STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of New York State Environmental Conservation Law (ECL) Articles 17, 19, 27, and 72 and Parts 201, 228, 364, 371 and 372 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

RULING

-by-

DEC Case No.
R1-20120725-87

MAN PRODUCTS, INC. and MICHAEL MANCUSI,

Respondents.

Appearances:

- Thomas S. Berkman, Deputy Commissioner and General Counsel (Susan H. Schindler, Assistant Regional Attorney), for staff of the Department of Environmental Conservation.
- Michael Mancusi, respondent pro se and for respondent Man Products, Inc.

SUMMARY

Staff of the New York State Department of Environmental Conservation (Department) commenced this administrative enforcement proceeding with a notice of hearing and complaint (Complaint) and now move for an order without hearing on the nine causes of action alleged therein (Motion).[1] Respondents oppose Department staff's motion and cross move for an order without hearing dismissing all the causes of action in the complaint (Cross Motion). Having considered the parties' submissions, I partially grant and otherwise deny the parties' motions.

With respect to the first, second, third, fourth, sixth, eighth, and ninth causes of action, I conclude that staff has made a prima facie showing of entitlement to judgment as a matter of law and that respondents have not met their burden to raise triable issues of fact or demonstrate they are entitled to judgment. As to those causes of action, I grant Department staff's on the issue of liability and deny respondents' Cross Motion. On the fifth cause of action, I partially grant and partially deny staff's Motion and deny respondents' Cross Motion. With respect to the seventh

[1] The caption has been conformed to include article 72 of the ECL inasmuch as the ninth cause of action in the Complaint alleges respondents violated article 72. Article 71 of the ECL is referenced in the notice of hearing and Complaint in terms of the penalty provisions, but the Complaint does not allege that respondents violated article 71. In addition, the caption also includes a reference to 6 NYCRR part 372, which Department staff allege respondents violated in the sixth cause of action.

cause of action, I grant respondents' Cross Motion, deny staff's Motion, and dismiss the cause of action. As discussed below, I reserve on the issue of the civil penalty.

PROCEEDINGS

By notice of hearing and complaint dated September 24, 2016 (Complaint), Department staff alleges that respondents Man Products, Inc. (Man Products) and Michael Mancusi (collectively respondents) violated Environmental Conservation Law (ECL) articles 17, 19, 27 and 72 and associated implementing regulations, title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) parts 201, 228[2], 364[3], 371, and 372 in connection with a surface coating facility then located in Suffolk County at 178 New Highway, Amityville, New York 11701 (Facility).

Staff seeks an order of the Commissioner: (1) holding respondents in violation of ECL articles 17, 19, 27, and 72 and 6 NYCRR parts 201, 228, 364, 371, and 372; (2) assessing a civil penalty in the amount of one-hundred seventy six thousand dollars ($176,000); (3) directing respondents to pay two thousand two hundred forty dollars ($2,240) in back regulatory fees ($160 per year for 14 years from 1999 to 2013); and (4) granting such other and further relief as the Commissioner deems just and appropriate.

Respondents initially failed to answer the Complaint. On December 22, 2016, Department staff served respondents with a notice of motion for default judgment and motion for default judgment, both dated December 22, 2016. On or about January 12, 2017, James D'Angelo, Esq., on behalf of respondents, and Region 1 assistant regional attorney Susan H. Schindler, Esq. advised the Office of Hearings and Mediation Services (OHMS) that they agreed to extend the time for respondents to answer staff's default motion to February 15, 2017 so that respondents could retain environmental counsel.

On February 15, 2017, Michael Mancusi filed papers on behalf of himself and respondent Man Products requesting an opportunity to answer the Complaint and opposing any default motion. Ms. Schindler opposed respondents' motion to reopen the default by affirmation dated February 22, 2017. On February 28, 2017, I issued a ruling denying Department staff's motion for a default judgment, without prejudice, and directing respondents to file an answer on or

[2] Surface coating processes and commercial and industrial adhesives, sealants and primers were formerly regulated pursuant to 6 NYCRR part 228 in effect on May 2, 2013. References to 6 NYCRR part 228 in this report refer to 6 NYCRR part 228 filed on August 31, 2010 and in effect on May 2, 2013. That version of part 228 was subsequently repealed. On May 6, 2013, a new Part 228, including subpart 228-1 Surface Coating Processes (§§ 228-1.1 through 228-1.16), was adopted and filed with the Secretary of State, effective 30 days after filing (*see* 6 NYCRR Part 228, Surface Coating Processes, Commercial and Industrial Adhesives, Sealants and Primers, Historical Notes).

[3] Section 364.2 of 6 NYCRR refers to the regulation in effect on May 2, 2013. Part 364 was repealed and replaced effective November 2017.

before March 20, 2017. On March 21, 2017, respondents submitted an answer to OHMS dated March 20, 2017 (Answer) with eight exhibits.

By notice of motion and motion dated June 16, 2017, Department staff moved for an order without hearing (Motion). Department staff seeks an order of the Commissioner holding respondents liable for the violations pleaded in the Complaint and awarding the relief sought therein. Staff's papers consist of an attorney affirmation of Susan Schindler, Esq. in support of the motion, a memorandum of law, affidavits from Tatiana Klappas, Jamie De Coteau, and Cathy Hass, and twenty-one exhibits.

On June 20, 2017, I directed respondents to file a response to Department staff's Motion on or before July 17, 2017. On June 30, 2017, respondents requested a two-month extension, until September 15, 2017, to respond to Department staff's motion. I granted respondents a two-week extension to July 31, 2017. On July 27, 2017, respondents sought an additional two-week extension to obtain additional data. Department staff did not object to the extension, but requested an opportunity to review and submit a response to the new data. On July 28, 2017, I granted respondents two additional weeks to file their response and Department staff until September 18, 2017 to submit a reply.

On August 10, 2017, respondents submitted a response to Department staff's Motion and cross-moved for an order dismissing the Complaint (Cross Motion). Respondents' papers consisted of an affidavit from Michael Mancusi, president of Man Products, an affidavit from Corrine Baransky, general manager of Man Products, and 30 exhibits.

By letter dated September 14, 2017, Department staff submitted its reply and its response to respondents' Cross Motion (Reply). Department staff's submissions consisted of an attorney affirmation from Susan Schindler, Esq., affidavits from Tatiana Klappas and Jamie De Coteau, and five exhibits.

A list of the parties' submissions and associated exhibits is attached to this ruling.

FINDINGS OF FACT

The following facts are determinable as a matter of law on staff's Motion and respondents' Cross Motion, which are the Department's equivalent of summary judgment motions pursuant to CPLR 3212.

1. Respondent Man Products, Inc. (Man Products) is an active domestic business corporation in the State of New York, originally incorporated in 1954 in Nassau County (*see* Motion, exhibit 14; Answer ¶ 2).

2. Respondent Michael Mancusi is an operator of Man Products (*see* Answer ¶ 4).

3. From 1999 to 2013, Man Products owned and operated a facility located in Suffolk County at 178 New Highway, Amityville, New York 11701 (the Facility or site) where it manufactured steel pre-fabricated buildings and conducted a surface coating operation in a spray booth (*see* Answer ¶¶ 2, 61; *see also* Motion, affidavit of Jamie De Coteau sworn to June 16, 2017 [De Coteau Aff], ¶ 13; Complaint, affidavit of Jamie De Coteau sworn to December 15, 2016 [De Coteau Aff], ¶ 13).

4. Suffolk County is located in the New York City metropolitan area which is designated as a nonattainment area pursuant to the Department's regulations because it does not meet national ambient air quality standards for certain air contaminants (*see* 6 NYCRR 200.1[au] and [av]).

5. Department staff inspected the Facility on May 2, 2013 (see Motion, affidavit of Jamie De Coteau sworn to June 16, 2017 [De Coteau Aff], ¶ 1).

6. Jamie De Coteau is an Environmental Engineer employed in the Division of Air Resources in Region 1 offices in Stony Brook, New York and has worked for the Department for over four years (*see* Motion, De Coteau Aff ¶ 1). He is a licensed New York State Engineer in Training (*id.*). He has access to the Department's records pertaining to air quality and is familiar with the facts and circumstances of this case (*see* Motion, De Coteau Aff ¶ 3).

7. During his May 2, 2013 inspection, Mr. De Coteau noted that the Facility failed to maintain and produce documentation regarding the filter removal efficiency, and purchase and use records for surface coatings used. He also noted that the Facility used a non-compliant primer and improperly disposed of spent material. (*See* Motion, De Coteau Aff ¶ 17.)

8. Man Products did not have an air registration or an air permit from the Department to operate the paint spray booth at its Facility (*see* Motion, De Coteau Aff ¶¶ 7, 13, 17, 19; *see also* Answer at ¶ 28).

9. Tatiana Klappas is a licensed Professional Engineer and an Environmental Engineer in the Division of Environmental Remediation in the Department's Region 1 office. She is a certified Resource Conservation and Recovery Act (RCRA) inspector and has 11 years of experience in providing technical guidance and oversight for RCRA regulated facilities. Ms. Klappas inspected the Facility on May 2, 2013 and documented her inspection with photographs. Ms. Klappas noted that at the time of the inspection respondents did not

provide the following records to the Department: purchase and use records for the primer used at the Facility; documentation that the air cleaning devices were at least 85% efficient; and a hazardous waste determination and waste disposal records for the solid waste generated at the Facility. (*See* Motion, affidavit of Tatiana Klappas sworn to June 16, 2017 [Klappas Aff], ¶¶ 1, 11 and exhibits 4 and 6; Reply, affidavit of Tatiana Klappas sworn to September 14, 2017 [Klappas Aff], ¶ 19 and exhibits A and C).

