STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter

of

Causing, Engaging In or Maintaining
a Condition or Activity Which Presents
an Imminent Danger to the Health or Welfare
of the People of New York State
or Which Is Likely To Result in Irreversible or Irreparable Damage
to Natural Resources of the State

-by-

**Morgan Materials Inc. (f/k/a Morgan Chemicals, Inc.),
Morgan Chemcial, Inc. (a/k/a Morgan Chemical, Inc. and Morgan Chemicals, Inc.),
Morgan Globex, Inc., North Sea Mining & Minerals, Ltd.,
Donald Sadkin, as Chief Executive Officer of Morgan Materials Inc.,
Morgan Chemcials, Inc., Morgan Globex, Inc. and North Sea Mining & Minerals, Ltd.,
and Donald Sadkin, Individually,**

Respondents.

Case No. R9-20160809-69

**SUMMARY ABATEMENT PROCEEDING
ORDER OF THE COMMISSIONER**

February 6, 2017

ORDER OF THE COMMISSIONER

I. BACKGROUND

Pursuant to section 71-0301 of the Environmental Conservation Law (ECL) and part 620 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), I issued a summary abatement order (SAO) and notice of hearing dated November 17, 2016, to respondents Morgan Materials Inc. (f/k/a Morgan Chemicals, Inc.), Morgan Chemcial,[1] Inc. (a/k/a Morgan Chemical, Inc. and Morgan Chemicals, Inc.), Morgan Globex, Inc., North Sea Mining & Minerals, Ltd., Donald Sadkin, as Chief Executive Officer of Morgan Materials Inc., Morgan Chemcials, Inc.,[2] Morgan Globex, Inc. and North Sea Mining & Minerals, Ltd., and Donald Sadkin, individually (collectively, respondents).

The SAO stated that respondents have accumulated an estimated eighteen million pounds of chemicals, including substantial quantities of hazardous and non-hazardous waste, and approximately 2,000 drums and larger bulk containers filled with flammable material, in several buildings with a street address of 380 Vulcan Street, Tonawanda, New York, in Erie County (Facility) (see SAO ¶ 16; see also Hearing Report at 27 [Finding of Fact No. 6]). The SAO stated further that the material at the Facility "presents an imminent danger to the health or welfare of the People of the State and is likely to result in irreversible or irreparable damage to the natural resources of the State" (SAO ¶ 17). Attached to the SAO were (i) sworn affidavits of an environmental engineer in the Department's Division of Environmental Remediation (DER), an environmental chemist employed in the Department's Region 9 office, and a section chief of DER; and (ii) an affirmation of an Assistant Regional Attorney from the Department's Region 9 office.

The SAO required respondents, among other things, to:

- Secure the Facility immediately, retain 24-hour surveillance and security services, and cooperate with outside entities in their efforts to remove wastes and products (id. ¶¶ II-V);
- "[I]mmediately cease purchasing, receiving or acquiring any chemicals or materials at the Facility" (id. ¶ I);
- Install, within sixty (60) days of the effective date of the SAO, "approved fire suppression and other appropriate safety related measures" (id. ¶ VI);
- "[C]onduct no further business or activities of any kind at the Facility pertaining to the handling, processing, and storage of any chemicals, materials or waste, except for activities required by" the SAO, until all activities required by the SAO were complete, "and until such time that Respondents document and certify to the Department's satisfaction that the Facility is in compliance with all applicable ECL provisions and applicable regulatory requirements" (id.);

[1] The entity name is spelled "chemcial" in the initial caption of this matter. See Hearing Report, at 1 fn 1.
[2] See footnote 1 of this order.

- Provide, within seven (7) days of the effective date of the SAO, a complete list of all storage locations where any of respondents store waste, materials or chemicals (id. ¶ VII); and
- Provide to the Department, the United States Environmental Protection Agency (EPA), and the New York State Department of Health complete access to the Facility, and to provide "appropriate records to perform inspections and oversight" of the work required pursuant to the SAO (id. ¶ VIII).

Pursuant to 6 NYCRR 620.3, the SAO and notice of hearing notified respondents that a hearing would be held on November 30, 2016 at the Department's Region 9 offices in Buffalo, New York. Following respondents' unopposed request for an adjournment, the hearing was adjourned to Tuesday, December 13, 2016.

On December 2, 2016, counsel for respondents informed the assigned administrative law judge Maria E. Villa (ALJ) that respondents and their counsel would appear at the hearing. By letter dated December 6, 2016, respondents stated that they would not be offering any witnesses or exhibits in addition to those offered by Department staff (see id.).

In the afternoon on the day before the hearing, however, respondents' counsel sent an email to the ALJ and Department staff, attaching a letter and an affidavit of respondent Donald Sadkin, sworn to December 12, 2016. Respondents' counsel stated that respondents lacked the financial resources to defend at the hearing, and that they "hereby waive the SAO Hearing under ECL § 71-0301 and … have nothing further to submit" (id.). Department staff objected to the submission of Mr. Sadkin's affidavit, arguing, among other things, that, absent his appearance at the hearing, staff would have no opportunity to cross-examine him. Following additional exchanges of emails and a teleconference with the parties and the ALJ, the ALJ ruled that the hearing would proceed as scheduled (see id.).

On the morning of the hearing, counsel for respondents confirmed by telephone that neither he nor his clients would appear at the hearing, and that two of the witnesses subpoenaed by Department staff (respondent Donald Sadkin, and witness Jonathan Sadkin) would not respond to the subpoenas (see id.). Respondents' counsel further argued that proceeding with the hearing would be improper, and that respondents' affidavit "is in response to our opportunity to be heard" under the ECL.

The ALJ proceeded with the hearing on December 13, 2016. Department staff called four witnesses and, although staff had subpoenaed three additional witnesses, only one appeared and testified at the hearing (see Hearing Report, at 3). The ALJ also accepted and considered Mr. Sadkin's affidavit "in order to provide a complete record for the Commissioner's consideration" (Hearing Report at 5).

Following the one-day hearing, the ALJ reviewed the record and submitted her hearing report pursuant to 6 NYCRR 620.3, in which she has recommended that the SAO be continued. Upon my consideration of the ALJ's hearing report and the testimony and documentary evidence in the record, I concur with and adopt the ALJ's findings of fact and

conclusions of law, subject to my comments below. The findings and conclusions establish that respondents have failed to effectively rebut any of the factual assertions made by Department staff.

Accordingly, I conclude that respondents violated the ECL and its implementing regulations. Respondents' continued operation of the Facility presents an imminent danger to the health and welfare of the people of the State of New York, and is likely to result in irreversible and irreparable damage to natural resources. Thus, the SAO is continued.

II. DISCUSSION

a. Applicable Legal Standards

Summary abatement proceedings are governed by ECL 71-0301 and 6 NYCRR part 620 (Part 620). Under those provisions, once the Commissioner issues a summary abatement order, a hearing must be scheduled (see 6 NYCRR 620.3[a]). The uniform enforcement hearing procedures found in 6 NYCRR part 622 apply to hearings on summary abatement orders except to the extent inconsistent with Part 620 (see 6 NYCRR 620.3[i]).

The regulations provide that Department staff bears the burden of persuasion at the hearing with respect to all charges and "matters affirmatively asserted" in the summary abatement order (see 6 NYCRR 620.3[b]). Department staff may meet its burden through the submission of the "supporting materials" accompanying the summary abatement order, as well as presenting testimony and evidence supplementing those materials (see id.).

A respondent shall have an opportunity to be heard at the hearing (see id.). The respondent has the burden to demonstrate that "the condition or activity" which is the subject of the order does not fall within the scope of section 620.2(a), the provision that describes the circumstances under which a Commissioner, after investigation, may issue a summary abatement order. The respondent also bears the burden of persuasion regarding all affirmative defenses (see 6 NYCRR 620.3[b]).

The regulations provide that both respondent and Department staff shall have the right of cross-examination (see id.). The respondent may waive the hearing, either affirmatively in writing or by failing to appear at the hearing (see 6 NYCRR 620.3[c]).

b. Staff Met Its Burden Through the Evidence Submitted with the SAO and at the Hearing

The documentary and testimonial evidence in the record confirm the SAO's conclusion that the conditions at the Facility present an imminent danger to the health or welfare of the people of the State and are likely to result in irreversible or irreparable damage to the natural resources of the State. The evidence establishes respondents' long-standing and continuing failures to comply with relevant environmental statutes and regulations at the

Facility and at other sites, as well as their failure to comply with a prior order on consent addressing operations at the Facility.

Respondents have historically purchased off-specification chemicals and raw materials which they attempt to resell (see Affidavit of Peter A. Reuben, sworn to November 14, 2016 [Reuben Aff.], at ¶ 21). Although respondents have failed to resell many of these chemicals and raw materials, they have continued to purchase additional chemicals while retaining the unsold chemicals, resulting in the accumulation of a large amount of materials at the Facility (see id.; see also Hearing Report at 11). The record establishes that respondents have accumulated approximately thirteen million pounds of chemicals at the Facility, some of which has been stored at the Facility for more than 20 years (see Hearing Report at 27-28 [Finding of Fact No. 13]).

Respondents also have a long history of violations, at the Facility and other locations, relating to their business of purchasing, storing, processing, selling and offering for re-sale chemical substances and materials. For example, respondents operated storage locations at 373 Hertel Avenue and Great Arrow Drive in Buffalo, New York. Both sites were the subject of removal actions by EPA during the 1990s (see Hearing Report at 28 [Finding of Fact No. 20]; see also Reuben Aff. ¶¶ 89-94). The facility at 373 Hertel Avenue was a warehouse used since 1963 to store chemicals. In 1997, at the request of the Department, EPA removed approximately 20,000 drums of waste from the site (see Affidavit of Gerard Burke, sworn to November 14, 2016 [Burke Aff.] at p. 3, ¶¶ 3-4). A fire at that site in 2003 destroyed much of the warehouse and as many as 18,000 additional drums of waste and materials remaining at that site (see id.).

With respect to this Facility, respondent Morgan Materials Inc. entered into an order on consent in 2005 (2005 Consent Order) to resolve Department staff's allegations, resulting from inspections of the Facility in December 2000 and January 2001, that respondent committed multiple violations of Departmental regulations, including but not limited to:

- failing to maintain land disposal restriction notices for hazardous wastes;
- storing hazardous wastes in leaking containers at locations without proper containment;
- failing to maintain containment building and facilities in a manner designed to prevent the release of hazardous wastes into the environment;
- failing to train personnel regarding proper handling and disposition of hazardous wastes;
- failing to develop and maintain a contingency plan designed to minimize hazards to human health or the environment from fires, explosions or release of hazardous waste or its constituents to air, soil or surface water;
- storing hazardous wastes for a period exceeding 90 days; and
- storing universal waste batteries in containers not properly marked, and on pallets rather than in containers designed to minimize the likelihood of leakage.

(see Hearing Report at 27 [Finding of Fact No. 9, citing Reuben Aff. ¶ 24, and Exhibit (Ex.) 1 thereto (2005 Consent Order)]; see also 2005 Consent Order ¶¶ 3-11).

Respondent Morgan Materials, Inc. agreed in the 2005 Consent Order to develop best management practices with respect to storage, maintenance and disposal of materials at all of its New York facilities, including implementing a material tracking and inventory system which "must include material description, quantities, location, and dates for material purchase, processing, transfer, sale, or disposal" (Reuben Aff. Ex. 1, at Schedule of Compliance ¶ 5). Pursuant to the management system plan, Morgan Materials would not accept a new material for purchase unless a known market existed for such materials, and materials would be properly inventoried and tracked from purchase to sale by an inventory management system (see Hearing Report at 12-13; see also id. at 27 [Finding of Fact No. 9]; see also Reuben Aff. Ex. 3 [Management System Plan, November 2005]). Morgan Materials, pursuant to the best management practices plan, was required to properly dispose of any materials for which a market could not be identified (see Hearing Report at 12-13).

