleanup, and liability, and are also subject to applicable provisions of article 17, Title 10 and section 17-1743 of the Environmental Conservation Law, and subpart 613-6 of this Title.
>
> (ii) Upon detection of a release of used oil to the environment that is not subject to the requirements of subpart F of 40 CFR part 280, as incorporated by reference

in section 370.1(e) of this Title, a generator must perform the following cleanup steps:

> (a) stop the release;
> (b) contain the released used oil;
> (c) clean up and manage properly the released used oil and other materials; and
> (d) if necessary, repair or replace any leaking used oil storage containers or tanks prior to returning them to service.

(iii) Within two hours of detecting a spill, discharge, or release of used oil, the generator must notify the department Spill Hotline at (800) 457-7362, or, if calling from out of state, (518) 457-7362."

Staff has established a prima facie case that respondent did not report the oil spill and has not undertaken any remedial action, in violation of 6 NYCRR 374-2.3(c)(5). (*See* FOF 7, 8; Mulvey affidavit ¶¶ 7, 20; Kane December 2020 affidavit ¶ 13.)

3. 6 NYCRR 374-2.3(c)(2)(i), 374-2.3(c)(4) – Compliance with used oil regulations

The Department's regulations regarding used oil tanks apply the PBS regulations (part 613) to all used oil tanks regardless of size. (6 NYCRR 374-2.3[c][2][i]). Staff has established that used oil containers were not inventoried, properly stored, or disposed of, as required by 6 NYCRR 374-2.3(c)(2)(i) and part 613. (*See* FOF 8, 11; Mulvey affidavit ¶ 10; Exhibit C, photos 2-3, 7-27, 29.) Nor were they labeled with the words "Used Oil," and the other information required by 6 NYCRR 374-2.3(c)(4). (*See id.)*

4. 6 NYCRR 374-3.2(d)(1)(i)- Waste management

Department regulations require the special handling of waste batteries:

> "(d) Waste management.
>
> (1) Universal waste batteries. A small quantity handler of universal waste must manage universal waste batteries in a way that prevents releases of any universal waste or component of a universal waste to the environment, as follows:
>
> (i) A small quantity handler of universal waste must contain any universal waste battery that shows evidence of leakage, spillage, or damage that could cause leakage under reasonably foreseeable conditions in a container. The container must be closed, structurally sound, compatible with the contents of the battery, and must lack evidence of leakage, spillage, or damage that could cause leakage under reasonably foreseeable conditions."

(6 NYCRR 374-3.2[d][1][i].)

Management of universal waste batteries also requires labeling and dating the batteries (*see* 6 NYCRR 374-3.2[e], [f]). Staff has established that respondent had lead acid batteries stored outside on the ground, which were unlabeled and undated in violation of 6 NYCRR 374-3.2(d)(1)(i); 374-3.2(e); 374-3.2(f). (*See* FOF 11; Kane December 2020 affidavit ¶ 11; Exhibit C, photos 24, 28.) Respondent is liable for violating 6 NYCRR 374-3.2(d)(1)(i).

Accordingly, respondent is liable for violating:

- 6 NYCRR 374-2.3(c)(3);
- 6 NYCRR 374-2.3(c)(5);
- 6 NYCRR 374-2.3(c)(2)(i);
- 6 NYCRR 374-2.3(c)(4); and
- 6 NYCRR 374-3.2(d)(1)(i).

Department's motion for order without hearing is granted on the second cause of action.

Third Cause of Action

Department staff's third cause of action alleges respondent failed to comply with metal processing and vehicle dismantling facility regulations, specifically 6 NYCRR 361-7.3(a)(1); 361-7.4(e); and 361-7.4(f) by failing to register the facility as a vehicle dismantling facility with the Department and by improper storage of used oil and lead acid batteries.