10. Ms. Klappas observed one paint spray booth at the Facility and also noted that the Facility utilized KEM-FLASH® 500 Primer, Red Oxide (*see* Motion, Klappas Aff ¶¶ 2, 11-12, 14.)

11. During Department staff's May 2, 2013 inspection, Ms. Klappas recorded the following observations: waste paint, waste rags and spent fluorescent lamps had been disposed of in the regular trash; four (4) 5-gallon drums and one (1) 55-gallon drum of spray paint were stored outside the building with no secondary containment; two (2) tubs containing soaked waste paint spray booth filters were on the ground toward the rear of the property with no secondary containment; five (5) 4-foot green tip spent fluorescent lamps were stored in the mechanical room, unboxed; two (2) paint trays containing "Red Oxide" primer were placed inside a regular dumpster located at the rear of the property; the floor in and around the spray booth were covered with "Red Oxide" dust; the asphalt and ground next to two (2) tubs with soaked filters had large red stains; and the Facility's storm drains had red staining on and around them (*see* Motion, Klappas Aff ¶¶ 15, 17, 19 and exhibits 4 and 6).

12. As of May 2, 2013, respondents provided no evidence that they made a hazardous waste determination for the waste generated at the Facility consistent with 6 NYCRR 373.2(a) (*see* Reply, Klappas Aff ¶ 17.b).

13. By letter dated May 8, 2013 from Waqas Saeed, Environmental Engineer Region 1, to Ms. Corrine Baransky, General Manger Man Products, Department staff requested that the Facility provide the following information: (1) documentation showing when Man Products started operating at 178 New Highway, Amityville, New York; (2) inventory data for gallons of primer purchased during 2007-2012 from all suppliers; (3) copies of painter certifications and training records from 2007-2012; (4) the report from the individual who inspected the spray booth on May 3, 2013; (5) documentation as to when the current and previous spray booths were installed; (6) documentation showing the specifications of Man Products's filters, including filter efficiency; (7) documentation demonstrating that paint spray guns are HVLP (high volume low pressure) spray guns; and (8) 2008-2012 invoices from the company who handled pick up and disposal of the filters (*see* Motion, De Coteau Aff ¶ 18 and exhibit 12).

14. On May 20, 2013, Ms. Baransky requested additional time to respond to the Department's May 8, 2013 information request. On June 4, 2013, Ms. Baransky sent a letter to Department staff purporting to transmit the requested documents, including the filter efficiency information, but failed to include the attachments. (*See* Motion, De Coteau Aff ¶ 23.)

15. On June 28, 2013, staff issued a notice of violation (NOV) to Man Products. The NOV stated that Man Products did not have documentation on site to demonstrate that the filter removal efficiency was at least 85%, that Man Products did not provide staff with purchase and use records during the inspection, and that Man Products failed to pay air regulatory fees (*see* Motion, exhibit 5 [air pollution control NOV]; Motion, Klappas Aff ¶ 20). According to Ms. Klappas, a search of the Department's records revealed that Man Products had not paid regulatory fees to the Department for its operations at the Facility (*see* Motion, Klappas Aff ¶ 21; Motion, exhibit 5 [air pollution control NOV]).

16. The material data safety sheet (MSDS) for KEM-FLASH® 500 Primer, Red Oxide dated May 25, 2012 indicates the product's volatile organic compound (VOC) content is 3.2 pounds per gallon (lb/gal) (Complaint, exhibit C). Respondents provided this MSDS sheet to Department staff at the time of the May 2, 2013 inspection (*see* Motion, Klappas Aff ¶ 28).

17. The material data safety sheet for KEM-FLASH® 500 Primer, Red Oxide dated October 23, 2014 indicates the product's VOC content is 3.2 lb/gal (Cross Motion, exhibit 2).

18. The material data safety sheet for KEM-FLASH® 500 Primer, Red Oxide dated October 13, 2016 indicates the product's VOC content is 3.86 lb/gal (Answer, exhibit 2).

19. Department air staff previously inspected the Facility on June 11, 2010. At that time, staff observed the painting of metal panels with paint containing volatile organic compounds or VOC-based paint in a paint spray booth. The booth filters were in place and the painting supplies were covered, but the spray booth was not operating at the time of the inspection. The Facility did not have an air permit or registration from the Department. Department staff provided the Facility manager, Corrine Baransky, with the New York State Small Business program permitting assistance information which included instructions for completing the air facility registration application. (*See* Motion, exhibits 9-10.)

20. Department staff re-inspected the Facility on October 16, 2013. The Facility was no longer spray painting its sheds. The inspection report states: "[t]he spray booth now looks presentable and has two types of filters (green and yellow) installed." With respect to staff's request for records, the inspection report states, "Michael Mancusi responded that

it should be in writing and that there were no longer any hazardous materials at the site, other than the ones in the backyard awaiting pickup. He then 'politely' told us that the tour was over." There were no violations recorded at the time of the October 2013 inspection. (Motion, exhibit 13.)

21. Man Products vacated the Facility in late 2014 and sold the property to the Town of Babylon on December 11, 2014 (*see* Answer at ¶ 20; Reply, Klappas Aff at ¶ 22).

22. Laurel Environmental Associates, Ltd. (Laurel Environmental) conducted a Limited Phase II Subsurface Investigation Report for sampling activities conducted on December 3, 2014 for M&D Millwork, LLC, the new tenant at the Site. The report concluded that semi-volatile organic compounds were present in two drywells in excess of allowed Suffolk County Department of Health action levels and recommended their remediation. (*See* Reply, Klappas Aff at ¶ 22; Cross Motion, exhibit 29 at 12.)

23. Laurel Environmental prepared a Drywell Remediation and Limited Phase II Investigation Report for the Department dated December 21, 2105. As part of the investigation, Laurel Environmental remediated one drywell to address elevated levels of selenium; conducted additional soil borings and analyzed eight soil samples; and collected endpoint soil samples from the base of four drywells. The results of the additional soil sampling indicated that soil over the 0 to 2-foot interval contained elevated levels of semi volatile organic compounds in two locations and elevated levels of zinc at two other locations. The results of the drywell sampling indicated that three drywells contained elevated levels of volatile organic compounds and semi volatile organic compounds at concentrations exceeding the unrestricted use soil cleanup objectives set forth in 6 NYCRR part 375. (*See* Cross Motion, exhibit 30 at 20).

DISCUSSION AND CONCLUSIONS OF LAW

Introduction and Preliminary Issues

At the outset, both parties move for judgment as a matter of law. Department staff move for an order without hearing on all nine causes of action in the Complaint (*see* Motion). Respondents oppose staff's Motion and cross move for an order dismissing all the charges in the Complaint (*see* Cross Motion, affidavit of Michael Mancusi sworn to August 10, 2017 [Mancusi Aff], ¶ 25). The following standards of review are applicable to the parties' motions.

A contested motion for order without hearing will be granted if, upon all the papers and proof, the cause of action (or defense) is established such that summary judgment can be granted under the CPLR (*see* 6 NYCRR 622.12[d]). "Summary judgment is appropriate when no genuine, triable issue of material fact exists between the parties and the movant is entitled to

judgment as a matter of law" (*Matter of Frank Perotta*, Partial Summary Order of the Commissioner, January 10, 1996, at 1, *adopting* ALJ Summary Report). CPLR 3212(b) provides that a motion for summary judgment shall be granted, "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." Once the moving party has put forward a prima facie case, the burden shifts to the non-movant to produce sufficient evidence to establish a triable issue (*see Matter of Locaparra*, Commissioner's Decision and Order, June 16, 2003, at 4). To prevail on its motion, the movant must establish its causes of action and or defenses sufficiently to warrant directing judgment in its favor as a matter of law, and do so by proffering evidentiary proof in admissible form. It is the movant's initial burden to make a prima facie showing of entitlement to summary judgment for each element of the violations alleged in the complaint or the defenses raised. Once a movant has done this, the burden shifts to the opposing party to put forth its proof.

ALLEGED AIR POLLUTION VIOLATIONS

First Cause of Action
6 NYCRR 201-1.1 Failure to Obtain a Permit or Registration

Department staff alleges that 6 NYCRR 201-1.1 requires owners and operators of air contamination sources in New York State to obtain a permit or registration certificate from the Department to operate such sources, and that respondents did not have a permit or registration from the Department to conduct a surface coating operation at the Facility. Staff further alleges that during the May 2, 2013 inspection, staff documented that the Facility was conducting a surface coating operation inside a paint spray booth at the site without authorization from the Department, in violation of 6 NYCRR subpart 201-1. (*See* Complaint ¶¶ 39-41.)