Department staff concluded, after several inspections, review and discussions, that respondents had not complied with the Facility's management system plan, failed to properly maintain the required inventory, and failed to comply with the terms of the 2005 Consent Order (see Hearing Report at 13, and 27 [Finding of Fact No. 11]). Specifically, the evidence submitted at the hearing establishes, among other things, that respondents:

- Have failed to notify the Department regarding chemicals that would not likely be sold within 12 months (for hazardous materials) or 18 months (for non-hazardous materials)
- Have failed to prepare and maintain an accurate inventory of chemicals and materials at the facility;
- Are storing chemicals outside the Facility, unsecured, with no secondary containment;
- Are storing thousands of drums inside the Facility which are unmarked, corroded and/or rusted through, some stacked four to six drums high;
- Are storing containers of hazardous waste intermixed with solid waste. Most of the containers are not properly managed or labeled, making it impossible to identify the contents without sampling and testing;
- Are in violation of several fire code provisions;
- Are storing abrasive materials that may not be approved for disposal as non-hazardous waste; and
- Are storing more than 2,000 drums and intermediate bulk containers, or "totes" of flammable materials, both inside and outside the Facility.

(see Hearing Report at 7, 10, 11-14; see also Hearing Report at 27-28 [Finding of Fact Nos. 12, 16-18]). After a partial roof collapse at the facility in April 2016, respondents provided Department staff with what was characterized as a "complete inventory by date and warehouse," revealing that approximately 13 million pounds of chemicals, materials, and hazardous and non-hazardous waste was being stored at the Facility, some of which had been

stored there for more than 20 years (see id. at 13-14; see also id. at 27-28 [Finding of Fact No. 13]).

Department staff has concluded that, given the conditions and lack of security at the Facility, an extremely high risk of release or explosion exists (see Hearing Report at 28 [Finding of Fact No. 18]).

Given the evidence submitted, Department staff met its burden on the charges and matters affirmatively asserted in the summary abatement order. Staff's witnesses have testified that the conditions at the Facility presents an imminent danger to the health and welfare of the people of New York State, and are likely to result in irreversible or irreparable damage to the natural resources of the State.

c. The ALJ's Acceptance and Consideration of the Sadkin Affidavit

As stated above, respondents submitted an affidavit of respondent Donald Sadkin, who identifies himself as Chief Executive Officer of Morgan Materials, Inc., Morgan Globex, Inc. and North Sea Mining & Minerals, Ltd. (see Affidavit in Opposition/Request to Vacate, sworn to December 12, 2016, at ¶ 1). The affidavit did not attach any exhibits. The ALJ received Mr. Sadkin's affidavit into the record over the objections of Department staff, and recommended that I accept and consider the affidavit. I conclude that the ALJ's acceptance and consideration of the affidavit was a proper exercise of her discretion, and have considered the affidavit in reaching the conclusions set forth in this Order.

In the letter accompanying the affidavit, respondents' counsel stated that the affidavit "is in response to our opportunity to be heard" under the ECL, and that respondents "hereby waive the SAO Hearing under ECL § 71-0301 and … have nothing further to submit" (Hearing Report at 3). These statements are contradictory, since submission of a sworn affidavit is actually an attempt to "be heard," rather than a waiver of the opportunity to be heard. Respondents were on notice, both by regulation and by the SAO itself, that the failure to appear at the hearing constituted a default and a waiver of respondents' right to a hearing (see 6 NYCRR 620.3[c]; SAO ¶ 4, at 14). By waiving their right to a hearing, respondents waived their right to present evidence. Respondents may not default in appearing and still "choose" to present evidence insulated from cross-examination by Department staff. Thus, respondents did not have a right to have the Sadkin affidavit admitted into the record.

In this instance, I accept the ALJ's exercise of discretion in accepting the affidavit (see 6 NYCRR 622.10[b][1][vii] [ALJ has the power to admit or exclude evidence]). I also agree with the ALJ's conclusion that the affidavit should be given little weight (see Hearing Report at 5). By submitting an affidavit but not responding to the subpoena and not appearing at the hearing, respondents have deprived Department staff of an opportunity to test through cross-examination the statements contained in Mr. Sadkin's affidavit. The regulations expressly state that "[b]oth the respondent and department staff shall have the right of cross-examination" (6 NYCRR 620.3[a]). As noted, respondents have deprived staff

of its right to cross-examine Sadkin at hearing. Thus, it was appropriate to afford the affidavit little weight.

The ALJ properly determined to proceed with the hearing notwithstanding respondents' objection, the submission of the Sadkin affidavit and respondents' waiver of the hearing (see Hearing Report at 4-5). The regulations provide that Department staff, which bears the burden of persuasion, may meet its burden by submission of the supporting materials accompanying the summary abatement order, and "[a]t the hearing, department staff may also present testimony and evidence that supplements the supporting materials that accompanied the summary abatement order" (6 NYCRR 620.3[b]). Having failed to appear and having waived their right to a hearing, respondents' objection to the hearing proceeding in their absence was baseless. Accordingly, it was appropriate to proceed with the hearing and provide Department staff the opportunity to present testimony and evidence supplementing the supporting materials that accompanied the SAO.

With respect to the substance of the Sadkin affidavit, I agree with and adopt the ALJ's discussion of the affidavit, and her conclusions that Mr. Sadkin's statements are self-serving, not supported by evidence in the record, and do not effectively rebut the testimony of Department staff's witnesses and the other evidence submitted by Department staff (see Hearing Report at 23-26).

III. CONCLUSION

Upon review of the entire record, I conclude that Department staff has met its evidentiary burden and that the summary abatement order should be continued. As discussed in the hearing report and this order, the evidence establishes, among other things, that:

- There is an extremely high risk of release or explosion at the Facility (see Hearing Report at 28 [Finding of Fact No. 18]);
- Absent a removal action, the conditions at the Facility would cause an inactive hazardous waste site to be created (see Hearing Report at 17);
- The Facility has already created irreversible damage to the State's natural resources (see id.);
- Respondents are unwilling or unable to perform the work necessary to bring the Facility into compliance (see id. at 17-18);
- The Facility is in violation of multiple provisions of the fire code, including lacking sprinkler systems in a large part of the Facility, and poses a risk of fire. A fire would be very difficult to control, and would affect nearby residential neighborhoods and schools (see id. at 18-21; see also id. at 6, 7, 10, 15).

NOW, THEREFORE, having considered these matters and being duly advised, it is **ORDERED** that:

I. Respondents Morgan Materials Inc. (f/k/a Morgan Chemicals, Inc.), Morgan Chemcial, Inc. (a/k/a Morgan Chemical, Inc. and Morgan Chemicals, Inc.), Morgan Globex, Inc., North Sea Mining & Minerals, Ltd., Donald Sadkin, as Chief Executive Officer of Morgan Materials Inc., Morgan Chemcials, Inc., Morgan Globex, Inc. and North Sea Mining & Minerals, Ltd., and Donald Sadkin, individually (respondents), have violated ECL article 27 and implementing regulations, as a result of their ownership and operations at the various buildings located on four separate tax parcels including 380 Vulcan Street, 400 Vulcan Street, 408 Vulcan Street, and 416 Vulcan Street in Tonawanda, New York (collectively, the Facility). The Facility presents an imminent danger to the health or welfare of the people of the State and is likely to result in irreversible or irreparable damage to the natural resources of the State.

II. The summary abatement order dated November 17, 2016 is continued.

III. This matter is remanded to Department staff for further action pursuant to this order.

IV. The provisions, terms and conditions of this order shall bind respondents, their officers, directors, agents, servants, employees, successors and assigns and all persons, firms and corporations acting for or on behalf of respondents.

V. All communications between respondents concerning this order shall be made to Jennifer Dougherty, Esq., Assistant Regional Attorney, New York State Department of Environmental Conservation, Office of General Counsel – Region 9, 270 Michigan Avenue, Buffalo, New York 14203.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Basil Seggos
Commissioner

Dated: February 6, 2017
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
Office of Hearings and Mediation Services
625 Broadway, First Floor
Albany, New York 12233-1550

In the Matter

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Respondents.

Case No. R9-20160809-69

SUMMARY ABATEMENT PROCEEDING
HEARING REPORT

_____/s/_____

Maria E. Villa
Administrative Law Judge
January 4, 2017

BACKGROUND

On November 17, 2016, the Commissioner of the New York State Department of Environmental Conservation (the "Department") issued a summary abatement order (the "Order") to respondents Morgan Materials Inc., (f/k/a Morgan Chemicals, Inc.), Morgan Chemcial,[1] Inc. (a/k/a Morgan Chemical, Inc. and Morgan Chemicals, Inc.), Morgan Globex, Inc., North Sea Mining & Minerals, Ltd., Donald Sadkin, as Chief Executive Officer of Morgan Materials Inc., Morgan Chemcials, Inc., Morgan Globex, Inc. and North Sea Mining & Minerals, Ltd., and Donald Sadkin, individually (collectively, "Respondents"). The Order was issued pursuant to the Commissioner's summary abatement powers, as set forth in Section 71-0301 of the Environmental Conservation Law ("ECL") and Part 620 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"). The Order stated that the Commissioner had caused the investigation of conditions present at property located at 380 Vulcan Street,[2] Tonawanda, Erie County, New York (the "Facility").

The Order stated that "[c]ollectively, the Respondents have accumulated an estimated eighteen (18) million pounds of chemicals, which includes a substantial quantity of hazardous and non-hazardous waste at the Facility. This waste includes approximately 2,000 drums as well as additional larger bulk containers filled with flammable material." Order, ¶ 16. The Order asserted that this material, as presently stored, "presents an imminent danger to the health or welfare of the People of the State and is likely to result in irreversible or irreparable damage to the natural resources of the State." Id., ¶ 17.

The Order required Respondents to "immediately cease purchasing, receiving or acquiring any chemicals or materials at the Facility." Id., ¶ I. The Order went on to direct that "Respondents will conduct no further business or activities of any kind at the Facility pertaining to the handling, processing, and storage of any chemicals, materials or waste, except for activities required by this summary abatement order" until all activities required by the Order were complete, "and until such time that Respondents document and certify to the Department's satisfaction that the Facility is in compliance with all applicable ECL provisions and applicable regulatory requirements." Id.

In addition, the Order required Respondents to immediately secure the Facility and retain 24-hour surveillance and security services, and to cooperate with outside entities in their efforts to remove wastes and products. Id., ¶¶ II-V. The Order directed Respondents to provide a complete list of all storage locations where any of the Respondents store waste, materials or chemicals. Id., ¶ VII. Respondents were ordered to provide the Department, the United States Environmental Protection Agency ("EPA"), and the New York State

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[1] The caption includes Respondents "Morgan Chemcial, Inc." and "Morgan Chemcials, Inc.," spelled "chemcial."

[2] This street address includes various buildings located on four separate tax parcels including 380 Vulcan Street, 400 Vulcan Street, 408 Vulcan Street, and 416 Vulcan Street in Tonawanda, New York.

Department of Health complete access to the Facility, and to provide "appropriate records to perform inspections and oversight" of the work required pursuant to the Order. Id., ¶ VIII. The Department was authorized under the Order "to take any and all appropriate actions to address the conditions at this Facility" that resulted in the issuance of the Order, including security measures and initiation of appropriate removal actions, to be conducted by either the Department or EPA, or the agencies' contractors. Id., ¶ IX. In addition, the Department was authorized to seek recovery from Respondents of any costs incurred by the Department and EPA, "including but not limited to proceeding against Respondents as well as any other responsible parties under statutory and common law." Id., ¶ X. Finally, the Order stated that

> [b]ased on the affidavits submitted, it is well documented that any removal action will require the removal of waste and other chemicals, which Respondents may try to argue, is saleable. However, given the nature and extent of the emergency situation that Respondents have caused, it is likely that the vast majority of chemicals within this Facility may have to be properly disposed of in order to deal with the emergency created by Respondents. If Respondents wanted to avoid the disposal of chemicals that they view as being saleable, they were provided that opportunity by Department Staff pursuant to a Consent Order to bring the Facility into compliance and alleviate the conditions described in this summary abatement order. The Respondents have refused to do so therefore necessitating the need for this summary abatement order and the removal actions described herein.