1. 6 NYCRR 361-7.3– Registration

Regarding registration of a vehicle dismantling facility, staff provided documentation of respondent's registration with the Department of Motor Vehicles as a motor vehicle repair shop (*see* FOF 10; Kane August 2022 affidavit ¶ 5 and Exhibit B thereto). Mr. Kane observed approximately 50 end-of-life vehicles on site (*see* FOF 11; Kane December 2020 affidavit ¶ 9). Mr. Kane reviewed Department records to verify that the facility was not registered with the Department as a vehicle dismantling facility (s*ee id.*).

As a motor vehicle repair shop registered with DMV, if respondent stores end-of-life vehicles, then he is either exempt pursuant to 6 NYCRR 361-7.2 or must register pursuant to 6 NYCRR 361-7.3 (a) or (b). If he stores no more than 25 end-of-life vehicles, he is exempt from subpart 361-7 under 6 NYCRR 361-7.2(a). If he stores between 26 and 50 end-of-life vehicles, he must register pursuant to 6 NYCRR 361-7.3(a) and comply with 6 NYCRR 361-7.5. If he stores more than 50 end-of-life vehicles, then he must register pursuant to 6 NYCRR 361-7.3(b) and comply with 6 NYCRR 361-7.4. The Kane December 2020 affidavit does not state whether respondent stored between 26 and 50 vehicles or more than 50 vehicles, only that he stored approximately 50 vehicles. Although the affidavit is insufficient to determine which subsection he must register under - 6 NYCRR 361-7.3(a)(1) or 6 NYCRR 361-7.3(b), staff does establish a prima facie showing that respondent was required to register as a vehicle dismantling facility pursuant to 6 NYCRR 361-7.3. Department's motion for order without hearing is granted as to the first claim in the third cause of action.

2. 6 NYCRR 361-7.4(e), (f) - Design and Operating Requirements

Staff alleges that respondent has violated 6 NYCRR 361-7.4(e) by improper storage of used oil in unlabeled open containers (*see* complaint ¶ 11(b); Stenerson affirmation ¶ 40*)*. Staff also alleges that respondent violated 6 NYCRR 361-7.4(f) by improper storage of batteries (*see* complaint ¶ 11(c); Stenerson affirmation ¶ 41*)*. That regulation provides design and operating requirements for facilities required to obtain a registration under subpart 361-7, "[e]xcept for facilities identified in subdivision 361-7.3(a)." As noted above, staff has not established whether respondent should register as a vehicle dismantling facility under 6 NYCRR 361-7.3(a)(1) or 6 NYCRR 361-7.3(b). If respondent stored between 25 and 50 end-of-life vehicles at any time, then he is required to register under 6 NYCRR 361-7.3(a)(1), but 6 NYCRR 361-7.4 would not apply. Staff has not made a prima facie showing that 6 NYCRR 361-7.4 applies to respondent. The motion is denied as to the alleged violations of 6 NYCRR 361-7.4(e) and 361-7.4(f) in the third cause of action.

Fourth Cause of Action

In its fourth cause of action, Department staff alleges respondent generated solid waste and failed to determine if the waste was hazardous, in violation of 6 NYCRR 372.2(a)(2). That subsection provides:

> "(2) Hazardous waste determination. A person who generates a solid waste must determine if that waste is a hazardous waste using the following method:
>
> > (i) First determine if the waste is excluded from regulation under section 371.1(e), exclusions, of this Title.
> >
> > (ii) Then determine if the waste is listed as a hazardous waste in section 371.4 of this Title.
>
> Note: Even if the waste is listed, the generator still has an opportunity under section 370.3(c) of this Title to demonstrate that the waste from this particular facility or operation is not a hazardous waste.
>
> > (iii) For purposes of compliance with Part 376 of this Title, or if the waste is not listed as a hazardous waste in section 371.4 of this Title, the generator must then determine whether the waste is identified in section 371.3 of this Title by either:
> >
> > > (a) testing the waste according to the methods set forth in Appendix 19, 20 or 21, infra, or according to an equivalent method approved under section 370.3(b) of this Title; or
> > >
> > > (b) applying knowledge of the hazard characteristic of the waste in light of the materials or the processes used;
>
> (iv) if the waste is determined to be hazardous, the generator must refer to Parts 370 through 374 and 376 of this Title, for possible exclusions or

> restrictions pertaining to management of the specific waste. Hazardous waste annual reporting requirements are set forth in paragraph 372.2(c)(2) of this Part. Hazardous waste annual reports must also be filed by facilities subject to ECL Section 72-0402."