In their Answer, respondents admit that the Facility did not have a permit or registration from the Department to conduct a surface coating operation in a spray booth at the Facility (*see* Answer ¶ 29 [referring to Complaint ¶ 40]) and that "Department staff documented that from 1999 to 2013, [r]espondents conducted a surface coating operation in a spray booth at the Site" (Answer at ¶ 61 [referring to Complaint ¶ 74). Mr. Mancusi attests in opposition to staff's Motion that "Man Products, Inc. has been in business since 1950 and always maintained a professional manufactured paint booth" (*see* Cross Motion, Mancusi Aff ¶ 10.c). He further attests that "[h]ad the Department inspected the premises on any other day when Man Products, Inc. was operating, they would have observed a very clean and compliant environment, including using a clean, professional, top of the line Binks spray booth manufactured to be compliant with all laws; State, Federal, and Locally [sic]" (*see* Cross Motion, Mancusi Aff ¶ 10.d).

Section 201-1.1 of 6 NYCRR, cited as the basis for the first cause of action, is, by its terms, a provision of general purpose and applicability. The stated purpose of part 201 is "to require owners and operators of air contamination sources to obtain a permit or registration from the department for the construction and operation of such sources" (6 NYCRR 201-1.1[a]). An air contamination source is defined as any apparatus capable of causing emission of any air contaminant to the outdoor atmosphere, including an associated exhaust system or air cleaning device (*see* 6 NYCRR 200.1[f]). Except for an emission or activity that is classified as exempt or trivial under subpart 201-3, owners and operators of air contamination sources must obtain a permit or registration to operate (*see* 6 NYCRR 201-1.1[b]). A source's potential to emit one or more air contaminants, or in some cases a source's actual emissions, determines what type of Department authorization is necessary (*see e.g.* 6 NYCRR 201-4.5). [4]

An air contaminant or air pollutant is broadly defined under the Department's regulations as any chemical, dust, fume, gas, mist, odor, smoke, vapor, pollen or any combination thereof (6 NYCRR 200.1[d]). Volatile Organic Compounds (VOC or VOCs), such as are found in surface coatings regulated under 6 NYCRR part 228 (*see* 6 NYCRR 200.1[cg]), constitute an air contaminant under the Department's regulations. VOCs are found in a variety of products, including paints and primers, and play a significant role in the formation of ozone and fine particulates in the atmosphere (http://www.epd.gov.hk/epd/english/environmentinhk/air/prob_solutions/vocs_smog.html#point_1).

Paint spray booths that apply VOC-based coatings or surface coatings to industrial and commercial products have the potential to emit air pollutants to the atmosphere and, therefore, constitute an air contamination source within the meaning of 6 NYCRR part 201. These sources must obtain some form of Department authorization to operate, unless they are classified as exempt or trivial pursuant to subpart 201-3. Section 228-1.1 of 6 NYCRR reinforces the requirement to obtain authorization, and directs every owner or operator of a facility containing a regulated coating line (*see* section 228-1.7 table 1) and located in the New York City Metropolitan Area (*see* 6 NYCRR 200.1[au] [NYCMA]) to apply to the Department for a permit or registration, as appropriate (*see* 6 NYCRR 228-1.1[a] and [b][1]). The only activity exempt under subpart 201-3 involving surface coating operations is not relevant to this proceeding (*see* 6 NYCRR 201-3.2[31]).

No factual dispute exists between the parties that Michael Mancusi is an operator of Man Products and that Man Products conducted a surface coating operation in a paint spray booth at its Facility (*see* Complaint ¶¶ 6, 74; Answer ¶¶ 4, 61). Likewise, the parties do not dispute that

[4] Owners or operators of major stationary sources must obtain a Title V permit pursuant to subpart 201-6. Owners and operators of other sources must either register pursuant to subpart 201-4 or obtain a State facility permit pursuant to subpart 201-5, as appropriate (*see* 6 NYCRR 201-1.1[b]; 6 NYCRR 201-4.1; 6 NYCRR 201-5.1).

the Facility did not have a permit or registration from the Department to operate (*see* Complaint ¶ 40; Answer ¶ 28), or that the surface coating line was subject to regulation under 6 NYCRR part 228 under the coating category fabricated metal products (*see* Motion, De Coteau Aff ¶ 5; Answer ¶ 11; Cross Motion, affidavit of Michael Mancusi sworn to August 10, 2017 [Mancusi Aff], ¶ 11.a).

Fabricated metal products are regulated pursuant to part 228 and are included within the description of "coating lines for miscellaneous metal parts and products" in section 228-1.7, table 1. Surface coatings applied to miscellaneous metal parts and products, including fabricated metal products, are subject to the VOC content limits set forth in section 228-1.7 table 1. While the parties dispute the specific VOC content limit applicable to the Facility's paint spray booth operations, the parties do not dispute the applicability of part 228 to regulate the VOC content of surface coatings used for fabricated metal products or the requirement to obtain Department authorization to operate (*see* Motion, De Coteau Aff ¶ 5; Answer ¶ 11; Cross Motion, affidavit of Michael Mancusi sworn to August 10, 2017 [Mancusi Aff], ¶ 11.a).

Further, the parties do not dispute that Man Products utilized a VOC-based surface coating at the Facility. Department staff alleges, and respondents admit, that "[a]ccording to the material data safety sheet for the Red Oxide Primer used at the Facility, the VOC content for the Red Oxide Primer was 3.2 lb/gal" (*see* Complaint ¶ 44, exhibit C; Answer ¶ 32). The material data safety sheet (MSDS) submitted by Department staff is for KEM-FLASH® 500 Primer, Red Oxide manufactured by the Sherwin Williams Company, dated May 26, 2012. (*See* Complaint ¶ 44, exhibit C). Respondents also submitted invoices and two material data safety sheets for KEM-FLASH® 500 Primer, Red Oxide manufactured by the Sherwin Williams Company showing a VOC content limit equal to, or greater than, 3.2 lb/gal. One MSDS sheet dated October 16, 2016 shows a VOC content limit of 3.86 lb/gal for KEM-FLASH® 500 Primer, Red Oxide manufactured by the Sherwin Williams Company (*see* Answer ¶ 32 [admitting allegations in paragraph 44 of the Complaint that the MSDS sheet showed a VOC content limit of 3.2 lb/gal], exhibit 2). The other MSDS sheet submitted by respondents, dated October 23, 2014, shows a VOC content limit of 3.2 lb/gal KEM-FLASH® 500 Primer, Red Oxide manufactured by the Sherwin Williams Company (*see* Cross Motion, exhibit 2).

In sum, the parties' submissions reveal no issues of material fact that respondents operated a paint spray booth to apply the VOC-based surface coating KEM-FLASH® 500 Primer, Red Oxide to fabricated metal products at the Facility, which constituted an air contamination source within the meaning of part 201. Accordingly, respondents needed to obtain some form of authorization from the Department pursuant to 6 NYCRR part 201 to operate the Facility.

Whether respondents needed a permit or registration to operate the Facility depends upon emissions information that is not known on this record. However, this information is not necessary for staff to establish a prima facie case that respondents were required to obtain some form of authorization from the Department, and failed to do so. At a minimum, respondents should have obtained an air facility registration to operate the Facility in compliance with the Department's air pollution regulations (*see* 6 NYCRR 201-1.1[b], 228-1.1[a]).

Respondents proffered no evidence that they had a permit or registration from the Department, nor did they assert that the surface coating operation at the Facility was exempt from permitting under part 201. Respondents' claim that they did not receive permit applications from Department staff in 2010 (*see* Answer ¶ 9) and, by implication, were unaware of the Department's permitting requirements does not provide a legally cognizable excuse for the failure to obtain a permit or registration to conduct a regulated activity. Department staff is entitled to judgment as a matter of law on its first cause of action.

Ruling: Department staff's Motion is granted on the issue of liability for the first cause of action. Respondents' Cross Motion is denied.

Second and Third Causes of Action
6 NYCRR 228-1.3(a) Excessive VOC Content of Primer
6 NYCRR 228-1.3(c) Failure to Demonstrate Efficiency of an Air Cleaning Device

The Complaint alleges in the second cause of action that "[a]ccording to the Material Safety Data Sheet ("MSDS") sheet [sic] for the Red Oxide Primer used at the Facility, the VOC content for the Red Oxide Primer was 3.2 lb/gal" (Complaint ¶ 44, exhibit C) and that "[t]he VOC content at the Facility was greater than 3.0 lb/gal, which constitutes a violation of 6 NYCRR 228-1.3(a)" (Complaint ¶ 45). Tatiana Klappas attested that respondents provided staff the MSDS data sheet for KEM-FLASH® 500 Primer, Red Oxide, *E61R26* dated May 26, 2012, manufactured by the Sherwin Williams Company, and that the Facility used that product formulation in 2013 (*see* Motion, Klappas Aff ¶ 28).

The Complaint alleges in the third cause of action that during the May 2, 2013 inspection, Department staff documented that respondents did not maintain documentation to confirm that the spray booth filter efficiency was at least 85% (Complaint ¶ 48), failed to provide documentation to the Department upon request demonstrating that the spray booth filter efficiency was at least 85% (Complaint ¶ 49), and failed to demonstrate that the spray booth filter efficiency was at least 85% (Complaint ¶ 50).