Id., ¶ XI.

Three affidavits were attached to the Order, including the affidavit of Juzer Rasani, an Environmental Engineer in the Division of Environmental Remediation in the Department's Central Office (the "Rasani Affidavit"); the affidavit of Peter A. Reuben, an Environmental Chemist in the Department's Region 9 office (the "Reuben Affidavit"); and the affidavit of Gerard Burke, Section Chief of the Department's Division of Environmental Remediation, Remedial Bureau E, Remedial Section A (the "Burke Affidavit"). All of the affidavits were sworn to on November 14, 2016. In addition, Jennifer Dougherty, Esq., counsel for Department Staff, submitted a November 10, 2016 affirmation (the "Dougherty Affirmation") in support of the Order.

APPEARANCES

Section 620.3(a) of 6 NYCRR provides that upon issuance of a summary abatement order, the Department must schedule a hearing within fifteen days. See also ECL Section 71-0301. Notice of the hearing must be provided with the written summary abatement order. Id. The Order notified Respondents that a hearing would be held at 1:00 p.m. on Wednesday, November 30, 2016, at the Department's Region 9 offices in Buffalo, New York. By letter dated November 22, 2016, counsel for respondents requested an adjournment to the week of

December 12. Department Staff did not object to the request, and the matter was adjourned to Tuesday, December 13, 2016.

The hearing proceeded as scheduled at 8:00 a.m. on Tuesday, December 13, 2016 at the Department's Region 9 offices in Buffalo. At the hearing, Department Staff was represented by Jennifer Dougherty, Esq., Assistant Regional Attorney (Region 9) and Benjamin Conlon, Esq., Bureau Chief of the Bureau of Remediation, from the Department's Office of General Counsel at 625 Broadway in Albany, New York. Department Staff called Juzer Rasani, Gerard Burke, and Peter Reuben, as well as Benjamin Keller, a Fire Protection Specialist 3, Branch Chief for the New York State Office of Fire Prevention and Control in the Division of Homeland Security and Emergency Services. Department Staff served subpoenas on three additional witnesses (Donald Sadkin, Jonathan Sadkin, and Tracy McLaverty). As discussed below, of the three subpoenaed witnesses, only Mr. McLaverty appeared and testified at the hearing.

Respondents were represented by Craig Slater, Esq. of the Slater Law Firm, PLLC, 500 Seneca Street, Suite 504, Buffalo, New York. After requesting that Respondents indicate via return e-mail that Respondents would be present with counsel at the hearing, and receiving no reply, the administrative law judge ("ALJ") telephoned Mr. Slater's office on December 2, 2016, and received confirmation from Emily Slater, the Firm's paralegal, that counsel and witnesses would appear at the hearing on December 13. By letter dated December 6, 2016, counsel for Respondents advised that Respondents would not be offering any additional witnesses or submitting any further exhibits at the hearing other than those already identified by Department Staff.

At 2:35 p.m. on December 12, 2016, the day before the hearing, counsel for Respondents sent an e-mail to the ALJ and to Department Staff. Attached to the e-mail was a letter in which counsel for Respondents stated that Respondents lacked the financial resources to mount a defense, and "[a]s a result, the respondents hereby waive the SAO Hearing under ECL § 71-0301 and, instead, submit the Affidavit of Donald Sadkin in opposition to and as respondents [sic] request to vacate the SAO. Respondents have nothing further to submit." Attached to counsel's e-mail was the affidavit of Donald Sadkin, sworn to December 12, 2016 (the "Sadkin Affidavit"). That affidavit is discussed further below.

Department Staff replied via e-mail, objecting to the submission of the affidavit, arguing that "Respondents' waiver of their right to a hearing necessarily requires the exclusion of additional documents, which Respondents appear to be trying to submit." E-mail from Jennifer Dougherty, Esq., 3:29 p.m., December 12, 2016. Department Staff pointed out that there would be no opportunity to cross-examine Mr. Sadkin, and contended that "if the Respondents fail to appear this is considered a waiver of the hearing requirement." Id.

At 4:09 p.m., counsel for Respondents replied via e-mail that ECL Section 71-0301 "does not compel any specific response by the Respondents to the SAO" but rather provides for an opportunity to be heard. E-mail from Craig Slater, Esq., 4:09 p.m., December 12,

2016. The e-mail maintained that Respondents had exercised their opportunity to be heard by filing the Sadkin Affidavit, and that there was no prejudice to Department Staff because "it is the Department's burden to show imminent danger or likely irreparable damage from operations" and the Department either "has or has not carried its burden on its papers." Id. The e-mail reiterated that the Respondents, witnesses and counsel would not appear at the hearing the following day.

Later that afternoon, the ALJ spoke with the parties via conference call. After hearing argument, the ALJ advised that the hearing would proceed the next morning, and testimony would be taken from the witnesses who appeared.

As the hearing began, Department Staff raised concerns regarding Respondents' failure to appear. Department Staff attempted to reach Mr. Slater by telephone, and were able to do so at approximately 9:00 that morning.

Mr. Slater confirmed that he would not appear at the hearing, and that Donald Sadkin and Jonathan Sadkin would not respond to the subpoenas served upon them by Department Staff. The parties renewed their arguments concerning the scope of the opportunity to be heard provided pursuant to ECL Section 71-0301. Counsel for Respondents asserted that it would be improper to proceed with the hearing, and that Respondents submitted an affidavit in opposition "which is in response to our opportunity to be heard under the Environmental Conservation Law." Hearing Transcript (hereinafter "Tr. at ___") at 13-14. Department Staff renewed its objection to receipt of the Sadkin Affidavit, and counsel for Respondents replied that the ECL provision "does not specify that we have to appear, does not specify that we have to have it [an opportunity to be heard] at the hearing, and it does not mandate that we submit Respondents to a cross-examination in a hearing that we've waived." Id. at 14-15.

Mr. Slater went on to state that "[w]e also believe that the rules governing administrative proceedings are broad enough, sufficient enough, and that it's fair to allow the Respondent [sic] to submit an affidavit with respect to their position on the allegations contained in the summary abatement order." Id. at 15. According to Mr. Slater, the summary abatement order "has to stand on its own feet" and Respondents believed that the Order did not meet Department Staff's burden "to show an imminent threat to public health and a potential for irreversible harm." Id. Mr. Slater again objected to the hearing going forward, and argued that "[t]his is not an opportunity for the Department to supplement a record to support the summary abatement order." Id. at 16. This argument is unavailing. Respondents are instead themselves seeking to supplement the record, after advising the ALJ and the parties that they did not intend to offer anything additional at the hearing. The Department was entitled to test what Respondents submitted, just as Respondents were afforded the opportunity to challenge the basis for the Order.

Department Staff contended that the regulations provide Respondents with an opportunity to submit evidence at a hearing, and that Respondents were attempting to improperly conflate the right to a hearing with the provision for waiver set forth in the

regulations. Counsel asserted that Respondents instead "would like to submit evidence while waiving the hearing. There is no provision which allows that to be done." Id. at 16-17.

Counsel for Respondents reiterated Respondents' objection to the hearing going forward in his and his clients' absence. Tr. at 12, 20. The ALJ advised him that his objection was noted, but that the hearing would nevertheless proceed. Tr. at 19-20.

The Sadkin Affidavit will be considered in this hearing report, in order to provide a complete record for the Commissioner's consideration. This report recommends that the document be given little weight, in light of the persuasive contrary evidence offered by Department Staff, the lack of opportunity for cross-examination of this witness, and Donald Sadkin and Jonathan Sadkin's failure to respond to the subpoenas served upon them. Exhibits 46 and 47. [3]

The remainder of this hearing report provides further detail as to the testimony and evidence offered as part of the Order, and at the hearing, and concludes that the Commissioner's November 17, 2016 Order should be continued.

RELEVANT FACTS AND ARGUMENTS PRESENTED

Part 620 of 6 NYCRR governs summary abatement proceedings. Section 620.2 ("General procedure") provides, in pertinent part, that

> (a) [w]henever the commissioner finds, after an investigation, that any person is causing, engaging in or maintaining a condition or activity which, in the judgment of the commissioner:
>
> > (1) presents an imminent danger to the health or welfare of the people of the State, or results in or is likely to result in irreversible or irreparable damage to natural resources; and
> >
> > (2) relates to the prevention and abatement powers of the commissioner in that the condition or activity pertains to or affects any of the objectives or goals of the Environmental Conservation Law, or relates to any of the permit, licensing, or regulatory programs of the Department; so that it appears to be prejudicial to the interest of the people of the State to delay action until an opportunity for hearing can be provided, the commissioner may, without prior hearing or notice, order such person to discontinue, abate or alleviate such condition or activity.

[3] Adjudicatory proceedings under ECL Section 71-0301 are governed by State Administrative Procedure Act ("SAPA") Article 3 (see ECL Section 70-0301; SAPA Section 102(3)). Pursuant to SAPA, all parties to the proceeding have the right to offer testimony and to cross-examine witnesses. SAPA Sections 301(4) and 306(3); see also Section 620.3(b) of 6 NYCRR. Respondents' decision to ignore the subpoenas deprives Department Staff of the right to cross-examine Mr. Donald Sadkin, and further diminishes the evidentiary weight to be afforded the Sadkin Affidavit.

> (b) Such order may be oral, telephonic, in writing, or in such other form as will, in the commissioner's judgment give reasonable notice to the person. . . . A written summary abatement order shall state the grounds on which the order is based, and shall be accompanied by evidence documenting the material facts supporting the order.
>
> (c) Upon receipt of the commissioner's summary abatement order, it shall thereafter be the duty of the respondent to immediately discontinue, abate or alleviate such condition or activity pursuant to the terms of said order. Failure to do so shall constitute a violation of the order and of these regulations.

Pursuant to Section 620.3(b), Department Staff bears the burden of persuasion on all charges and matters affirmatively asserted in the Order. Respondent bears the burden of persuasion regarding all affirmative defenses. Section 622.11(c) of 6 NYCRR[4] provides that "[w]henever factual matters are involved, the party bearing the burden of proof must sustain that burden by a preponderance of the evidence unless a higher standard has been established by statute or regulation."

As noted above, the Order was accompanied by three affidavits, and an affirmation of counsel for Department Staff. Those affidavits, and the testimony offered by the witnesses at the hearing, are summarized in the discussion that follows.

Testimony of Environmental Engineer Juzer Rasani

The Rasani Affidavit indicated that the affiant was provided with a copy of an order on consent entered into by Respondent Morgan Materials Inc., with an effective date of January 31, 2005 (the "2005 Order"). (Exhibit 1). The Rasani Affidavit stated that information provided by the Department's Region 9 office "documented a number of very significant non-compliance issues" at the Facility, including photographs of leaking, corroded and damaged drums, as well as unsafe storage of drums and other containers both inside and outside the Facility. Rasani Affidavit, ¶ 9.

The Rasani Affidavit stated that on April 4, 2016, Respondents notified the Region that part of the roof at the Facility had collapsed. According to the Rasani Affidavit, "[f]or a period of time, a large slab of concrete was dangling from the roof inside the building. To date, the roof has not been completely repaired. This raises concern of additional risk of further collapse and catastrophic damage to drums and other containers, which contain flammable and toxic chemicals, especially given the likelihood of substantial snowstorms." Id., ¶ 10. In addition, the Rasani Affidavit indicated that the affiant was provided with a map of the area around the Facility, showing its proximity to two charter schools and a residential

[4] Section 620.3(i) of the Department's summary abatement regulations provides that "[t]he provisions of Part 622 of this Title (Uniform Enforcement Hearing Procedures) apply to hearings on summary abatement orders except to the extent inconsistent with the provisions of this Part."

neighborhood. In light of these circumstances, after discussions with Department personnel, "it was determined that a site inspection should be conducted by multiple agencies." Id., ¶ 13.