(6 NYCRR 372.2[a][2]).

A solid waste is defined as any discarded material (6 NYCRR 371.1[c]). A discarded material is any material which is abandoned, recycled, or considered inherently waste-like. (*See* 6 NYCRR 371.1[c][2]; *Matter of Man Products, Inc. and Michael Mancusi*, Order, October 16, 2019, at 5.)

To support this claim, Department staff avers that respondent had disposed of spent aerosol cans throughout the facility (*see* Kane December 2020 affidavit ¶ 12, referring to photos of cans in a garage pit [Exhibit C, photo 4], a liquid wrench can on a tool bench [Exhibit C, photo 5] and an aerosol can on top of a blue drum [Exhibit C, photo 19]. There is no indication that these cans were disposed of.

Respondent admitted during the July 3, 2019 inspection that he had disposed of spent aerosol cans in vehicles sent off for scrapping without determining whether they were hazardous. (*See* FOF 11; Kane December 2020 affidavit ¶ 12.) From the context, staff is apparently alleging that the aerosol cans were empty, not "spent" as defined in 6 NYCRR 371.1(a).[7] "Any hazardous waste remaining in … an empty container … is not subject to regulation under this Part and Parts 372 through 374, and 376 of this Title." 6 NYCRR 371.1(h)(1)(i). Therefore, the disposal of empty aerosol cans is not a violation of 6 NYCRR 372.2(a)(2).

Department staff's motion for an order without hearing on the fourth cause of action is denied.

Seventh Cause of Action

For the seventh cause of action, Department staff alleges respondent discharged petroleum at the facility, failed to timely report the discharge to the department, failed to timely remediate the contamination caused by the discharge, and allowed the petroleum contamination to remain on site, violating Navigation Law article 12, §§ 173, 175, 176 and 181.

The purpose of article 12 is to "ensure a clean environment and healthy economy for the state by preventing the unregulated discharge of petroleum which may result in damage to lands, waters or natural resources of the state by authorizing the department of environmental conservation to respond quickly to such discharges and effect prompt cleanup and removal of such discharges, giving first priority to minimizing environmental damage, and by providing for liability for damage sustained within the state as a result of such discharges." (Navigation Law §

[7] "A spent material is any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing." 6 NYCRR 371.1(a)(7).

171.) Navigation Law § 195 provides that article 12 should be liberally construed to effect its purposes. (*See State v. Green*, 96 NY2d 403, 406 [2001]).

The Act explicitly prohibits discharges of petroleum (Navigation Law § 173[1]). Discharge is defined as "any 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 lands from which it might flow or drain into said waters" (Navigation Law § 172[8]). "Waters" includes all "bodies of surface or groundwater, whether natural or artificial" (Navigation Law § 172[18]). "'Petroleum' means oil or petroleum of any kind and in any form including, but not limited to, oil, petroleum, fuel oil, oil sludge, oil refuse, oil mixed with other wastes and crude oils, gasoline and kerosene." (Navigation Law § 172[15]).