With respect to the second cause of action, respondents admit the allegation in paragraph 44 of the Complaint that, according to the MSDS sheet, the VOC content of the red oxide primer

used at the Facility is 3.2 lb/gal, and claim insufficient knowledge to form a belief as to the truth of the allegation in paragraph 45 regarding the alleged violation of section 228-1.3(a) (*see* Answer ¶¶ 31-33). Michael Mancusi asserts that Mr. De Coteau misinterprets part 228, that Man Products manufactures "fabricated metal products," and that the VOC content limit for fabricated metal parts and products is 4.3 lb/gal, not 3.0 lb/gal as asserted by Mr. De Coteau (*see* Answer ¶ 11 and attached exhibits 4 and 4A). Mr. Mancusi further contends that Man Products does not make "miscellaneous metal parts," but rather "fabricated metal parts and products." which are subject to a higher VOC content limit. With respect to the third cause of action, respondents deny all of staff's allegations and submit a paint arrestance filter test report dated January 3, 2010 purporting to show an average removal efficiency of the test filter of 98.21% (*see* Answer, exhibit 1).

Applicable VOC Content Limit

Section 228-1.3(a) of 6 NYCRR prohibits the use of coatings that exceed the maximum permitted pounds of VOC per gallon as specified in table 1 of section 228-1.7, unless the facility utilizes a coating system meeting specific VOC removal requirements (*see* 6 NYCRR 228-1.3[a] and [d]), utilizes control equipment meeting specific VOC removal requirements (*see* 6 NYCRR 228-1.3[b] and [c]), or makes a process specific demonstration satisfactory to the Department (*see* 6 NYCRR 228-1.3[e]).

Section 228-1.7 table 1 sets forth VOC content limits for specific industrial processes. The parties do not dispute that the Facility performed surface coating operations that involved fabricated metal products (*see* Answer at ¶ 29 [referring to Complaint at ¶ 40], ¶ 61 [referring to Complaint at ¶ 74]). Fabricated metal products are included in the product description for coating lines for miscellaneous metal parts and products. Table 1 of 6 NYCRR 228-1.7 prescribes four separate VOC content limits for coatings for miscellaneous metal parts and products: 4.3 lb/gal for clear coatings; 3.5 lb/gal for a coating application system which is air dried or forced warm air dried at temperatures up to 90 degrees Celsius; 3.5 lb/gal for extreme performance coatings designed for harsh exposure or extreme environmental conditions; and 3.0 for all other miscellaneous metal parts and products coatings.

Respondents contend that a VOC content limit as high as 4.3 lb/gal applies to coatings used for fabricated metal parts and products (*see* Answer ¶ 11). This argument is misplaced. A VOC content of 4.3 lb/gal only applies to a clear coating. Under part 228, a clear coating is "[a] coating which lacks color and opacity or is transparent and uses the undercoat as a reflectant base or under-tone color" (6 NYCRR 228-1.2[19]). A primer qualifies as a coating under part 228 and, therefore, is subject to the applicable VOC content limits for miscellaneous metal parts and products (*see* 6 NYCRR 228-1.2[21]). By definition, a primer, such as KEM-FLASH® 500 Primer, Red Oxide, that contains the color red does not qualify as a clear coating as that term is

defined in part 228 (*see* 6 NYCRR 228-1.2[19]). Moreover, neither party asserts that the KEM-FLASH® 500 Primer, Red Oxide coating used at the Facility is a clear coating. Similarly, neither party asserts that KEM-FLASH® 500 Primer, Red Oxide is an extreme performance coating or coating application system which is air dried at high temperatures, both of which are subject to a VOC content limit of 3.5 lb/gal. Accordingly, KEM-FLASH® 500 Primer, Red Oxide falls within the "other" coating category in table 1 of section 228-1.7, and the applicable VOC content limit is 3.0 lb/gal.

The parties' submissions unequivocally establish that the VOC content of KEM-FLASH® 500 Primer, Red Oxide exceeded 3.0 lb/gal (*see* Complaint ¶ 44; Answer ¶ 32). The MSDS sheets submitted by the parties show that, in 2012 and 2014, the product had a VOC content of 3.2 lb/gal (*see* Complaint, exhibit C; Cross Motion, exhibit 2). According to respondents' 2016 MSDS sheet, the VOC content was even higher – 3.86 lb/gal (*see* Answer, exhibit 2). No evidence exists in the record showing that the primer had a VOC content equal to or less than the regulatory limit of 3.0 lb/gal. Consequently, Department staff has made a prima facie showing that the VOC content of KEM-FLASH® 500 Primer, Red Oxide used at the Facility exceeded the applicable VOC content limit in 6 NYCRR 228-1.7 table 1.

The resolution of the second cause of action, therefore, turns on whether Department staff made a prima facie showing that respondents failed to employ one of the strategies set forth in 6 NYCRR 228-1.3 (b)-(e) that would have allowed respondents to utilize a surface coating with a VOC content in excess of the regulatory limit.

Spray Booth Filter Efficiency

Section 228-1.3(a) prohibits the use of coatings that exceed the maximum permitted VOC content as specified in table 1 in section 228-1.7 unless one of three control strategies is employed, including the use of an air cleaning device with an overall removal efficiency of 85 percent (*see* 6 NYCRR 228-1.3[c]). Section 228-1.5[a] states in relevant part, "[a] facility owner or operator must maintain a record that identifies each air cleaning device that has an overall removal efficiency of at least 85 percent. Any additional information required to determine compliance with this Part must be provided to the department in a format acceptable to the department." Department staff contend that respondents failed to maintain on site, or provide to staff upon request, records demonstrating that the efficiency of the spray booth filter (*see* Complaint §§ 48-50).

Respondents generally deny the allegations in the third cause of action, and cite to exhibit 1 of their Answer. Exhibit 1 is a paint arrestance filter test report dated January 3, 2010 showing a spray removal efficiency and paint holding capacity for the product High Solids Baking Enamel (S.W. #1 Permaclad 2400, red). It is the only documentation in the record regarding the

efficiency of the spray booth filter purportedly utilized at the Facility. Respondents attached this report to their Answer dated March 20, 2017, without any discussion or explanation. Notably, the product "High Solids Baking Enamel (S.W. #1 Permaclad 2400, red)" (*see* Answer, exhibit 1) is not the same product that is listed in the MSDS sheet submitted by the parties for KEM-FLASH® 500 Primer, Red Oxide (*see* Complaint, exhibit C; Answer, exhibits 1 and 2; Cross Motion, exhibits 1 and 2). The Complaint makes no assertions with respect to "High Solids Baking Enamel (S.W. #1 Permaclad 2400, red)," and respondents provide no explanation as to how the filter efficiency test results for "High Solids Baking Enamel (S.W. #1 Permaclad 2400, red)" are relevant to establishing the efficiency of the filter(s) respondents used to control VOC emissions from KEM-FLASH® 500 Primer, Red Oxide.

Because Department staff has made a prima facie showing that the VOC content of KEM-FLASH® 500 Primer, Red Oxide exceeded regulatory limits, the burden shifts to respondents to offer proof that they used a proper control strategy that would allow the Facility to apply a coating with a higher than prescribed VOC content. Respondents failed to meet this burden and failed to rebut staff's prima facie showing that the Facility utilized a surface coating whose VOC content exceeded the regulatory limit.

Conclusion on Second and Third Causes of Action

Department staff have made a prima facie showing that respondents operated a coating line for miscellaneous metal products and utilized KEM-FLASH® 500 Primer, Red Oxide, a surface coating that was subject to a VOC content limit of 3.0 lb/gal pursuant to 6 NYCRR 228-1.7 table 1. The record establishes that the KEM-FLASH® 500 Primer, Red Oxide coating had a VOC content of at least 3.2 lb/gal. In addition, staff has made a prima facie showing that respondents failed to maintain the required records, and failed to provide Department staff with records upon request to demonstrate that the Facility utilized a spray booth filter with an 85% efficiency to control the VOCs in KEM-FLASH® 500 Primer, Red Oxide. Respondents' papers contain no documentation rebutting staff's contention that respondents utilized a surface coating with a VOC content that exceeded the regulatory limit, and failed to implement a control strategy consistent with 6 NYCRR part 228. Accordingly, Department staff is entitled to judgment on the second cause and third causes of action as a matter of law.

Ruling: Department staff's Motion is granted on the issue of liability for the second and third causes of action. Respondents' Cross Motion on those causes of action is denied.

Fourth Cause of Action
6 NYCRR 228-1.5 Failure to Maintain Records

Department staff allege in the fourth cause of action that respondents failed to provide staff with the records required by 6 NYCRR 228-1.5(a) and 228-1.5(k), which staff requested during the May 2, 2013 inspection of the Facility (Complaint ¶ 54); failed to provide records in response to Department staff's written request for records dated May 8, 2013 (Complaint ¶ 55); and failed to maintain the required records for a period of five (5) years, in violation of 6 NYCRR 228-1.5(a) and 228-1.5(k) (Complaint ¶ 56). Respondents deny the allegations in staff's Complaint, but offer no proof that they maintained and supplied the records to the Department (*see* Answer ¶¶ 41-44).

Section 228-1.5(a) of 6 NYCRR states in relevant part:

> The owner or operator of any emission source subject to this Subpart must maintain and, upon request, provide the department with a certification from the coating supplier/manufacturer which verifies the parameters used to determine the actual VOC content of each as applied coating, (VOC)a[5], used at the facility. In addition, purchase, usage and/or production records of the coating material, including solvents, must be maintained in a format acceptable to the department and, upon request, these records must be submitted to the department. Any facility required to perform the overall removal efficiency calculation set forth in Equation 2 of this Part, must maintain records to verify the parameters used in the calculation. A facility owner or operator must maintain a record that identifies each air cleaning device that has an overall removal efficiency of at least 85 percent. Any additional information required to determine compliance with this Part must be provided to the department in a format acceptable to the department.