The Rasani Affidavit stated that on July 25, 2016, Mr. Rasani did "a brief walk through of the Site and discussed the Site operations with Respondents' representatives." Id., ¶ 14. The following day, Mr. Rasani returned to the Facility, along with personnel from the Department's Region 9 and Central Offices, the EPA, the New York State Division of Homeland Security and Emergency Services, the Occupational Health and Safety Administration ("OSHA"), the Buffalo Sewer Authority, the Tonawanda Fire Department, and the Town of Tonawanda Building Code Enforcement. Mr. Rasani described the inspection as "limited" due to the nature and scope of the material stored at the Facility, which, according to Mr. Rasani, "would require a month or more to fully inspect for RCRA [the federal Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq.] and other program purposes." Id., ¶ 16.

The Rasani Affidavit noted that prior to the multi-party inspection on July 26, 2016, the Department "had requested and received from Respondents an electronic copy of what Respondents described as a complete inventory by date and warehouse." Id., ¶ 17. According to the Rasani Affidavit, based upon that inventory, "a substantial amount" of the solid and hazardous waste, chemicals and materials had been stored at the Facility "for a very significant period of time, some dating back as far as 1993 (or in excess of two decades)." Id., ¶18. The Rasani Affidavit noted that the inventory records showed that the Facility was storing in excess of 600,000 pounds of hazardous waste, and that Respondents' inventory identified this material with notations such as "no good," "hard," and "dump." Id. The Rasani Affidavit stated further that "in excess of 2,000 drums and intermediate bulk containers ("IBCs" or "totes") of flammable chemicals as well as other significantly toxic substances are stored both inside and outside the warehouses" at the Facility, "in direct proximity to the two Charter Schools and a residential neighborhood." Id., ¶ 19. The affiant concluded that "[t]hese chemicals have been stored for such a long period of time that a substantial amount of them are clearly waste and must be disposed of as hazardous waste." Id.

The Rasani Affidavit described conditions at the Facility, including the lack of a temperature controlled environment, with drums and other containers exposed to the elements, "both outside and within parts of the building where the roof has partially collapsed and leaked. Based on my experience, a significant amount of these chemicals are unsaleable and must be disposed of as waste. A substantial amount of that waste will have to be handled and disposed of as hazardous waste." Id., ¶ 20. According to the Rasani Affidavit, at the inspection on July 26, 2016, Respondents' representatives were unable to identify or locate "virtually any of the waste material that they had previously identified on their own inventory list. . . . Respondents' inability to locate this waste is a very significant environmental concern." Id.

The Rasani Affidavit described corroded, unmarked drums observed at the Facility, and drums stacked as high as six on top of one another, on rotting wooden pallets. Id., ¶¶ 23-

24. The Rasani Affidavit stated that there was no sprinkler system, no means of communication, and in many instances there was no aisle space between the drums and the racks. Id. The affiant observed a drum of pigment that had leaked onto the floor, and numerous drums in poor condition: "leaking, corroding, collapsing bulging and had no aisle space between them" and stacked unsafely on pallets. Id., ¶ 24; Exhibits 23, 24, 25.

The inspection continued on the exterior of the warehouse, where flammable materials were stored under a canopy. According to the Rasani Affidavit, "[t]here were approximately 1,000 drums of flammable liquid including epoxies that contain toluene and xylene solvents. The drums were sitting on pallets stacked up to 3 high, directly on top of broken cement flooring with dirt and vegetation growing around it." Id., ¶ 25. The Rasani Affidavit noted that there was no secondary containment, and some of the drums were bulging and leaking. The affiant concluded that "[g]iven the substantial amount of flammable material and lack of security for the area, the risk for significant release or explosion is extremely high." Id., ¶ 26.

The Rasani Affidavit noted that inside the Facility, Room D, which contained drums of flammable material, did have sprinklers but had no temperature control. According to the Rasani Affidavit, the Fire Department concluded that the sprinkler system in place was inadequate. Moreover, Respondents identified that within the Facility incompatible materials are stored together, "which is extremely dangerous and could result in a fire, explosion, a release to the environment, or potentially a release of a noxious gas which could result in an evacuation of the area." Id., ¶ 30. The Rasani Affidavit concluded that "by the end of the inspection I had identified substantial violations, which existed throughout the Site. Many of these violations . . . significantly increase the potential for a catastrophic event to occur." Id., ¶ 29.

According to the Rasani Affidavit, the following violations were noted during the July 26, 2016 inspection. Specifically:

1. Failure to make a determination as to whether solid waste is a hazardous waste, in violation of Section 372.2(a)(2) of 6 NYCRR. Rasani Affidavit, ¶ 31(i).

2. Failure to have an aisle space in the storage area, in violation of Section 373-3.3(f) of 6 NYCRR. Id., ¶ 31(ii).

3. Failure to separate containers of incompatible waste, in violation of Section 373-3.9(g)(3) of 6 NYCRR. Id., ¶ 31(iii).

4. Failure to provide secondary containment for the storage areas, in violation of Section 373-1.1(d)(1)(iv)(f) and Section 373-2.9(f)(1)(i) of 6 NYCRR. Id., ¶ 31(iv).

5. Failure to place "No Smoking" signs wherever there is a hazard from ignitable or reactive waste, in violation of Section 373-3.2(h)(1) of 6 NYCRR. Id., ¶ 31(v).

6. Failure to have an internal communication system or alarm system capable of providing immediate emergency instruction, by voice or signal, to facility personnel, in violation of Section 373-3.3(c)(1) of 6 NYCRR. Id., ¶ 31(vi).

7. Failure to have a device such as a telephone or a hand-held, two-way radio capable of summoning emergency assistance from local police departments, fire departments or emergency response teams, in violation of Section 373-3.3(c)(2) of 6 NYCRR. Id., ¶ 31(vii).

8. Failure to ship hazardous waste off-site within ninety days without obtaining a Part 373 permit to store such waste for more than ninety days, in violation of Section 373.2(a)(8)(ii) of 6 NYCRR. Id., ¶ 31(viii).

9. Failure to label containers in the hazardous waste storage area with an accumulation date, in violation of Section 372.2(a)(8)(ii) and Section 373-1.1(d)(1)(ii)(c)(2) of 6 NCYRR. Id., ¶ 31(ix).

10. Failure to maintain containers in good condition, in violation of Section 373-3.9(b) of 6 NYCRR. Id., ¶ 31(x).

11. Failure to close the containers in the hazardous waste storage area, in violation of Section 373-3.9(d)(1) of 6 NYCRR. Id., ¶ 31(xi).

12. Failure to have a hazardous waste label on containers, in violation of Section 373-3.9(d)(3) of 6 NYCRR. Id., ¶ 31(xii).

13. Failure to inspect the hazardous waste storage area weekly, in violation of Section 373-3.9(e) of 6 NYCRR. Id., ¶ 31(xiii).

14. Failure to have a Personnel Training program, in violation of Section 373-3.2(g) of 6 NYCRR. Id., ¶ 31(xiv).

15. Failure to maintain and operate the Facility to minimize the possibility of a fire or explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil or surface water, in violation of Section 373-3.3(b) of 6 NYCRR. Id., ¶ 31(xv).

16. Failure to have a contingency plan, in violation of Section 373-3.4 of 6 NYCRR. Id., ¶ 31(xvi).

17. Failure to activate emergency procedures immediately, in violation of Section 373-3.4(g) of 6 NYCRR. Id., ¶ 31(xvii).

18. Failure to have land disposal notices, in violation of Section 376.1(g)(1)(viii) of 6 NYCRR. Id., ¶ 31(xviii).

19. Failure to mark batteries as "Universal Waste Batteries" or "Used Batteries," in violation of Section 374-3.2(e)(1) of 6 NYCRR. Id., ¶ 31(xix).

20. Failure to store universal waste batteries in a container, in violation of Section 374-3.2(d)(1)(i) of 6 NYCRR. Id., ¶ 31(xx).

21. Failure to report multiple spills, and to timely address and remediate such spills. Id., ¶ 31(xxi).

The affiant stated that he was "certain that a full inspection would identify a significant number of additional violations," and that the current operations at the Facility "present a very significant risk to human health and the environment." Id., ¶ 31.

The Rasani Affidavit stated that Department Staff met with Respondents, but Respondents had not addressed the significant issues at the Facility. According to the affiant, in his more than twenty years' experience, the Facility is "the worst site that I have seen." Id., ¶ 36. The Rasani Affidavit concluded that the Facility presents an imminent danger to the health or welfare of the people of the State, and that the Facility may have already caused irreversible or irreparable damage to the State's natural resources, as a result of ongoing spills and operations at the Facility. The Rasani Affidavit went on to assert that if such damage had not already occurred, "it is clear that continued operations in the same manner by Respondents are not just likely to cause such damage to the natural resources of the State, but almost certainly will result in such damages." Id., ¶ 38.

Mr. Rasani adopted the testimony in his affidavit when he took the stand at the hearing, and the Rasani Affidavit was received into the record. Tr. at 42-43. Mr. Rasani testified that EPA has assumed responsibility for payment of the Facility's electric bill. Tr. at 43-44. According to the witness, without power, there is a risk that chemicals that are not stored in a temperature-controlled environment may freeze. When the temperature rises, the drum containing the chemical may crack, and the chemical could overheat and spill out, possibly coming into contact with other, incompatible material. Tr. at 44-45. This could result in a fire, explosion, or a release of toxic fumes or toxic chemicals into the environment. Id. Mr. Rasani testified that industrial chemicals are more concentrated than chemicals used in a typical household, and that a severe reaction could result if incompatible industrial chemicals were mixed. Tr. at 46.

The witness testified that during his inspection of the facility, he identified waste that was not properly handled. Tr. at 49-50. According to Mr. Rasani, the Facility's failure to properly manage that waste increased the likelihood of a release to the environment. Tr. at 50. The witness noted that there were a number of areas at the Facility where it appeared that contamination might already have reached the ground. Mr. Rasani stated that there is an area called "back room" where the wooden floor is saturated with liquid. Tr. at 51. He testified that he observed leaking drums stacked six high in the back room. Tr. at 52. The witness

stated that "[w]e could see the liquid on the floor of the . . . building, underneath the drums." Id.

Mr. Rasani testified that, as a result of the inspection, and in light of the close proximity of two charter schools and a residential area to the Facility, he participated in referring the case to the EPA for an emergency removal. Tr. at 52-53. Mr. Rasani concluded that the Facility presented an imminent danger to the health and welfare of the people of New York State, and that there was a likelihood of irreversible or irreparable damage to the State's natural resources as a result of conditions at the Facility. Tr. at 50-51.

Testimony of Environmental Chemist Peter A. Reuben

The Reuben Affidavit stated that the Facility is located on an 8-acre parcel, with a complex of buildings including approximately 2.8 acres of warehouses and material processing space. According to the Reuben Affidavit, Respondents have historically purchased off-specification chemicals and raw materials, "which they attempt to resell." Reuben Affidavit, ¶ 21. The Reuben Affidavit stated that Respondents have failed to re-sell these materials in a timely manner, and in some instances, chemicals have been improperly stored at the Facility for over two decades. The affiant asserted that there is a large accumulation of chemicals at the Facility, "which now have no market and have to be addressed as waste." Id.

The Reuben Affidavit described Respondents' processing of some of the material at the Facility, using process equipment to grind flakes of chemicals into powder, or sift chemicals, removing oversized particles or off-specification chemicals or contaminants. According to the Reuben Affidavit, Respondents would also repackage materials, removing the brand names and attempting to re-sell the material under a generic label. The Reuben Affidavit went on to state that Respondents' operations resulted in an OSHA enforcement action, and that a representative of Respondents had informed Mr. Reuben that it would cost almost $400,000 for Respondents to comply with OSHA requirements and continue operations. The affiant stated that "[b]ased upon recent discussions and communications with Respondents, it appears that Respondents have stopped any processing at the Site, due to lack of funding and staff." Id., ¶ 22. Respondents' inability to process chemicals at the Facility further limits Respondents' ability to sell their inventory, according to the Reuben Affidavit.