In *Merrill Transp. Co. v State*, 94 AD2d 39, 42-43 (3d Dept 1983), the owner of a tractor-trailer carrying oil which spilled on the highway as a result of a collision argued that it did not discharge oil into the waters of the state or on "lands from which it might flow or drain into said waters" as prohibited by Navigation Law § 173. The Third Department held that even when there is "nothing in the record to positively demonstrate that the spilled oil might have flowed into protected waters, judicial notice can be taken of the common knowledge that oil can seep through the ground into surface and groundwater near a highway and thereby cause ecological damage." (*Merrill,* 94 AD2d at 42-43.) In *Domermuth Petroleum Equip. and Maintenance Corp. v Herzog & Hopkins, Inc.,* 111 AD2d 957, 958 (3d Dept 1985), the court found that an oil leak in a basement presented a "substantial likelihood that, if not cleaned up, it would proceed to seep into the surrounding groundwater." Citing *Merrill*, the court ruled that there was "no need for specific proof that the oil was ever in danger of seeping into protected water in order to render [Navigation Law article 12] applicable." (*Domermuth,* 111 AD2d at 959.) (*See also Matter of The Rabee Holdings Inc.,* Ruling, October 31, 2020, at 20-21[respondents did not overcome presumption that spilled oil will seep through the ground, and were liable under Navigation Law § 173 for spill]; *Matter of Richard Locaparra, d/b/a L & L Scrap Metals,* Final Decision and Order of the Commissioner, June 16, 2003, at 7, adopting Hearing Report, August 7, 2002, at 6 [proof that discharge reached any particular ground or surface water is not necessary to prove Navigation Law violation because the "discharge could have contaminated the waters of the state, whether or not it actually did."]).

Department staff has made a prima facie showing that respondent discharged oil at the facility by storing used oil in containers which caused "petroleum releases to occur as precipitation filled the containers, releasing the oil to the ground surface where it migrated and continues to migrate off site" (Mulvey affidavit ¶ 11) and by storing oil in containers, "some of which have spilled to the ground" (Kane December 2020 affidavit ¶ 10). Department staff sent respondent a NOV on July 19, 2019, documenting the violations with photographs of the leaking and damaged containers and demanding remediation of the surface spills. (*See* Notice of Violation dated July 19, 2019, Exhibit B to Mulvey affidavit.) The photographs taken during the July 3, 2019 inspection and incorporated into the NOV include a photo of open containers of black viscous liquid. (*See* Exhibit B at 2; Exhibit C, photo 23.) These photographs and the affidavits submitted present a prima facie showing that oil was discharged by respondent in violation of Navigation Law § 173.

Respondent did not report the discharge and therefore violated Navigation Law § 175. (*See Raymond Larussa d/b/a A&D Home Heating,* Commissioner's Order, June 27, 2019, at 3.) The reporting of the discharge by others does not absolve respondent from the reporting requirement. (*See Patnode,* Ruling and Hearing Report, at 13.)

By failing to immediately undertake to contain the discharge, respondent violated Navigation Law § 176. Respondent is liable, pursuant to Navigation Law § 181, for all cleanup and removal costs and all direct and indirect damages. The failure to remediate the contamination is a violation of Navigation Law § 181. (*See Matter of Pacos Construction Company, Inc.*, Order, February 23, 2010, at 3, adopting Default Summary Report, February 17, 2010, at 3-4.) Therefore, Department staff's motion for an order without hearing on the seventh cause of action is granted.

Penalty

Department staff initially requested a civil penalty of seventy-five thousand dollars ($75,000) in the original complaint. After withdrawing two claims, staff now requests a civil penalty of forty-five thousand dollars ($45,000). The request is not broken down by cause of action. Department staff avers that the potential statutory maximum for the violations proven is in the "multiple tens of millions of dollars" without calculating the statutory maximum (*see* Stenerson affirmation ¶ 50) and relying on ECL 71-1929, which provides for a maximum penalty of $37,500 per day for each violation proven. However, ECL 71-1929 applies to "titles 1 through 11 inclusive and title 19 of article 17, or the rules, regulations, orders or determinations of the commissioner promulgated thereto," which includes only the first and second causes of action.