Owners and operators of facilities subject to recordkeeping requirements must maintain records and provide records to staff upon request (6 NYCRR 228-1.5[a]). All records required by section 228-1.5 must be maintained at the facility for a period of five years (6 NYCRR 228-1.5[k]).

As the operator of a paint spray booth subject to regulation under 6 NYCRR part 228, respondents were subject to the recordkeeping requirements set forth in 6 NYCRR 228-1.5. Mr. De Coteau attested that at the time of staff's May 2, 2013 inspection, staff requested, and respondents failed to provide, documentation regarding the VOC removal efficiency of the spray booth filter, or the Facility's purchase and usage records of coatings and solvents (*see* Motion, De Coteau Aff ¶ 17).

[5] The term VOCa means the VOC content of each coating as applied (*see* 6 NYCRR 228-1.5[a]).

On May 8, 2013, Department staff sent Ms. Baransky, the general manager of the Facility, a written request for records, including documentation showing when the Facility commenced operation, records of the number of gallons of primer purchased from 2007-2012 from all suppliers, painter certifications and training records from 2007 to 2012, the May 3, 2013 inspection report of the paint spray booth, documentation establishing when current and previous paint spray booths were installed, documentation showing the specifications of the filters used and filter efficiency, documentation establishing that spray guns were HVLP spray guns, and the 2007-2012 invoices from the company that handled pickup and disposal of filters (*see* Motion, exhibit 12). Respondents did not respond to staff's written request for records (*see* Motion, De Coteau Aff ¶ 18, 23).

Respondents offer no proof that they maintain records on site or provided the records to the Department upon request as required by 6 NYCRR 228-1.5(a) and (k). Respondents' papers included two invoices from Sherwin Williams dated April 4, 2013, one for a one time purchase of "5 GAL KF 500 PRM RED OX," and another for a case of "2020100DP 20x20 PT ARSTRS" (*see* Cross Motion, exhibits 1A and 1B). Neither of these invoices is sufficient to satisfy staff's May 8, 2013 information request or the recordkeeping requirements of 6 NYCRR 228-1.5.[6]

Respondents dispute Department staff's contention that they refused to provide records and blame staff for a lack of communication (*see* Cross Motion, Mancusi Aff ¶ 11.c). They offer no proof, however, that they maintained the records they were required to maintain pursuant to 6 NYCRR 228-1.5(a), submitted the records to the Department upon request as they were obligated to do pursuant to 6 NYCRR 228-1.5(a), or maintained the records for a period of at least five years as required pursuant to 6 NYCRR 228-1.5(k). Accordingly, respondents failed to rebut Department staff's prima facie showing that respondents failed to comply with the recordkeeping requirements set forth in 6 NYCRR 228-1.5(a) and 228-1.5(k), and staff is entitled to judgment as a matter of law on its fourth cause of action.

Ruling: Department staff's Motion is granted on the issue of liability for the fourth cause of action. Respondents' Cross Motion is denied.

Fifth Cause of Action
6 NYCRR 228-1.10(a) and 228-1.10(e) Improper Storage of Materials

Department staff allege in the fifth cause of action that "during the May 2, 2013 inspection, Department staff documented that respondents stored and disposed of spent filters

[6] Respondents' papers include an email from Man Products' legal counsel to Michael Mancusi and Corrine Baransky regarding a settlement proposal counsel wanted to present to staff. The purported email has no bearing on respondents' obligations to maintain the Facility's records under part 228, even assuming the email had been sent. The email is in the nature of settlement negotiations and is, therefore, inadmissible in this proceeding.

and primer in an outdoor tub and dumpster, respectively, which constitutes a violation of 6 NYCRR 228-1.10(a) and 6 NYCRR 228-1.10(e)" (*see* Complaint ¶ 59). Respondents deny staff's allegation (*see* Answer ¶ 46).

6 NYCRR 228-1.10(a)

Section 228-1.10(a) of 6 NYCRR states in relevant part that "[w]ithin the work area(s) associated with a coating line, the owner or operator of a facility subject to this Subpart must: (a) use closed, non-leaking containers to store or dispose of cloth or other absorbent applicators impregnated with VOC solvents that are used for surface preparation, cleanup or coating removal" (6 NYCRR 228-1.10[a]). The term solvent is defined as "[a] substance that is liquid at standard conditions and is used to dissolve or dilute another substance; this term includes but is not limited to: organic materials used as dissolvers, viscosity reducers, degreasing agents, or cleaning agents. Any excluded VOC is not a solvent" (6 NYCRR 228-1.2[48]). Pursuant to 6 NYCRR 200.1(cg)(29), acetone is expressly excluded from the definition of a volatile organic compound and, therefore, is not a regulated solvent under part 228.

Ms. Klappas attested that Corrine Baransky, the general manager of Man Products, told her that the paint guns had been cleaned with acetone and that waste acetone was added to the paint (*see* Motion, Klappas Aff ¶ 13). In their Cross Motion, respondents state: "Ms. Klappas, [sic] states in § 13 that the 'General Manager' informed her of the use of acetone. We are unsure of the relevance of this statement as acetone is federally exempt as it is not used to calculate VOC in products" (Cross Motion ¶ 21.a).

Department staff's proof that respondents stored or disposed of cloth or other absorbent applicators impregnated with VOC solvents is inconclusive. The only proffered evidence concerning respondent's use of a VOC solvent is Ms. Baransky's statement to Ms. Klappas that acetone was used to clean spray guns and added to paint (*see* Klappas Aff ¶ 13). Acetone is not considered a VOC under the Department's air pollution regulations, and the storage or disposal of waste rags or other materials saturated with acetone would not give rise to a violation of 6 NYCRR 228-1.10(a). Staff does not allege that KEM-FLASH® 500 Primer, Red is a solvent, and surface coatings and solvents have distinct definitions under the Department's regulations (*compare* 6 NYCRR 228-1.2[b][21]) and 228-1.2[b[49]).

Respondents deny staff's allegation supporting the alleged violation of 6 NYCRR 228-1.10(a) (*see* Cross Motion ¶ 21.a). Respondents' general denial, however, is not sufficient to warrant to judgment as a matter of law under these circumstances. Given staff's documentation of paint stained cloths at the Facility (*see* Motion, exhibit 4 [photographs 4-1–4-3, 4-5] and exhibit 6 [photographs 6-1 and 6-3]), a genuine issue a fact exists whether any of those cloths were saturated with a regulated VOC solvent and, therefore, subject to the storage requirements

under 6 NYCRR 228-1.10(a). Accordingly, neither party is entitled to judgment as a matter of law with respect to respondents' alleged violation of NYCRR 228-1.10(a).

6 NYCRR 228-10(e)

Department staff has made a prima facie showing through affidavits and photographic evidence that respondents violated 6 NYCRR 228-1.10(e). Section 228-1.10(e) of 6 NYCRR states in relevant part that "[w]ithin the work area(s) associated with a coating line, the owner or operator of a facility subject to this Subpart must. . . (e) not use open containers to store or dispose of spent surface coatings, or spent VOC solvents." During Ms. Klappas's May 2, 2013 inspection, she observed that "waste paint, waste rags, and spent fluorescent lamps had been disposed of in the regular trash" (*see* Motion, Klappas Aff ¶ 17). In staff's reply to respondents' Cross Motion, Ms. Klappas clarified that she observed two tubs during her May 2 inspection; one tub contained filters soaked in water and the other tub contained filters and several rags soaked in water (*see* Reply, Klappas Aff ¶ 20). Ms. Klappas submitted photographs of the Facility that she took during her inspection showing red stained rags in a dumpster, red stained rags positioned on top of a drum, and red stained rags strewn about on the floor of the Facility (*see* Motion, exhibit 4 [photographs 4-1–4-3, 4-5] and exhibit 6 [photographs 6-1 and 6-3]). In particular, photograph 4-5 shows two uncovered half-full trays of KEM-FLASH® 500 Primer commingled with other trash that Ms. Klappas indicated were being stored in a dumpster (*see* Reply, affidavit of Tatiana Klappas sworn to September 14, 2017, [Klappas Aff], ¶ 18.b). Photograph 6-1 shows red paint stained rags soaking out in the open in a trough, while photograph 6-3 shows paint stained rags on top of a drum. Ms. Klappas's observations of red paint stained items are consistent with respondents' admitted use of KEM-FLASH® 500 Primer, Red Oxide at the Facility (*see* Findings of Fact Nos. 10-11), and establish that materials saturated with a used VOC-based surface coating were being stored in the open air.

Mr. De Coteau also inspected the Facility on May 2, 2013. Mr. De Coteau observed that the Facility had spent filters and red primer in a tub and dumpster outdoors (*see* Motion, De Coteau Aff ¶ 23). The NOV issued June 28, 2013 for violations of ECL article 19 states that "6 NYCRR 228-1.10(e) requires facilities to properly dispose of used materials. It was observed during the time of inspection that the facility disposed of spent filters and primer in a tub and dumpster located outside the building" (*see* Motion, exhibit 5 [NOV for ECL article 19 violations]).