The Reuben Affidavit stated that the Facility "has been and continues to be an illegal Treatment Storage and Disposal Facility under RCRA." Id., ¶ 23. The affiant noted that the Facility was the subject of substantial non-compliance, which resulted in the 2005 Order. Exhibit 1.

Exhibit 2 to the Reuben Affidavit was a series of photographs, taken during Mr. Reuben's February 19, 2015 site visit. The photographs document the following observations:

a. Chemicals stored outside directly exposed to the elements. Approximately 2,000 of the drums contained flammable chemicals. Many drums were in very poor condition, were unmarked and/or unlabeled, and were stored in an area which was not secured, secondarily contained, and lacked appropriate aisle space to allow for visual inspection. At least three feet of snow covered many of the drums.

b. Inside the Facility, thousands of drums were stored, some stacked four drums high. The majority of the drums were unmarked and/or unlabeled and significantly corroded. Some of the drums had rusted through completely. Despite this, other drums were stacked atop the compromised containers. The drums were not secured, lacked secondary containment, and there was insufficient aisle space to allow for a complete visual inspection.

Id., ¶ 27. The Reuben Affidavit stated that "given the condition of the drums and containers storing millions of pounds of chemicals at the Site, I also questioned Respondents' representatives about any waste . . . Respondents' representatives stated that all of the chemicals at the Site were product, not waste. Given that some of the drums had completely corroded through and the contents had leaked out, it was clear that this statement was false." Id., ¶ 28.

The Reuben Affidavit described the terms of the 2005 Order, which required Respondents, among other things, to assess all the material at the Facility for marketability, maintain a database of inventory, and report to the Department any materials stored for longer than 18 months. Exhibit 1, Item 4, p. 10. Any such materials for which a market could not be identified within 18 months were to be managed and disposed of in accordance with the requirements of 6 NYCRR Part 360 and/or Parts 370-74 and 376. Id.

Pursuant to the 2005 Order, Respondents were required to develop a best management practices plan ("BMP") for all of Respondents' locations in the State. The BMP would address Respondents' storage, management and disposal of materials and waste, and include a tracking and inventory system for all materials. Id., Item 5.

The BMP was submitted to the Department, and approved in 2005. Exhibit 3. The BMP stated that Respondents would not accept any additional materials for purchase unless a known market exists, as determined by Morgan Materials Inc.'s president, Donald Sadkin. Exhibit 3, ¶ 2.2. The BMP provided further that the president would undertake an annual check of the purchase date of all material in the inventory, and would notify the Department in writing if he determined that materials "will not likely be sold within the 12-month timeframe for hazardous materials or the 18-month timeframe for non-hazardous materials." Id.

Pursuant to the BMP, Respondents agreed that material would be disposed of if a market were not identified; if a market were identified but the material was not sold within two years; or if the material were beyond its useful life. Id. The BMP provided that "[a] material is not considered to be speculatively accumulated if a market does exist but Morgan Materials owns insufficient material for sale provided: The integrity of the containers is maintained. The containers are properly stored. No signs of material deterioration is visible." Id. The Reuben Affidavit stated that based upon the affiant's review and discussions, Respondents had not complied with the BMP, had not implemented best management practices, and failed to properly maintain the required inventory. Reuben Affidavit, ¶ 36.

During a subsequent inspection on July 16, 2015, "Respondents admitted to me that they had significant problems with their inventory (that their inventory was not correct)." Reuben Affidavit, ¶ 37. Mr. Reuben requested a partial inventory of all chemicals that had been stored at the Facility for five years or longer. Upon receiving the inventory, "[s]ubsequent review documented that the partial inventory report failed to list all of the chemicals stored at the Facility, and raised substantial additional concerns as to what chemicals are actually at the Facility and how long they have been stored there." Id., ¶ 39.

Moreover, according to the Reuben Affidavit, Respondents had violated Item 4 of the 2005 Order by failing to identify materials that had been warehoused for 18 months or longer, and failed to properly dispose of such materials for which a market could not be identified within 18 months of cumulative storage. In addition, Respondents had not provided the notice required by the BMP, or disposed of material if a market was not identified, or a market was identified but the material was not sold within two years, or was beyond its useful life. Finally, the Reuben Affidavit stated that Respondents were in violation of the 2005 Order and the BMP by storing drums that had deteriorated, leaked or otherwise completely rusted through, or were stored improperly. The Reuben Affidavit noted that "Respondents had accumulated substantial quantities of chemicals at the Facility for which they had not identified markets and those chemicals were waste." Id., ¶ 46.

Mr. Reuben visited the Facility again on September 17, 2015, and informed Respondents that they were in violation of the 2005 Order. Mr. Reuben directed Respondents to submit monthly reports, update the BMP, and provide cover for all chemicals stored outside. According to the Reuben Affidavit, the monthly reports (submitted during the period from October, 2015 to July, 2016) "clearly document that Respondents had enormous quantities of unsaleable chemicals in storage that were not being managed as waste or disposed of in accordance with either State regulatory requirements or the 2005 Consent Order. The monthly reports document that the Facility was moving farther out of compliance rather than into compliance." Id., ¶ 52. Respondents identified some inventory items as waste, but were unable to locate that material during a December 3, 2015 site visit.

On April 4, 2016, Mr. Reuben was informed that a portion of the roof at the Facility had collapsed, and as a result, Mr. Reuben scheduled another site visit. Mr. Reuben was accompanied by a code enforcement officer and a fire inspector from the Town of

Tonawanda. As a result of that inspection, the Town issued a violation notice dated April 26, 2016. Exhibit 16. On July 15, 2016, Mr. Reuben received an electronic copy "of what [Guy Sadkin] described as a complete inventory by date and warehouse." Reuben Affidavit, ¶ 67; Exhibit 17. According to the Reuben Affidavit, "[t]his was the first time that I got a total view of what was stored at the Facility and I learned that there was a total of approximately 13 million pounds at 380 Vulcan Street of chemicals, materials, hazardous and non-hazardous waste, some of which was stored at the Facility for more than 20 years." Id.

Mr. Reuben participated in the July 26, 2016 multi-party inspection, and the Reuben Affidavit refers to the significant number of fire code violations observed during that inspection. According to the Reuben Affidavit, "[m]ost of these violations relate to the storage of the waste. The most concerning is that flammable liquids were observed to be stored in very close proximity to a natural gas furnace in the warehouse." Id., ¶ 74. During a subsequent site visit, on August 4, 2016, Mr. Reuben was accompanied by an environmental radiation specialist for the Department, who measured the potential radioactivity of some abrasives at the Facility. The Reuben Affidavit stated that some of these abrasive materials, if found to be waste, would not be approved for disposal in Subtitle D[5] solid waste landfills, and "[t]his could substantially increase disposal costs if these abrasives have to be treated as waste." Id., ¶ 75.

The Reuben Affidavit went on to describe the activities of Dow Chemical Company, which voluntarily agreed to remove all of the Dow chemicals at the Facility. At the hearing, Mr. Reuben mentioned that third parties had contracted with Clean Harbors, which was "currently going through the inventory separating waste and shipping it off to be properly disposed of." Tr. at 27. The Reuben Affidavit also discussed an agreement Respondents entered into with a group interested in possibly investing in Respondents' business. According to the Reuben Affidavit, the Department delayed enforcement actions pending the outcome of those discussions. The investor group ultimately chose not to complete the transaction.

As discussed more fully below in the testimony of Gerard Burke, Respondents also operated storage locations at 373 Hertel Avenue and Great Arrow Drive in Buffalo, New York. Both sites were the subject of removal actions by EPA during the 1990s. The Reuben Affidavit noted that Respondents have mentioned other locations where they have operated, and stated further that "I am concerned that Respondents will expand their operations in the same illegal, uncontrolled manner" that they did at the Facility, Hertel Avenue, and Great Arrow Drive. Id., ¶ 99.

The Reuben Affidavit provided a detailed description of the lack of inventory controls. According to the affiant, the Facility is filled with containers of hazardous waste intermixed with solid waste, and most of the containers are not properly managed or labeled, making it impossible to identify the contents without sampling and testing. The Reuben Affidavit alleged that "it appears that little or no products are being sold," and that on one

[5] Subtitle D of RCRA (42 U.S.C. §§ 6941-6949) governs the disposal of non-hazardous waste and of small-quantity hazardous waste not regulated under Subtitle C of RCRA.

occasion, Respondents were unable to locate material that appeared on an inventory report as marketable. Id., ¶ 105, 111.

The Reuben Affidavit discussed Respondents' financial difficulties, and the series of layoffs that have taken place at the Facility. The Reuben Affidavit concluded that in light of the lack of employees, marketable material is unlikely to be sold and as a result will be abandoned in place. The Reuben Affidavit stated that storage conditions at the Facility have created hazards that will be difficult to address, in light of the stacked drums, inadequate aisle space, and the poor condition of the drums, pallets, and wood floor in certain areas of the Facility.

The Reuben Affidavit concluded that Respondents' failure to comply with statutory and regulatory requirements, including storing hazardous waste for unacceptable periods of time and without secondary containment, labeling, and a defined storage area, has created a danger to the health and welfare of the people of the State. The Reuben Affidavit noted the proximity of the Facility to a residential neighborhood and schools, which "exacerbates the risk to human health because of the large number of people that could be impacted if there were a spill, fire or other event at the Facility." Id., ¶ 136. According to the Reuben Affidavit, the Facility presents an imminent danger, and moreover, Respondents' activities have likely already resulted in irreversible or irreparable damage to the State's natural resources. The Reuben Affidavit concluded that if such damage has not already occurred, such damage is "not just likely, but inevitable, unless substantial emergency actions are taken to address the non-compliance at the Facility." Id., ¶ 138.

At the hearing, Mr. Reuben adopted the testimony in his affidavit, and the Reuben Affidavit was received into the record. Tr. at 29. Mr. Reuben testified that EPA now has control of the Facility, and that some third-party suppliers have contracted with Clean Harbors to inventory and separate the wastes, and arrange for proper disposal. Mr. Reuben then referred to a November 21, 2016 final disconnection notice from National Grid that was sent to Respondents. Exhibit 43. According to the witness, Donald Sadkin provided the notice to EPA's on-scene coordinator, who then forwarded the notice to Department Staff. Mr. Reuben testified that Mr. Sadkin had stopped paying for electricity at the Facility.

The witness testified that if the power is shut off at the Facility, security systems would no longer be operable, there would be no heat or lighting, and that given the time of year, without heat, water pipes in the Facility would freeze and burst. He stated that the lack of heat would affect the chemicals stored at the Facility, because containers could freeze, then bulge or burst, causing a release of the contents. Mr. Reuben testified that "[i]t is an absolute certainty that waste will be released" if the containers were to freeze. Tr. at 33.

Mr. Reuben concluded his testimony by reiterating that the Facility poses an imminent danger to the health and welfare of the people of New York State. He testified further that the conditions at the Facility are likely to result in irreversible or irreparable damage to the natural resources of the State.

Testimony of Section Chief Gerard Burke

The Burke Affidavit described the management methods and activities that the Department or EPA would have to conduct for an emergency removal action of solid and hazardous wastes from the Facility. These would include security measures to protect the surrounding community, such as fencing the site, and a community air monitoring program ("CAMP"), which would establish air monitoring points to ensure that chemical removal at the site "is not leaving the work zone or impacting the environment or the health of the community surrounding the site." Burke Affidavit, ¶ 2.[6] According to the Burke Affidavit, "[g]iven the sensitive receptors in the area surrounding the Facility, including schools, the importance of these safety/security measures is heightened substantially." Id. In addition, workers would be required to have the appropriate personal protective equipment, OSHA training, and familiarity with a site-specific health and safety plan. Exclusion and decontamination zones would be established to maintain control of the site during removal activities.