For the third cause of action, the vehicle dismantling facility registration violation is based on title 23 of article 27. The maximum penalty is $1,000 for each day a violation continues, as provided in ECL 71- 4003. (*See A &D Auto Recycling and Sales LLC*, Order, February 27, 2020, at 2-4, adopting Summary Report, February 3, 2020, at 3.)

The fourth cause of action is for a violation of 6 NYCRR 372.2. Part 372 of 6 NYCRR implements ECL 27-0907 – Standards applicable to generators of hazardous waste – under title 9 of article 27 of the ECL. The penalty provision applicable to a violation of titles 9, 11 and 13 of article 27 of the ECL is ECL 71-2705, which is similar to ECL 71-1929, providing "for a civil penalty not to exceed thirty-seven thousand five hundred dollars and an additional penalty of not more than thirty-seven thousand five hundred dollars for each day during which such violation continues"

In addition, as staff notes, Navigation Law § 192 provides for a penalty of up to $25,000 per day for violations of Navigation Law article 12.

When multiple causes of action are based on the same set of facts, the civil penalty should not be increased because the respondent violated multiple provisions of law with the same action or inaction. (*See Matter of Smith,* Commissioner's Order, July 2, 2015, at 2, adopting Hearing Report, November 19, 2014, at 26.) I note that several of the claims in the first and second causes of action are based on the same facts as claims in the seventh cause of action. Also, if the

claims in the third cause of action alleging violations of 6 NYCRR 372-7.4 are established at hearing, the allegations of improper storage of used oil and batteries are multiplicative of claims in the second cause of action. Staff has made no attempt to parse the multiplicative claims for the purposes of civil penalties.

Staff has addressed some of the factors in DEE-1, specifically the economic benefit by operation of the facility without compliance with law, the breadth of the violations, the potential harm to the environment, respondent's culpable mental state and failure to cooperate with the Department once the contamination was discovered. (*See* Stenerson affirmation ¶¶ 50-56). However, there has been no assignment of penalties to each cause of action or calculation of maximum penalties, no discussion of program-specific guidance on penalties and no discussion of consistency with other penalties in similar cases.

The Commissioner has held that "[i]n reviewing staff's submissions, the ALJ should consider whether the penalty sought (1) falls within the potential maximum penalty authorized by law, (2) is consistent with [DEE-1] and any other program specific guidance documents for assessing penalties... (3) is warranted by the circumstances of the case, and (4) is generally consistent with other penalties imposed in other matters involving similar circumstances..." (*Matter of Alvin Hunt,* Decision and Order of the Commissioner, July 25, 2006, at 8-9 [citations omitted]; *see also Man Products, Inc. and Michael Mancusi*, Ruling, February 20, 2018, at 28). Staff has not addressed these factors other than citing to the statutory maximum for three of the five causes of action. Additional information is required to determine an appropriate penalty for each violation.

Remedial Relief

Department staff requests an order that respondent investigate and remediate any and all areas of petroleum contamination under a Department-approved workplan; respondent comply with all applicable regulations; and that respondent either register as a Vehicle Dismantling Facility under 6 NYCRR 361-7.3 or bring the facility into compliance under 6 NYCRR 361-7.4. As discussed above, respondent should register as a vehicle dismantling facility under 6 NYCRR 361-7.3. Until staff establishes the number of end-of life vehicles stored at the facility, it cannot be determined whether he must comply with 6 NYCRR 361-7.4.

Submission and implementation of a workplan to remediate all areas of petroleum contamination is appropriate where the respondent has not remediated a petroleum discharge. (*See Matter of Cherokee Partners*, Order, March 2, 2011, at 4.) In addition, because the violations included mishandling of hazardous waste and lead acid batteries, the work plan should also address identification and disposal of hazardous waste and proper storage of lead acid batteries.