Respondents dispute that spent florescent lamps were disposed of in the regular trash and present photographs they claim show new florescent bulbs in their original boxes which had not yet been used (*see* Cross Motion, exhibits 15, 16, and 24). Ms. Klappas attested that during the May 2 inspection, Ms. Baransky showed her several boxes and several lamps stored without a box in a mechanical room that she identified as spent fluorescent lamps and during her October

2013 inspection she observed spent fluorescent lamps stored outside. She photographed the pictures showing the lamps that respondents submitted with their Cross Motion. (*See* Reply, Klappas Aff ¶ 23.F, exhibit C; Cross Motion, exhibits 15, 16, 23, and 24).

Respondents also dispute that red primer was stored in a tub and dumpster outdoors, noting that clean up debris, not paint, was stored in the 55-gallon drum outside (*see* Cross Motion, exhibit 18). Respondents also contend that the rags floating in the open in a dumpster were floating in water in a temporary trough used for the cleanup of the Facility, and that there was no contamination of the outside environment (*see* Cross Motion, exhibit 8 and 8A). Respondents claim that the paint was not water soluble and did not mix with the water, which they say was used to soak cleanup rags. Photograph 8A, according to respondents, "shows rags, coated in paint, floating in water. All rags and waste water were disposed of by AARCO Environmental" (*see id*.).

I need not make any findings whether respondents improperly stored spent fluorescent lamps to conclude that they violated 6 NYCRR 228-1.10(e). Photographs submitted by respondents and Department staff show used rags stained with red VOC-based paint stored in open containers at the Facility, and strewn about the facility floor (*see* Cross Motion, exhibits 8, 8A, 9 and 18; Motion, exhibit 4 [photographs 4-1-4-3]).[7] Photographs also show open containers of spent VOC-based paint stored in dumpsters (*see* Motion, exhibit 4-5; Cross Motion, exhibit 12). Part 228 prohibits facility owners and operators from storing or disposing of spent surface coatings in this manner (*see* 6 NYCRR 228-1.10[e]). The objective of part 228 is to prevent and control the release of VOCs from surface coatings into the atmosphere. The storage and disposal of waste rags laden with VOC paint in open containers frustrates this objective and is a violation of 6 NYCRR 228-1.10(e).

Based on the record, Department staff made a prima facie showing of its entitled to judgment on the fifth cause of action insofar as the Complaint alleges respondents' 6 NYCRR 228-1.10(e) and respondents failed to raise a triable issue of fact.

Ruling: Department staff's Motion is granted in part and denied in part on the fifth cause of action. With respect to the alleged violation of 6 NYCRR 228-1.10(e), staff's Motion and Respondents' Cross Motion are both denied. With respect to the alleged violation of NYCRR 228-1.10(a), staff's Motion is granted on the issue of liability and respondents' Cross Motion is denied.

[7] Photographs in exhibits 8-24 of respondent's Response were taken by Tatiana Klappas (*see* Reply, Klappas Aff ¶ 28).

Ninth Cause of Action
Failure to Pay Air Regulatory Fees ECL 72-0302

Department staff alleges that respondents conducted a surface coating operation in a spray booth at the Facility from 1999 to 2013, without any Department authorization, and are, therefore, required to pay $160 per year for 14 years from 1999 to 2013, or $2,240 in back regulatory fees pursuant to ECL 72-0302(a) (*see* Complaint ¶¶ 73-76). Department staff argues that each person who is required to obtain a permit, certificate or other approval from the Department must pay an annual air quality control program fee pursuant to the State Air Quality Control Program (*see* Complaint ¶ 73). Respondents admit that the Facility did not have an air permit or registration to conduct a surface coating operation at the Facility from 1999 to 2013 (*see* Answer ¶ 61), but otherwise claim insufficient knowledge or information upon which to base a belief as to staff's allegations concerning regulatory fees (*see* Answer ¶¶ 73, 75-76).

Section 72-0302(1) of the ECL states that "[a]ll persons, except those required to pay a fee under [the Title V program], who are required to obtain a permit, certificate or approval pursuant to the state air quality control program shall submit to the department a per emission point fee in an amount established" under that section.[8] As discussed above with the first cause of action, respondents, as the operators of the Facility, were required to obtain a permit from the Department to lawfully operate the paint spray booth therein (*see* 6 NYCRR 201-1.1[b], 228-1.1[a]). Therefore, respondents were subject to the requirement to pay a regulatory fee to the Department for the operation of the Facility.

Staff is seeking payment of the regulatory fee corresponding to a process air contamination source with an annual emission rate less than twenty-five tons per year of total volatile organic compounds. That fee is $160 annually (ECL 72-0302[1][e]). This is the lowest regulatory fee prescribed under ECL article 72, and Department staff only need establish that respondents were operating a process air contamination source for the fee to apply. The term "process air contamination source" is defined in relevant part as any industrial, commercial, agricultural or other activity, operation, manufacture or treatment in which chemical, biological or physical properties of the material or materials are changed, and which emits air contaminants to the outdoor atmosphere;(*see* ECL 72-0301[13][a]). The paint spray booth at Facility qualifies as a process air contamination source under ECL 72-0302 because it altered the physical properties of the fabricated metal products through the application of a VOC-based surface coating and emitted air contaminants, specifically VOCs contained in the surface coating, to the atmosphere.

[8] Department staff's citation to ECL 72-0302(a) in paragraph 73 of the Complaint appears to be a typographical error. The correct citation for the proposition that sources required to have permits or registration must pay state air quality control fees is ECL 72-0302(1). The citation for the annual fee of $160 that must be paid by a process air contamination source for an annual emission rate less than 25 tons per year of total volatile organic compounds is ECL 72-0302(1)(e).

Staff has made a prima facie showing that the Facility was subject to annual regulatory fees pursuant to ECL 72-0302(1)(e), and that respondents failed to pay them. Respondents offer no proof to rebut staff's contention. The complaint seeks a total of $2,240 in regulatory fees, equal to an annual fee of $160.00 for each of the fourteen years the Facility operated without a permit. Staff is entitled to judgment on its ninth cause of action against respondents.

Ruling: Department staff's Motion is granted on the ninth cause of action on the issue of liability. Respondents' Cross Motion is denied.

ALLEGED HAZARDOUS WASTE VIOLATIONS

Sixth Cause of Action
Failure to Make Hazardous Waste Determination 6 NYCRR 371.1(f) and 373.2(a)(2)

Department staff alleges in the sixth cause of action that at the time of inspection, staff requested, and respondents failed to provide, documentation demonstrating that respondents made a hazardous waste determination on the following items: waste paint; waste filters from the spray booth; waste water from the soaking of waste filters; waste rags from painting/cleaning operations; and waste (*see* Complaint ¶ 62). Staff alleges that respondents' failure to produce documentation demonstrating that they made a hazardous waste determination on the aforesaid items constitutes a violation of 6 NYCRR 371.1(f) and 372.2(a)(2) (*see* Complaint ¶ 63).

Respondents deny the allegations in paragraphs 62 and 63 of the Complaint, and include two exhibits to refute the allegations (*see* Answer ¶¶ 53-54; exhibits 6 and 7). One exhibit is a letter from AARCO Environmental Services Corp. dated June 25, 2013, which states that on June 7, 2013, an AARCO field technician "obtained representative samples of filters and spent dried paint, both of which are waste products generated from their painting process" and had them analyzed for "RCRA Hazardous Metals, Flashpoints, PH, and Volatile Organic Compounds (V.O.C.'s)" (*see* Answer, exhibit 6; Cross Motion, exhibit 6). According to the letter, "[b]ased on the products Man Products are [sic] utilizing, these were the analysis [sic] required to determine if the waste exhibited hazardous characteristics. Based on these results, the waste can be disposed of as Non-Hazardous" (*id.*). Finally, the letter notes that "the test results as based on this particular waste generated from a specific process. If the process changes or different paints/chemicals are used a new analysis may be required" (*see id.*).

Respondents also rely on a Uniform Hazardous Waste Manifest from AARCO Environmental Services Corp. dated June 13, 2013 purporting to show a one-time disposal of hazardous waste by the Facility (*see* Answer, exhibit 7; Cross Motion, exhibit 7). Respondents state that AARCO Environmental only provided the final determination letter to Man Products,

and that they contacted AARCO to obtain additional documentation, but did not have any records (*see id.*).

Requirement to Make a Hazardous Waste Determination

Any person who generates solid waste is obligated under the Department's regulations to make a determination whether the waste is hazardous (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, considered inherently waste-like, or a military munition (*see* 6 NYCRR 371.1[c][2]).

The record shows that respondents generated solid waste in the course of their operation of the Facility. Tatiana Klappas attested that during the May 2, 2013 inspection, she observed "[w]aste paint, waste rags, and spent fluorescent lamps that had been disposed of in the regular trash" (*see* Motion, Klappas Aff ¶ 17 and exhibit 4; Reply, Klappas Aff ¶ 23f. and exhibits A and C). She also observed that "[t]wo (2) paint trays containing Red Oxide primer were found inside a regular dumpster located at the rear of the property" (*see* Motion, Klappas Aff ¶ 17). Photographs submitted depicting the Facility at the time of inspection corroborate Ms. Klappas's attestations (*see* Motion, exhibit 4 [photographs 4-1–4-3, 4-5] and exhibit 6 [photographs 6-1 and 6-3]; Reply, exhibits A and C). As the operators of a facility that generates solid waste, respondents were obligated, pursuant to 6 NYCRR 372.2(a)(2), to determine whether the waste was hazardous based on the specific processes conducted and the surface coatings utilized at the Facility.