In addition, the Burke Affidavit alleged that Respondents "could significantly hinder" those activities by continuing to operate the Facility during an emergency removal action. Id., ¶ 4. According to the affiant, "Respondents could interfere with the effectiveness of the cleanup and their continued presence could create safety and health issues for Respondents, USEPA or DEC removal staff, as well as the general public." Id. Specifically, chemicals could be tracked into and out of the emergency work area or outside the Facility, and Respondents, in operating the Facility, might interfere with handling and storage of chemicals identified for removal.

The affiant explained that the removal staff would be obliged "to keep track of untrained unprotected workers which could lead to unsafe exposures," and that "[s]ince an emergency removal at the facility would involve assessing the chemicals throughout the facility, the removal team would be hindered from assessing and removing the chemicals and wastes from the site" if Respondents' operations were taking place at the same time. Id. The Burke Affidavit concluded that because of the Facility's condition, "an emergency removal would be all encompassing at the site and would require the Respondents to stop operating at the Facility while the removal is taking place to avoid increased dangers to Emergency Response staff and Respondents as well as dangers to the human health and the environment of the surrounding community." Id., ¶ 5. According to the Burke Affidavit, if Respondents were unable or unwilling to conduct the work required, "the only way this removal action can be completed by USEPA or DEC would be if Respondents are prohibited from entering the site until such time as the removal action is complete." Id., ¶ 7.

The Burke Affidavit also contains allegations concerning damage to the State's natural resources caused by Morgan Materials at 373 Hertel Avenue, Buffalo, New York.

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[6] The paragraphs in the Burke Affidavit are not numbered sequentially. Rather, the paragraphs under each heading are numbered independently. The paragraphs referenced in this hearing report all are found under the heading in the Burke Affidavit entitled "Emergency Removal Procedures and Concerns." That section of the Burke Affidavit begins on page 4.

Beginning in 1963, Morgan Materials used a warehouse at that location to store chemicals. According to the Burke Affidavit, in 1997, Respondents' operations at that location necessitated an emergency removal by EPA of approximately 20,000 drums of waste. The removal action was completed in 1999.

The Burke Affidavit stated that "[i]n July of 2003, a fire destroyed much of the Hertel Avenue warehouse and as many as 18,000 additional drums of waste and materials which Respondents still had remaining in the building." Id., ¶ 4. Cleanup activities in the wake of the fire removed all of the fire-related debris, down to the floor slab in the main part of the warehouse. According to the Burke Affidavit, subsequent investigations revealed the presence of chemicals in the soil and groundwater, including trichloroethane, tretrachloroethane, and other volatiles from Respondents' past operations. The Burke Affidavit went on to state that the Department is in the process of listing 373 Hertel Avenue as a Class 2[7] Inactive Hazardous Waste Disposal Site in the New York State Registry of Inactive Hazardous Waste sites.

The Burke Affidavit stated that "[b]ased on the existing inventory information, similar chemicals are currently being stored at the Facility and those chemicals are being stored in a similar manner to the way they were stored at 373 Hertel Avenue which caused a release to the environment at that site." Id., ¶ 5. As a result, the affiant took the position that a similar release may have occurred at the Facility, and even if such a release has not yet occurred, "continuing operations in such a fashion almost assures that a release to the environment" will take place at the Vulcan Street site. Id.

At the hearing, Mr. Burke adopted the testimony in his affidavit, and the affidavit was received into the record. Tr. at 129. Mr. Burke reiterated that the activities at the Facility were similar to those at Hertel Avenue, and that in his opinion the conditions at the Facility would cause another inactive hazardous waste site to be created. Tr. at 132. He stated that "to actually start the [remedial activities] is going to be a monumental effort so as we don't create more of a hazard during our operation, or the EPA's operation." Tr. at 134-35. The witness was asked for his estimate of the cost of the remedial activities, and he responded that "[b]ecause of the nature, it's going to be very expensive. I couldn't really guess, but it would be in the tens of millions of dollars." Tr. at 138. Mr. Burke affirmed the statements in his affidavit that concluded that the Facility is an imminent danger to the health and welfare of the people and the environment of the State, and testified that the Facility has already created irreversible damage to the State's natural resources. Tr. at 139-40.

Dougherty Affirmation

The Dougherty Affirmation stated that Department Staff met with Respondents numerous times in an effort to negotiate a settlement and bring the Facility into compliance. According to the Dougherty Affirmation, "[t]he Department's expectation was that the Respondents would assume responsibility for completing an inventory of the drums and

[7] A hazardous waste disposal site designated as Class 2 is one at which contamination constitutes a significant threat to public health or the environment. See Section 375-2.7(b)(3)(ii) of 6 NYCRR.

containers of waste on-Site, characterize the waste, and properly dispose of it." Dougherty Affirmation, ¶ 6. The Dougherty Affirmation stated that on October 27, 2016, Respondents notified the Department that they were unwilling to enter into a consent order or perform the work to bring the Facility into compliance. According to the Dougherty Affirmation, Respondents have indicated that they lack the financial resources to handle and dispose of the material on-site, or to develop an accurate inventory, and have laid off the majority of their workforce.

The Dougherty Affirmation asserted that Respondents had blocked efforts by third parties to voluntarily remove waste from the site, after Respondents had entered into an agreement to do so. Specifically, the Dougherty Affirmation alleged that Respondents "failed to move and segregate the wastes that are in their Facility as was expressly set forth in the agreement." Dougherty Affirmation, ¶ 17. According to Ms. Dougherty, after those third parties agreed to pay the contractor to collect and move the waste, Respondents refused to sign the waste manifest that would allow the waste to be removed, unless the third parties first paid the hazardous waste generator fees. At the hearing, Department Staff asked Mr. Reuben for an update and he testified that, as of the date of the hearing, third-party suppliers have contracted with Clean Harbors to remove their materials from the Facility, and the removal process is ongoing. Tr. at 27.

Testimony of Branch Chief Benjamin Keller

At the hearing, Department Staff offered the testimony of Benjamin Keller. Mr. Keller testified that he is the program coordinator for the inspections and investigations unit for half of New York State, including Buffalo and Tonawanda. He has completed between 5,000 and 7,000 building inspections. Mr. Keller stated that he reviewed inspection reports from the Town of Tonawanda, which included aerial views of the Facility. He testified that those photographs show several buildings at the Facility in close vicinity, which he characterized as a "target hazard." Tr. at 61. He explained that the term "target hazard" refers to a facility that would be vulnerable to a threat of fire as a result of a fire at another facility located nearby. Id. at 61-62. Mr. Keller also observed that there were other vulnerable locations in close proximity, including residential neighborhoods, railroads, and highways.

Mr. Keller testified at length concerning a report prepared by his staff following the July 26, 2016 inspection at the Facility. Exhibit 18. Mr. Keller also referred to photographs taken by his staff during the inspection (Exhibit 37), which he correlated with the violations observed during the inspection. Mr. Keller noted, as an initial matter, that the photographs showed what appeared to be a significant amount of dust accumulation. Tr. at 59. The witness stated that he reviewed the material safety data sheets ("MSDS") related to the chemicals stored in the areas where dust was observed. Tr. at 60. Mr. Keller testified that the MSDS indicated that all of the chemicals in question "were subject to explosion when released into the environment in concentrations that would be hazardous." Id. at 60-61.

Mr. Keller then referred to the inspection report and photographs, and discussed the following violations, characterizing them as only a representative sample, or snapshot of the violations observed:

Violation No. 1: Exhibit 18: combustible waste material accumulated; fire hazard. Mr. Keller noted that the photograph showed bags of hydrocarbon resin strewn haphazardly near an entrance, in an area where combustible dust was present (Tr. at 67-68; Exhibit 37 at 7 and 9[8]).

Violation No. 2: Exhibit 18: clearance between ignition sources not maintained. Mr. Keller testified that "cardboard combustible drums were abutted almost adjacent to the furnace." (Tr. at 105; Exhibit 37 at 36).

Violation No. 4: Exhibit 18: individual containers of hazardous materials not labeled; no hazard warning signs (Tr. at 72-74, 83, 86 and 90-91; Exhibit 37 at 13-15; 22, 25 and 29).

Violation No. 6: Exhibit 18: electrical hazards observed; improper use of extension cords, and exposed electrical connections. Mr. Keller testified that the inspection revealed a transformer damaged by weight placed on top of the transformer, with the associated conduit pulled away and exposing the internal wiring. In addition, combustible dust was present in the area, presenting a potential ignition source (Tr. at 70-71, 75-76 and 84; Exhibit 37 at 12, 17, 18, and 23).

Violation No. 7: Exhibit 18: in the flammable liquid storage room near the middle of the warehouse, the walls and ceiling are insulated with what appear to be Styrofoam panels. The flammability rating of the panels is not indicated; they are assumed to be a Class C finish, which is prohibited (Tr. at 104-05; Exhibit 37 at 35).

Violation No. 9: Exhibit 18: portable fire extinguishers mounted higher than permitted, and blocked by debris (Tr. at 69-70, 73 and 76; Exhibit 37 at 12, 14, and 17).

Violation No. 10: Exhibit 18: aisles not maintained at 36 inches; in several areas throughout the structure, chemicals were stored in aisles (Tr. at 79-80, 82 and 86-87; Exhibit 37 at 20, 21, and 25).

Violation No. 11: Exhibit 18: combustible dust accumulation; large accumulations in several areas. The witness referred to photographs showing plastic-wrapped containers on a pallet, and stated that if the pallet were to be unwrapped inappropriately, static discharge alone could ignite the dust in that area. Mr. Keller testified further that the dust-laden areas throughout the plant present a surface for a fire, once ignited, to continue to propagate throughout the building (Tr. at 64-68, 74, 99-100 and 107; Exhibit 37 at 5, 6, 9, 12, 33 and 37).

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[8] The pages of Exhibit 37 were not numbered when received; for clarity of the record and ease of reference, the ALJ added page numbers.

Violation No. 12: Exhibit 18: containers leaking product. Some have been damaged from tow motor usage; some have deteriorated to the point of leaking product. Several releases have not been cleaned up and remain a hazard (Tr. at 71-72,77, 85, 87-89, 92-93, 99-100 and 107; Exhibit 37 at 12, 15, 16, 19, 20, 23, 26-28, 30, 32-33 and 37).

Violation No. 14: Exhibit 18: the warehouse reportedly contains 15 to 20 million pounds of chemicals, per the Department; thus outside the maximum allowable quantity per control area. Mr. Keller testified that the fire code requires flammable liquids greater than 120 gallons to be stored in areas "constructed as hazardous occupancy, which raises the level of fire suppression and detection within a facility." Tr. at 101.

The fire code also requires segregation of materials into smaller quantities within a particular control area. A control area is a subdivision of the building that prevents the materials stored in that location "from being leaked or extended to another area of the building itself. It provides a fire break for those materials. It's usually a one-hour construction, fire-rated construction, that provides encapsulation of a small quantity of materials to separate it into smaller compartments within the building." Tr. at 102-03. Mr. Keller stated that in this particular instance, the limit would be 120 gallons of flammable material per control area. Despite this requirement, the witness testified that the number of totes in the facility exceeded 400 (each 330 gallons) within one control area. Mr. Keller noted that he was not aware of any recognized fire separations at the Facility, and stated that Respondents had not employed the additional levels of protection and detection required for storage of flammable materials under these circumstances. (Tr. at 101-106; Exhibit 37 at 35-36).

Violation No. 15: Exhibit 18: the outside flammable liquid storage area is not separated by at least 25 feet from vegetation, as required by the fire code. The witness testified that vegetation had grown up and around the actual containers on the exterior of the building, and that flammable vegetation had also grown near the gas main to the building (Tr. at 72, 85-86 and 89-92; Exhibit 37 at 13, 24, 28 and 29).