CONCLUSIONS OF LAW

Department staff has established a prima facie showing that respondent violated the following provisions of law:

A. Cause of Action I:

1. By failing to report a petroleum spill now designated as Spill No. 1903482, respondent violated 6 NYCRR 613-4.4(d)(1);

2. By failing to register the used oil tank associated with the used oil burner, respondent violated 6 NYCRR 613-1.9;

3. By failing to properly label the unregistered used oil tank and various containers, respondent violated 6 NYCRR 613-4.2(a)(3);

4. By failing to color code the unregistered used oil tank, respondent violated 6 NYCRR 613-4.2(a)(4);

5. By failing to perform monthly inspections on the unregistered used oil tank, respondent violated 6 NYCRR 613-4.3(a)(1)(i) and 613-4.3(b)(1); and

6. By failing to maintain or failing to keep sufficient monthly inspection reports, respondent violated 6 NYCRR 613-4.3(e).

B. Cause of Action II:

1. By discharging petroleum at the facility, respondent violated 6 NYCRR 374-2.3(c)(3);

2. By failing to notify the Department of the discharge of petroleum, failing to remediate the petroleum contamination and allowing the discharged petroleum to remain on site, respondent violated 6 NYCRR 374-2.3(c)(5);

3. By failing to properly label, store use and dispose of containers of used oil, respondent violated 6 NYCRR 374-2.3(c)(2)(i) and 6 NYCRR 374-2.3(c)(4); and

4. By storing lead acid batteries outside on the ground, undated and unlabeled, respondent violated 6 NYCRR 374-3.2(d)(1)(i).

C. Cause of Action III:

1. By failing to register as a vehicle dismantling facility, respondent violated 6 NYCRR 361-7.3.

D. Cause of Action IV:

1. Respondent did not violate 6 NYCRR 372.2(a)(2) by disposing of empty aerosol cans in cars sent for scrapping.

E. Cause of Action VII:

1. By discharging petroleum at the facility, respondent violated New York State Navigation Law § 173;

2. By failing to timely report the discharge at the facility to the Department, respondent violated New York State Navigation Law § 175;

3. By failing to timely remediate the contamination caused by the discharge, respondent violated New York State Navigation Law § 176; and

4. By allowing the petroleum contamination to remain on site, respondent violated New York State Navigation Law § 181.

RULING

I. Department staff's motion for order without hearing dated December 15, 2020, is granted in part on the issue of liability against respondent Leroy Snow on the following violations:

A. 6 NYCRR 613-4.4(d)(1) for failing to report a petroleum spill now designated as Spill No. 1903482 (Cause of Action I);

B. 6 NYCRR 613-1.9 for failing to register the used oil tank associated with the used oil burner (Cause of Action I);

C. 6 NYCRR 613-4.2(a)(3) for failing to properly label the unregistered used oil tank and various containers (Cause of Action I);

D. 6 NYCRR 613-4.2(a)(4) for failing to color code the unregistered used oil tank (Cause of Action I);

E. 6 NYCRR 613-4.3(a)(1)(i); 613-4.3(b)(1) for failing to perform monthly inspections on the unregistered used oil tank (Cause of Action I);

F. 6 NYCRR 613-4.3(e) for failing to maintain or failing to keep sufficient monthly inspection reports (Cause of Action I);

G. 6 NYCRR 374-2.3(c)(3) for discharging petroleum at the facility (Cause of Action II);

H. 6 NYCRR 374-2.3(c)(5) for failing to notify the Department of the discharge of petroleum, failing to remediate the petroleum contamination and allowing the discharged petroleum to remain on site (Cause of Action II);

I. 6 NYCRR 374-2.3(c)(2)(i) and 374-2.3(c)(4) for failing to properly label, store use and dispose of containers of used oil (Cause of Action II);

J. 6 NYCRR 374-3.2(d)(1)(i) for storing lead acid batteries outside on the ground (Cause of Action II);

K. 6 NYCRR 361-7.3 for failing to register as a Vehicle Dismantling Facility (Cause of Action III);

L. New York State Navigation Law § 173 for discharging petroleum at the facility (Cause of Action VII);

M. New York State Navigation Law § 175 for failing to timely report the discharge at the facility to the department (Cause of Action VII);

N. New York State Navigation Law § 176 for failing to timely remediate the contamination caused by the discharge (Cause of Action VII); and

O. New York State Navigation Law § 181 for allowing the petroleum contamination to remain on site (Cause of Action VII).

II. For the reasons discussed above, Staff's motion for order without hearing on the second and third claims in Cause of Action III alleging violations of 6 NYCRR 361-7.4(e) and 6 NYCRR 361-7.4(f) is denied.