The AARCO letter makes clear that any waste analysis AARCO performs is specific to the process, and the paints and chemicals used, and may need to be updated if there are any changes to the parameters (*see* Answer, exhibit 7). Part 372 prescribes a four step process for making a hazardous waste determination (*see* 6 NYCRR 372.2[a][2]). The first step is to determine whether the waste is excluded from regulation under section 371.1(e) (*see* 6 NYCRR 372.2[a][i]). If the waste is not excluded from regulation, the generator must determine if the waste is listed as a hazardous waste in section 371.4 (*see* 6 NYCRR 372.2[a][ii]). If the waste is not listed as hazardous in section 371.4, the generator must determine whether the waste is identified in section 371.3 by either testing the waste according to one of the methods set forth in Appendices 19, 20 or 21 of the Department's regulations, or by applying knowledge of the hazardous characteristic of the waste in light of the materials or the processes used (*see* 6 NYCRR 372.2[a][iii]). A solid waste that is not excluded from regulation as a hazardous waste under section 371.1(e) is considered a hazardous waste if it exhibits any of the characteristics identified in section 371.3 (*see* 6 NYCRR 371.3[a][1]).

Ms. Klappas attested that Department staff reviewed the AARCO letter in June 2013 and requested additional information, including sample chain of custody documentation and analytical reports to ensure that proper procedures were utilized during sample collection and that the resulting chemical analytical data accurately represented the conditions that testing was intended to evaluate. In addition, staff requested documentation establishing that the samples were submitted to a New York State Department of Health Environmental Laboratory Approved Program (ELAP)-certified laboratory. The record shows that respondents did not respond to staff's request for additional information in 2013, and at this point, no additional information is available from AARCO. (*See* Motion, Klappas Aff ¶ 28; Cross Motion ¶ 24.)

The AARCO letter by itself is not sufficient to demonstrate that respondents made a hazardous waste determination for the waste generated at the Facility, as they were required to do consistent with the protocols set forth in 6 NYCRR 372.2(a)(2). AARCO only tested samples of filters and spent dried paint, but did not examine the other waste items noted in paragraphs 62 and 63 of the Complaint. It is not clear whether the dried paint tested included waste saturated with KEM-FLASH® 500 Primer, Red Oxide. Moreover, the inclusion of a hazardous waste manifest with respondents' papers suggests that some hazardous waste was generated at the Facility, but there are no corresponding records of a hazardous waste determination for the waste recorded in the manifest.

In sum, staff has a made a prima facie showing that respondents generated solid waste from the operation of the Facility, but failed to determine whether the waste was hazardous pursuant to 6 NYCRR 372.2(a)(2). Respondents' offer of proof is not sufficient to raise a triable issue of fact.

Ruling: Staff's Motion is granted on the issue of liability for the sixth cause of action is granted. Respondents' Cross Motion is denied.

Seventh Cause of Action
Failure to Use a Permitted Waste Transporter for Regulated Waste 6 NYCRR 364.2(b)

The seventh cause of action alleges that respondents violated 6 NYCRR 364.2(b) (*see* Complaint ¶¶ 65-67). Specifically, staff alleges that at the time of the May 2, 2013 inspection, staff requested that respondents provide documentation indicating that all regulated waste generated at the Facility was transported by a transporter permitted pursuant to 6 NYCRR part 364, and that respondents failed to provide such documentation thereby violating 6 NYCRR 364.2[b]) (*see* Complaint ¶¶ 65-67). Ms. Klappas states in her supporting affidavit:

> Respondents' Exhibit 7 hazardous waste manifest waste shows a one-time disposal of three drums as hazardous waste solids via a Part 364 permitted

> transporter on May 20, 2013, shortly *after* the Department site inspection conducted on May 2, 2013, and had been previously submitted to the Department. However, [respondents] failed to provide documents proving that wastes generated on-site during the fourteen (14) years of operation at the Amityville location had been disposed of using a Part 364 transporter.

(Motion, Klappas Aff ¶ 28 [referring to respondents' Answer paragraph 16] [emphasis in original]).

Section 364.2(b) directs that "[n]o person who owns or operates a facility at, or on premises, which any regulated originates, is generated, or occurs, shall deliver or otherwise relinquish possession of such waste except to a person who has a valid permit issued pursuant to this Part." Notably, the Complaint does not allege, nor does staff provide proof with its Motion papers, that respondents delivered regulated waste to an unpermitted waste transporter. Staff's claim that respondents failed to maintain records does not state a violation of the regulation. Section 364.2(b) is not a record keeping provision and does not obligate facility owners and operators to maintain waste disposal records, much less for 14 years as staff argues. Although courts will look "beyond the pleadings to discover the nature of the case," in response to a motion for summary judgment, staff's motion papers contain no offer of proof to establish a necessary element of a violation of section 364.2(b) (*see Alvord and Swift v Muller Construction Co.*, 46 NY2d 276, 281 [1978]).

Because staff's pleadings, and the proof staff submitted with its motion papers, fail to state a violation of 6 NYCRR 364.2(b) for which relief could be granted, or made a prima facie showing of fact sufficient to establish the violation, staff is not entitled to summary judgment on the seventh cause of action.

Respondents also move for summary judgment on the seventh cause of action. Respondents deny staff's allegations with respect to 6 NYCRR 364.2(b) (*see* Answer ¶¶ 53-54). In his affidavit in support of respondents' Cross Motion, Michael Mancusi attests that "Man Products, Inc. does not need records for any waste generated for fourteen (14) years as there was never hazardous waste generated at any time. Man Products, Inc. always properly maintained legal, forty (40) yard dumpsters that were picked up by registered waste removal companies, including the Town of Babylon" (*see* Cross Motion, affidavit of Michael Mancusi dated August 10, 2017, ¶ 24a.). In support of its claim, respondents include a waste manifest removal receipt from Aarco (*see* Cross Motion, exhibit 7). Thus, respondents have made a prima facie showing that they did not violate section 364.2(b).

When a party moving for summary judgment puts forth evidence sufficient to warrant judgment as a matter of law, the burden shifts to the non-moving party to produce sufficient

evidence to demonstrate that a triable issue of fact exists warranting a hearing (*see Matter of Locaparra*, Final Decision and Order of the Commissioner, June 16, 2003, at 4). As noted above, respondents make a prima facie showing that they properly disposed of the solid waste generated at the Facility. Staff's assertion that respondents failed to maintain records that they properly disposed of the solid waste generated at the Facility during 14 years of operation (*see* Reply, Klappas Aff ¶ 17) fails to raise a material issue of fact. There is no regulatory requirement in section 364.2(b) for respondents to maintain records, and respondents deny any wrong doing with respect thereto. Moreover, staff has not offered any other evidence that respondent violated section 364.2(b). Accordingly, respondents are entitled to summary judgment on their Cross Motion on the seventh cause of action.

Ruling: With respect to the seventh cause of action, staff's Motion is denied and respondents' Cross Motion is granted. The seventh cause of action is dismissed.

ALLEGED WATER POLLUTION VIOLATION

Eighth Cause of Action
Unlawful Discharge of Waste into Waters of the State ECL 17-0511

The Complaint alleges in the eighth cause of action that "Department staff documented that [r]espondents unlawfully discharged industrial waste (organic and/or inorganic matter) into the waters of the State by washing the paint spray booth filters in outdoor tubs resulting in the unlawful discharge of industrial waste water into the storm drains, as evidenced by the staining in and around the storm drains, which constitutes a violation of ECL 17-0511" (Complaint ¶ 71). Respondents deny these allegations (*see* Answer ¶¶ 57-58) and state that claim is "false and inflammatory," that staff has no scientific proof and that "at no time was there a discharge of any industrial waste, as evidenced by soil and dry well analyses" (*see* Cross Motion ¶ 22.b).

ECL 17-0511 states that the use of existing or new outlets or point sources, which discharge sewage, industrial waste or other wastes into the waters of this State is prohibited unless such use is in compliance with all standards, criteria, limitations, rules and regulations promulgated, or applied by the Department pursuant to ECL article 17 (*see also* ECL 17-0807 [4] [prohibiting "any discharge not permitted by the provisions of this article, rules and regulations adopted or applicable pursuant thereto, the [federal Clean Water] Act, or provisions of a permit hereunder"]). The term "point source" is defined in relevant part as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, or landfill leachate collection system from which pollutants are or may be discharged" (ECL 17-0105[16]).

An industrial waste is "any liquid, gaseous, solid or waste substance or a combination thereof resulting from any process of industry, manufacturing, trade or business or from the development or recovery of any natural resources, which may cause or might reasonably be expected to cause pollution of the waters of the state in contravention of the standards adopted as provided herein" (ECL 17-0105[5]).

The term "waters" or "waters of the state" is broadly defined "to include lakes, bays, sounds, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Atlantic ocean within the territorial limits of the State of New York and all other bodies of surface or underground water, natural or artificial, inland or coastal, fresh or salt, public or private. . . which are wholly or partially within or bordering the state or within its jurisdiction" (ECL 17-0105[2]).