Mr. Keller also noted hazards to firefighters in several photos, including entrapment hazards where storage sacks were stacked on top of one another. According to Mr. Keller, in the event of a fire, firefighters could be injured or killed if the sacks fell on them, or the sacks could block their means of escape. Exhibit 37 at 9, 20 and 31. In addition, the witness testified that rack storage greater than 12 feet high, such as the storage at the Facility, creates additional risks and therefore additional requirements. Mr. Keller testified that "[i]t poses an additional fuel load, and when fire burns it burns in an upward directions similar to what we call a chimney effect. So the more combustible materials that you have in a stack going towards the ceiling creates a larger quantity of materials that can burn and continue to burn vertically throughout the facility, and it makes it easier to transmit that fire rather rapidly throughout the facility itself." Tr. at 98. The witness stated that the Facility had not complied with the additional fire suppression and detection required for storage over 12 feet high. Tr. at 108.

In addition, the witness testified regarding an area where part of the sprinkler system piping was cut off. Tr. at 80; Exhibit 37 at 21. Mr. Keller stated that the local fire service would be relying upon any of the fire protection systems in the Facility to help extinguish the fire at the point of origin, and that in the condition noted in the photograph, the system would be of no assistance. In another area of the Facility, according to the witness, there were no sprinkler pipes above certain storage areas where drums were stacked, and as a result, there would be no way for firefighters to reach the source of a fire inside the stack and effectively extinguish the fire. The fact that National Grid issued a disconnect notice to the Facility also raised concerns for this witness because the air in the sprinkler system was maintained under pressure by an electric-powered air compressor. Mr. Keller stated that if the air compressor lost power, the system could charge with water, and if the pipes were to freeze, water would flood the facility. Without power to the building, the fire alarm monitoring system would be unable to provide notification of the water flowing through the pipes. Tr. at 93-96. The witness confirmed that the only area of the Facility that is protected by a fire suppression system is the newer part of the warehouse.

Mr. Keller stated that if the Facility were to ignite, it would be very difficult for firefighters to control the fire. Because of the unknown nature of the chemicals stored there, firefighters would be very reluctant to perform a "direct attack" on the fire, in light of the risks to firefighting personnel. A "direct attack," according to the witness, "would be an offensive operation from the fire service perspective, which means that we would deploy firefighters to the interior of the building, attempt to locate the source of the fire and extinguish it at its source to prevent it from spreading to the remainder of the building." Tr. at 109. This type of firefighting effort is preferred. Tr. at 110.

Mr. Keller testified that, instead, a fire at the Facility would be subject to a defensive operation, or indirect attack. According to the witness, "firefighters from a distance would set up large hose streams from ladder trucks and other vehicles and apply copious amounts of water to the facility in hopes of limiting the fire spread to the best of their ability . . . it's very difficult to apply water directly to the source of the fire in that type of scenario." Tr. at 109-110. According to Mr. Keller, a defensive mode would result in multiple large hose streams, and that "typically, one of those large hose streams flows anywhere between 1,000 and 2,000 gallons a minute." Tr. at 110-111. The witness stated that as a result, millions of gallons would flow onto, and run off the site, and there would be a large release of smoke. Persons in target locations near the Facility would have to be evacuated, or an attempt would be made to shelter them in place temporarily, during the several days that it would likely take to extinguish the blaze.

Mr. Keller testified that the large amount of water used to fight the fire would collect chemicals from inside the Facility, would saturate the soil and make its way into storm drains. The witness stated that it is highly likely that there would be a release to the environment in the event of a fire. Mr. Keller observed that access to the Facility is very limited, and there is debris surrounding the fence line which would hinder access. Moreover,

adjoining facilities would be at risk of catching fire as well. The witness concluded that, in his opinion, the Facility poses an imminent danger to human health and the environment.

Testimony of Tracy McLaverty

Tracy McLaverty, a former employee at the Facility, appeared pursuant to a subpoena (Exhibit 48) served upon him by Department Staff. Mr. Slater stated during the telephone conference at the beginning of the hearing that he did not represent Mr. McLaverty, and when Mr. McLaverty took the stand he was advised of his right to obtain counsel. Tr. at 12; 142. Mr. McLaverty chose to proceed with his testimony. Tr. at 142.

Mr. McLaverty testified that he was no longer employed at the Facility, and that his last day on the job was November 23, 2016. Tr. at 143-44. He stated that he was the general manager of Morgan Materials Incorporated. Tr. at 144-45. The witness testified that when he came to the company, "[t]he inventory was a mess." Tr. at 149. Mr. McLaverty attempted to address the situation by calling for a complete inventory, but testified that he was "never sure" of exactly how much material was stored at the Facility, and that he could not confirm that the inventory records submitted to the Department were accurate. Tr. at 150-51; 162-63; 168-69.

The witness stated that from time to time spills occurred at the Facility, and that those spills "were cleaned up immediately mostly, until we stopped having the staff capable of doing it." Tr. at 170-71. He stated that he did not think that any of the spills that he witnessed were over the reportable limit. Tr. at 171. Mr. McLaverty testified that he did not recall any spills of flammable material, but did recall spills of resins, and that he believed that the resins spilled were not hazardous. Tr. at 171-72. He testified that he noticed drums that had completely rusted through, and that he believed that the Facility "got rid of 750 drums at my insistence because the drums were becoming useless." Tr. at 174-75.

Mr. McLaverty testified that repairs to the building are necessary, and that "[i]f you gave me the building, I wouldn't have taken it." Tr. at 185. According to the witness, the entire roof will collapse within the next two years, and that there is an imminent danger of collapse "particularly during this coming spring." Tr. at 185-86; 190. He also described the "pigeon room," a room where broken windows allow birds to enter and nest in the area. Tr. at 184.

Mr. McLaverty went on to testify that he was aware "for some time, a couple of years, that we should concentrate on getting rid of flammables. I was responsible for building an extension to the flammable tents, and I said, this is no damn good, we need to get a proper facility for this, and this particular operation will last maybe two years before the concrete starts to back up." Tr. at 191. The witness went on to state that "my predictions are actually coming true. The concrete is backing up, and the whole thing's become a mess." Id. Mr. McLaverty stated that the present containment area was never properly designed, and it was also out in the open, where the drums were exposed to the weather. Tr. at 192. The witness stated that he had requested funds from Mr. Donald Sadkin in order to dispose of the

flammables at the Facility, but that no funds were forthcoming. Tr. at 201-02. Mr. McLaverty acknowledged that, based upon the testimony of Mr. Keller, the handling and management of the flammables at the Facility created an increased risk of fire. Tr. at 203.

Mr. McLaverty stated that the Facility lacked the resources to dispose of waste, and that he "was trying to tell Mr. Donald Sadkin that just about everything within the building was waste." Tr. at 204. He went on to state that Mr. Sadkin would view materials as product when they were, in fact, waste, but went on to testify that "sometimes he justified himself by selling it . . . he was able to generate markets for stuff which was frankly waste." Tr. at 207-208. According to Mr. McLaverty, Mr. Sadkin "needs psychiatric assistance . . . he's mentally not working properly." Tr. at 205.

The Donald Sadkin Affidavit

As discussed above, Respondents submitted the affidavit of Donald Sadkin. The affidavit is considered in this hearing report, but is given little weight. Donald Sadkin failed to respond to a subpoena served upon him, and Respondents did not appear at the hearing. As a result, Department Staff was unable to cross-examine Mr. Sadkin. Moreover, the evidence offered by Department Staff through the affidavits, as well as the testimony and evidence at the hearing, establishes by a preponderance of the evidence that the Order should be continued.

The Sadkin Affidavit states that Mr. Sadkin is the chief executive officer "of MORGAN MATERIALS, INC. (PREVIOUSLY KNOWN AS MORGAN CHEMICALS, INC.), MORGAN GLOBEX, INC., AND NORTH SEA MINING & MINERALS, LTD." Sadkin Affidavit, ¶ 1 (capitals in original). As an initial matter, Respondents argued that the Department failed to show that any conditions or activities at the Facility presented an imminent or even likely threat of harm to health, welfare, or the environment. According to the Sadkin Affidavit, "the SAO seems to be supported by the simple claim that the legal storage of industrial materials or chemicals (occurring ubiquitously and routinely throughout the State and country) means that someday they could, some day, some way, possibly leak or explode or start on fire." Sadkin Affidavit, ¶ 4. The affiant characterized this claim as "pure conjecture" and wholly insufficient to meet the Department's burden of proof pursuant to ECL Section 71-0301. Id.

With respect to the photographs that accompanied the SAO, the Sadkin Affidavit asserted that "virtually all of the materials stored at the Facility that are reflected in the photographs are stored in leak-proof containers, drums, bags, and totes, palletized, covered and/or sealed in plastic, properly stacked or stored on racks, and stored under roof or cover. The photographs may imply some housekeeping concerns, but do not indicate an imminent threat to health, welfare, the environment, or natural resources." Id., ¶ 5. This statement is not supported by the evidence, and suggests willful disregard of the risks posed by the Facility in its current condition.

The Sadkin Affidavit contended that the Department had made no showing "that activities at the Facility have already caused any release, spillage, or discharge of chemicals into the environment. There are no soil or groundwater samples we are aware of that show there is contamination today." Id., ¶ 7. According to the Sadkin Affidavit, the Department had not shown (through sampling, characterization, or analysis) "that all or some significant portion of the materials on site are hazardous or are hazardous waste by definition. Nor does the fact that any of the material at the Facility is flammable serve to support a claim that it represents an imminent threat to the environment or public safety." Id. This statement overlooks the fact that it is the improper management of flammables, not the mere presence of flammable material at the Facility, which increases the risk. The Sadkin Affidavit asserted that the response to a fire at the Facility "is not in respondents' control, access is not limited if you come to the gate, we cannot control [where] firefighting waste would go but believe it would drain into publically available drainage facilities, our buildings comply with Fire Code requirements, and our storage . . . is safe." Id., ¶ 10.

The Sadkin Affidavit was not accompanied by any exhibits, and did not make reference to any documentation in support of the statements therein. There is no record evidence to show that Mr. Sadkin has the expertise or experience to rebut the testimony of Department Staff's witnesses. The only testimony on this point is Mr. McLaverty's statement that he regarded Mr. Sadkin "as an expert relating to the chemicals that he was involving himself with." Tr. at 179. Mr. McLaverty based this observation on a library of chemical books kept by Mr. Sadkin, and Mr. Sadkin's "self-proclaimed knowledge of the chemicals that he is buying." Id. Mr. McLaverty's testimony is insufficient to establish that Mr. Sadkin's statements regarding the nature of the material stored at the Facility, or the risks associated with such storage, should be given greater weight than the testimony of Department Staff's witnesses.

Many of the statements in the Sadkin Affidavit are directly contradicted by the testimony of Department Staff's witnesses. Specifically, those witnesses stated that containers were corroded, bulging, and leaking, stacked unsafely and housed in a manner that would increase the likelihood of a release. The Sadkin Affidavit acknowledges only "some housekeeping concerns" at the Facility. Sadkin Affidavit, ¶ 5. To the contrary, the evidence in the record establishes that the conditions at the Facility go far beyond housekeeping concerns, and instead pose an imminent hazard.

Mr. Keller described numerous violations of the fire code in his testimony, but the Sadkin Affidavit states generally only that "legally compliant fire suppressions systems are in place" and that the Facility is grandfathered from more current requirements. Id., ¶ 6. In light of Mr. Keller's experience and expertise, his testimony is afforded more weight than the statements offered by Respondents. Department Staff met its burden to demonstrate that in the event of fire, it is reasonable to conclude that the conditions at the Facility would present a significant hazard to any occupants, firefighters, and the residents and buildings in close proximity, as well as to the environment and the State's natural resources.