III. For the reasons discussed above, Staff's motion for order without hearing on Cause of Action IV alleging violations of 6 NYCRR 372.2(a)(2) is denied.

IV. Department staff's motion to amend the complaint pursuant to 6 NYCRR 622.15, renumbering Cause of Action IX to Cause of Action VI, renumbering Cause of Action X to Cause of Action VII and withdrawing Causes of Action V and VI, as renumbered, is granted.

V. I reserve ruling on the civil penalty and relief requested in Department staff's motion for order without hearing until a hearing is held on the remaining claims and penalty.

Accordingly, Department's motion for order without hearing is granted in part, as detailed herein. I will schedule a hearing on the remaining claims and the requested civil penalties and relief.

/s/

_____

Elizabeth Phillips
Administrative Law Judge

Dated: November 18, 2022
Albany, New York

APPENDIX A

Matter of Leroy Snow
DEC Case No. CO 5-20200117-7
Motion for Order Without Hearing

- Cover letter, dated December 15, 2020, from Justin Stenerson, Esq. to James McClymonds, Chief Administrative Law Judge, attaching:

    1. Notice of Motion for Order Without Hearing, dated December 15, 2020.
    2. Motion for Order Without Hearing, dated December 15, 2020, with the following attachments:

        A) Affirmation of Justin Stenerson, Esq., dated December 15, 2020.

        B) Affidavit of Russell B. Mulvey, sworn to August 21, 2020, marked as Exhibit A, and attaching the following exhibits:

            a) Spill Report Form for spill number 1903482;
            b) Notice of Violation dated July 19, 2019;
            c) Photographs of the facility taken during an inspection on July 3, 2019; and
            d) Emails to respondent dated July 26, 2019, August 6, 2019, August 16, 2019, and September 3, 2019.

        C) Affidavit of Patrick M. Kane, sworn to December 8, 2020, marked as Exhibit B, and attaching the following exhibits:

            a) Notice of Violation dated July 25, 2019; and
            b) Photographs of the facility taken during inspection on July 3, 2019.

        D) Twenty-nine (29) photographs of the facility, marked as Exhibit C.

- Email dated January 26, 2021, from Justin Stenerson, Esq. to James T. McClymonds, Chief Administrative Law Judge, attaching:

    1. Notice of Hearing and Complaint dated January 29, 2020.
    2. Affidavit of Service of the Notice of Hearing and Complaint, showing personal service on February 1, 2020, sworn January 20, 2021.
    3. Affirmation of Justin Stenerson regarding service of the Motion for Order Without Hearing, dated January 25, 2021.

- Cover letter from Justin Stenerson, Esq. to Administrative Law Judge Elizabeth Phillips, dated August 9, 2022, with the following attachments:

    1. Affidavit of Patrick M. Kane in Support of Motion for an Order Without Hearing, sworn August 9, 2022, with the following exhibits:

        A) Deed from Barbara S. Carlson to Leroy K. Snow dated January 2, 2009, and recorded as Document Number 2009-0000006 on January 2, 2009, B. 1594, P. 307, in the Clerk's Office for Essex County, New York.

        B) Letter from Christopher Ayers, NYS Department of Motor Vehicles Director of Vehicle Safety Field & Consumer Services, stating facility 7080701 was approved as a repair shop on March 6, 1998, and has renewed its registration through February 29, 2024.