Accordingly, to prevail on the eighth cause of action, staff must make a prima facie showing that: (1) respondents discharged industrial waste; (2) the discharge of industrial waste occurred from a point source; and (3) the industrial waste discharged from a point source entered the waters of the State (*see* ECL 17-0511).

Industrial Waste

It is clear from the record that the waste generated as a result of the surface coating operations at the Facility constitutes industrial waste. Whether the red staining depicted in the photographs in exhibit 4 of the Motion is red dust accumulated from cleanup activities, as respondents argue (*see* Cross Motion ¶ 21[e]), "Red Oxide dust" as Ms. Klappas states (*see* Motion, Klappas Aff ¶ 19), or red paint residue (*see* Motion, affidavit of Cathy Haas sworn to June 16, 2017 [Haas Aff], ¶ 7) is of no consequence. Red dust, red oxide dust and red paint resulting from surface coating operations are within the purview of a "solid or waste substance or a combination thereof resulting from any process of industry, manufacturing, trade or business," and meet the definition of an industrial waste under the ECL (*see* ECL 17-0105[5]).

Respondents' argument that staff's claim that red paint was washing into the storm drains is false because "[a]ll wells tested on the property by Laurel Environmental scientifically show no evidence of paint contamination" misses the mark (*see* Cross Motion, ¶ 22.e). Industrial waste is broadly defined under the ECL, and staff need not demonstrate that waste is red paint, as opposed to red dust, for the waste to qualify as an industrial waste and for the discharge to be unlawful pursuant to ECL 17-0511. Similarly, whether the drywells tested by Laurel Environmental Associates showed evidence of hazardous waste contamination is not necessary to find that the Facility discharged industrial waste, within the meaning of ECL 17-0105(5), from a point source.

Discharge from a Point Source to Waters of the State

Ms. Klappas attested that during her inspection, she observed red staining on the storm drains (*see* Motion, Klappas Aff ¶ 19 and exhibits 4-6 and 4-7). Cathy Haas, an Environmental Engineer in the Department's Division of Water, region 1 offices, attested that she examined the photographs taken by Ms. Klappas in exhibit 4 and observed red paint residue mixed with standing water on the grated cover of and around storm drains at the Facility (*see* Motion, affidavit of Cathy Haas sworn to June 16, 2017 [Haas Aff] ¶ 7] and exhibits 4-6 and 4-7). Photographs submitted by respondents similarly show asphalt with red stains and pieces of dry red paint near a storm drain and a red stain around and on the storm drain cover (*see* Cross Motion, exhibits 13 and 14). The affidavits and photographic evidence demonstrate that the Facility's storm drain is a "discernible, confined and discrete conveyance," similar to a pipe, into which industrial waste generated from surface coating operations was discharged. Accordingly, that the storm drain meets the definition of a "point source" within the meaning of ECL 17-0105(16).

Absent evidence to the contrary, a reasonable inference can be made that industrial waste generated at the Facility from surface coating operations entered the storm drain and was conveyed to the municipal sewer system, eventually reaching surface water. Such a discharge constitutes a discharge of industrial waste to the waters of the State from a point source and is prohibited unless authorized from the Department (*see* ECL 17-0511; *see e.g.* ECL 17-0803). Respondents offer no proof that the storm drain emptied into an enclosed containment area, or was otherwise plugged and did not empty into the municipal sewer system. Respondents' claims that the waste generated at the Facility was not hazardous and did not contaminate the soil are not relevant to the issue whether industrial waste entered the storm drain, a point source, was conveyed to the municipal sewer system, and was discharged to waters of the State.

Based on the record evidence, I conclude that staff has made a prima facie showing that the Facility discharged industrial waste from a point source into the waters of the State in violation of ECL 17-0511, and that respondents have failed to raise a triable issue of fact on the eighth cause of action.

Ruling: Staff's Motion is granted on the issue of liability for the eighth cause of action. Respondents' Cross Motion is denied.

CIVIL PENALTY

Department staff seeks a payable penalty of $176,000 for causes of action one through eight alleged in the Complaint and provides a penalty calculation that includes an amount for each cause of action. For the air pollution violations alleged in the first and second causes of

action, staff seeks the statutory maximum penalty of $18,000 for the first violation pursuant to ECL 71-2703, and an additional amount for the continuation of the violation up to the statutory maximum for one day of violation (*see* Complaint, exhibit E, numbered ¶¶ 1-2). For the air pollution violations alleged in the third, fourth and fifth causes of action, staff seeks the statutory maximum penalty of $18,000 for the first violation pursuant to ECL 71-2103 (*see* Complaint, exhibit E, numbered ¶¶ 3, 4, and 5). For the sixth cause of action alleging a failure to make a hazardous waste determination, staff purportedly seeks a maximum daily penalty for one violation in the amount of $25,000 pursuant to ECL 71-2705. Under ECL 71-2705, however, the maximum daily statutory penalty for one violation is $37,500 (*see* Complaint, exhibit E, numbered ¶ 6). For the seventh cause of action alleging the failure to use a permitted waste transporter, staff seek the maximum penalty amount of $7,500 for one violation pursuant to ECL 71-2103 (*see* Complaint, exhibit E, numbered ¶ 7). For the eighth cause of action alleging the discharge of industrial waste from a point source into waters of the state, staff seeks the maximum statutory penalty of $37,500 for one day of violation pursuant to ECL 71-1929 (*see* Complaint, exhibit E, numbered ¶ 8).

I reserve on the amount of the civil penalty for two reasons. First, I am only partially granting Department staff's Motion. Second, staff's penalty calculation does not include a justification for the penalty amount it is seeking consistent with the Department's Civil Penalty Policy (Commissioner Policy DEE-1, June 20, 1990 [DEE-1]). DEE-1 provides a framework for calculating civil penalties (*see* DEE-1 at IV A.). The first component of a penalty calculation concerns the economic benefit. According to DEE-1, a respondent obtains an economic benefit by avoiding or delaying costs related to regulatory compliance (*see* DEE-1 § IV.C.1). DEE-1 recommends that every effort should be made to calculate and recover the economic benefit of noncompliance (*id.*). The second component of the civil penalty calculation is the gravity component, which considers the potential or actual harm that resulted from the violations, and the importance of the violations to the regulatory scheme (*see* DEE-1 § IV.D.) Neither of these components is discussed in staff's calculation. After the economic benefit and the gravity components are determined, the final civil penalty may be adjusted based on factors such as respondent's culpability, respondent's cooperation to resolve the violations, and respondent's history of non-compliance, among other things (*see* DEE-1 § IV.E.). Staff's penalty calculation does not address these factors.

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 . . . " (*see Matter of Alvin Hunt*, Decision and Order of the Commissioner, July 25, 2006, at 8-9 [citations omitted]). Although this case has not gone to hearing, staff's penalty calculation only

addressed one of the four factors above, namely the maximum statutory penalty. Additional justification for the amount sought by staff is necessary for me to determine whether the penalty is appropriate in light of DEE-1.

RULING

Based upon the foregoing, my ruling on Department staff's motion is as follows:

1. Department staff's motion for order without hearing dated June 16, 2016 is granted on the issue of liability for the following:

    a. 6 NYCRR 201.1 for failing to have an air facility permit or registration to operate the spray paint booth at the Man Products Facility (first cause of action);
    b. 6 NYCRR 228-1.3(a) for using a surface coating that exceeds the maximum permitted pounds of VOC per gallon without employing an air cleaning device with the required removal efficiency pursuant to 6 NYCRR 228-1.3(c) (second and third causes of action);
    c. 6 NYCRR 228-1.5(a) for failing to provide Department staff with records concerning the VOC coating used at the facility upon request (fourth cause of action);
    d. 6 NYCRR 228-1.5(k) for failing to maintain the records required pursuant to 6 NYCRR 228-1.5 for a period of five years (fourth cause of action);
    e. 6 NYCRR 228-1.10(e) for using open containers to store or dispose of spent surface coatings, or spent VOC solvents (fifth cause of action);
    f. 6 NYCRR 372.2(a)(2) for failing to make a hazardous waste determination (sixth cause of action);
    g. ECL 17-0511 for unlawfully discharging industrial waste into the waters of the State (eighth cause of action); and
    h. ECL 72-0302(a) for failing to pay air program regulatory fees in the amount of two thousand two hundred and forty dollars, consisting of annual payments of $160 per year for 14 years from 1999 to 2013 (ninth cause of action).

2. Department staff's Motion is denied on the fifth cause of action insofar as it alleges a violation of 6 NYCRR 228-1.10(a) and denied on the seventh cause of action in its entirety.

3. Respondents' Cross Motion is granted on the seventh cause of action and otherwise denied.

4. The seventh cause of action is dismissed.

5. I reserve ruling on the civil penalty requested in staff's Complaint pending further proceedings in this matter.

Accordingly, Department staff's Motion is granted in part, and denied in part, respondents' Cross Motion is granted on the seventh cause of action and otherwise denied, and the seventh cause of action is dismissed. My office will schedule a conference call with the parties in the near future to discuss further proceedings in this matter.

/s/
Lisa A. Wilkinson
Administrative Law Judge

Dated: February 20, 2018
Albany, New York