Although, as Respondents point out, Department Staff has not provided sampling to demonstrate that contamination has reached the soil or groundwater at the Facility, the evidence and testimony is sufficient to demonstrate a strong likelihood of such contamination either at present or in the very near future. While Respondents seek to characterize all of the materials at the Facility as "product," the evidence and testimony by Department Staff's witnesses and Mr. McLaverty with respect to the state of the Facility refute Respondents' assertions on this point. It is undisputed that Respondents lack the financial wherewithal to manage the materials at the Facility in a manner that would minimize the risk of harm, or to sell the material they own so as to obtain the necessary funding to do so. Absent any reliable inventory or other means of identifying the material, given the requirements of the 2005 Order, Respondents' non-compliance is enough to support a reasonable inference that the materials stored are waste, not product.

Moreover, the record demonstrates that Respondents failed to comply with the terms of the 2005 Order, or the BMP, which required them to limit the amount of long-term waste storage at the Facility, and arrange for disposal if a market for a particular product could not be identified. The lack of proper labeling on the material at the Facility raises additional concerns, making a complete inventory impossible. As a result, Respondents cannot establish whether a particular container holds hazardous material, waste, or flammable material.

Respondents' contentions that all of the materials are "useful products," and were not "intended to be discarded" notwithstanding, it is undisputed that Respondents entered into the 2005 Order, and provided a BMP that required Respondents to dispose of waste for which a market could not be found within a specified period of time. Moreover, the Sadkin Affidavit must be viewed as self-serving, because the affiant has a financial interest in avoiding the costs related to the handling and proper disposal of materials at the Facility. The affiant offered no evidence (such as contracts or negotiations with customers) that he will be able to sell the material at the Facility before the roof collapses entirely, or some other catastrophic event occurs.

The Sadkin Affidavit set forth the measures Respondents had undertaken to comply with the summary abatement order. According to the Sadkin Affidavit, Respondents are no longer accepting material at the Facility, and have continued their efforts to sell the material on-site, or cooperate with third parties to remove material. The Sadkin Affidavit stated that the Facility "has been secured, is fenced, and we have perpetual Sonitrol security in place." Sadkin Affidavit, ¶ 29. The Sadkin Affidavit asserted further that Respondents were "not required by law to install any further or additional fire suppression systems or implement any additional fire control measures in the buildings (as grandfathered)." Id., ¶ 31. According to the Sadkin Affidavit, Respondents informed Department Staff of the other locations where Respondents' materials were stored, and have provided, and will continue to provide, Department Staff with access to the Facility for inspections.

The remainder of the Sadkin Affidavit responded to the allegations in the Order, alleging that "there are approximately 16 million pounds of total chemicals at the Facility

now of which only 500,000 pounds is potentially flammable and the vast majority of all flammable materials are in covered buildings that have sprinkler systems for fire suppression and is [sic] segregated from incompatible material." Id., ¶ 40. The Sadkin Affidavit stated further that "[a]ll flammables are located under roof today" and reiterated that Department Staff had not established that there had been any significant release of a hazardous substance into soil or groundwater "that would or could migrate to off-site receptors." Id., ¶ 42.

The Sadkin Affidavit went on to state that none of Donald Sadkin's actions detailed in the Order "were undertaken in my individual capacity or would constitute actions allowing the piercing of the corporate veil to impose individual liability on me." Id., ¶ 45. According to the Sadkin Affidavit, "flammable liquids are not located in close proximity to a natural gas furnace – the warehouse where all flammable liquids are stored is not heated." Id., ¶ 49. As discussed during the testimony of Mr. Keller, cardboard combustible drums were observed in close proximity to the furnace. Tr. at 105.

As noted above, the Sadkin Affidavit has been received into the record for the Commissioner's consideration. The Commissioner may elect to disregard the Sadkin Affidavit as untimely or exclude it from the record, in light of the lack of opportunity for cross-examination of the affiant, and his willful disregard of the subpoena served upon him.

Alternatively, this hearing report recommends that the Sadkin Affidavit be given little weight. The material points made in the Sadkin Affidavit were fully refuted by Department Staff, and as a result, the Sadkin Affidavit is of limited evidentiary value.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent Morgan Materials Inc. is a New York State Domestic Business Corporation, authorized to do business in the State of New York. Respondent is engaged in the business and commercial operation of purchasing, processing, selling and offering for re-sale chemical substances and materials. Order, ¶ 7.

2. Respondent Morgan Globex, Inc. is a New York State Domestic Business Corporation authorized to do business in the State of New York. Respondent is engaged in the business and commercial operation of purchasing, processing, selling and offering for re-sale chemical substances and materials. Order, ¶ 8.

3. Respondent Morgan Chemcial, Inc. is a New York State Domestic Business Corporation authorized to do business in the State of New York. Respondent is engaged in the business and commercial operation of purchasing, processing, selling and offering for re-sale chemical substances and materials. Order, ¶ 9.

4. Respondent Donald Sadkin is the chief executive officer of Morgan Materials Inc. (previously known as Morgan Chemicals, Inc.), Morgan Globex, Inc., Morgan Chemcial, Inc., and North Sea Mining & Minerals, Ltd. Order, ¶ 14; Sadkin Affidavit, ¶ 1.

5. Respondents Morgan Materials Inc., Morgan Globex, Inc., Morgan Chemcial, Inc., Donald Sadkin as Chief Executive Officer of Morgan Materials Inc., Morgan Chemcials, Inc., Morgan Globex, Inc. and Donald Sadkin individually currently operate and store solid and hazardous waste, chemicals, and materials at various locations. Order, ¶ 10.

6. Respondent North Sea Mining & Minerals, Ltd.is a Domestic Business Corporation authorized to do business in the State of New York, and owns the real property at 380 and 416 Vulcan Street, Tonawanda, Erie County, New York. Order, ¶ 12. Respondent Morgan Materials Inc. owns the real property at 408 Vulcan Street. Order, ¶ 13. The street address of 380 Vulcan Street includes various buildings on four separate tax parcels, including 380 Vulcan, 400 Vulcan, 408 Vulcan, and 416 Vulcan Street (collectively, the "Facility"). Order, ¶ 11.

7. The Facility is the subject of a summary abatement order dated November 17, 2016.

8. The Facility is located on an 8-acre parcel, with a complex of buildings, including approximately 2.8 acres of warehouses and material processing space. Reuben Affidavit, ¶ 20. The Facility is located in close proximity to residential neighborhoods, as well as two charter schools. Rasani Affidavit, ¶ 11 and Exhibit 22.

9. Morgan Materials Inc. entered into an order on consent (effective date January 31, 2005) with the Department. Reuben Affidavit, ¶ 24, and Exhibit 1. Pursuant to the terms of the 2005 Order, Respondents agreed to develop best management practices and create a management system plan. Reuben Affidavit, ¶ 31; Exhibit 1. Respondents' plan required that Respondents will not accept new materials for purchase unless a known market exists, and that materials would be properly maintained at the Facility. Reuben Affidavit, ¶ 33; Exhibit 3.

10. The plan required further that if materials would not be sold within a twelve-month timeframe (for hazardous materials) or an eighteen-month timeframe (for non-hazardous materials) Respondents would notify the Department. Reuben Affidavit, ¶ 33; Exhibit 3.

11. Respondents failed to comply with the terms of the 2005 Order and the management system plan. Reuben Affidavit, ¶¶ 36; 41-47.

12. Respondents have not maintained a complete and correct inventory of product or waste at the Facility. Reuben Affidavit, ¶¶ 102-120. As a result, it is unknown what chemicals, materials, flammables, or hazardous waste are stored at the Facility, or how long they have been there.

13. Respondents have accumulated approximately 13,000,000 (thirteen million) pounds of chemicals at the Facility, and a substantial amount of that material consists of

hazardous and non-hazardous waste. Reuben Affidavit, ¶ 67. Some of the material has been stored at the Facility for more than twenty years. Id.; Rasani Affidavit, ¶ 18.

14. On April 4, 2016, Respondents notified Department's Region 9 office that part of the roof at the Facility had collapsed. To date, the roof has not been completely repaired. Rasani Affidavit, ¶ 10.

15. On July 26, 2016, personnel from the Department's Region 9 and Central Offices, the EPA, the New York State Division of Homeland Security and Emergency Services, OSHA, the Buffalo Sewer Authority, the Tonawanda Fire Department, and the Town of Tonawanda Building Code Enforcement conducted a multi-party inspection of the Facility. Rasani Affidavit, ¶ 15; Reuben Affidavit, ¶¶ 70-71. A number of violations were identified during that inspection. Rasani Affidavit, ¶ 31.

16. In excess of 2,000 drums and intermediate bulk containers, or "totes" of flammable materials are stored inside and outside the warehouses at the Facility. Rasani Affidavit, ¶ 19. Most of the materials stored at the Facility are not maintained in a temperature-controlled environment, and many of the containers are exposed directly to the elements. Rasani Affidavit, ¶ 21.

17. In many instances, containers of material were observed to be bulging, corroded, and/or leaking. Rasani Affidavit, ¶ 22-25. In addition, drums were stacked on top of one another without adequate support. Id. The drums are not secured, lack secondary containment, and sufficient aisle space is not maintained to allow for a complete visual inspection. Reuben Affidavit, ¶ 27; Exhibit 2.

18. Due to the substantial amount of flammable material at the Facility, as well as the lack of security, the risk for significant release or explosion is extremely high. Rasani Affidavit, ¶ 26. Numerous fire code violations were observed during the inspection, and in the event of fire, the Facility would pose a significant risk to occupants, firefighters, and neighboring residents. Tr. at 56-120.

19. Respondents lack the financial resources to address the conditions at the Facility. Marketable material is unlikely to be sold, and will ultimately be abandoned in place, requiring removal. Reuben Affidavit, ¶¶ 113-120.

20. Respondents also operated storage locations at 373 Hertel Avenue and Great Arrow Drive in Buffalo, New York. Both sites were the subject of removal actions by EPA during the 1990s. Reuben Affidavit, ¶¶ 89-99.

21. The evidence establishes significant violations of the ECL and the Department's regulations, including but not limited to violations of ECL Article 27, Title 9 and Parts 360, 370 through 374, and 376 of 6 NYCRR, as well as the terms of the 2005 Order. Rasani Affidavit, ¶ 31; Reuben Affidavit, ¶ 41. As set forth in ¶ 31 of the Rasani Affidavit, Respondents failed to make the required hazardous waste determinations, as

required by Section 372.2(a)(2) of 6 NYCRR. Respondents violated numerous provisions of Part 373 of 6 NYCRR by failing to separate containers of incompatible waste, provide secondary containment and maintain required aisle space in storage areas, and properly label, maintain, and close containers of hazardous waste. Respondents did not inspect the hazardous waste storage area weekly, did not have a personnel training program or contingency plan, and did not maintain the Facility to minimize the possibility of a release of hazardous waste. Containers were stored at the Facility in excess of ninety days without a permit. The Facility did not have the required "No Smoking" signs, an internal communication or alarm system, or a means of summoning emergency assistance from local police, fire, or emergency responders. Respondents also violated Section 376.1(g)(1)(viii) of 6 NYCRR by failing to have land disposal notices, and violated Part 374 of 6 NYCRR by failing to mark universal waste batteries or store universal waste batteries in a container. Finally, Respondents did not timely report or address multiple spills.

22. Respondents' failure to comply with statutory and regulatory requirements at the Facility has created an imminent danger to the health and welfare of the people of the State. Moreover, Respondents' activities have likely already resulted in irreversible or irreparable damage to the State's natural resources, and if such damage has not already occurred, it is likely to occur unless emergency actions are undertaken promptly to address the non-compliance at Respondents' Facility.

RECOMMENDATION

The testimony and documentary evidence offered by Department Staff establishes that Respondents are causing, engaging in or maintaining a condition or activity which presents an imminent danger to the health or welfare of the people of New York State, through the continued operation of the Facility. Moreover, the record demonstrates that continued operation of the Facility is likely to result in irreversible or irreparable damage to the State's natural resources.

For the reasons set forth above, the November 17, 2016 summary abatement order should be continued.