STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 27 of the Environmental Conservation Law (ECL) and Title 6, Parts 372 and 373 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

ORDER

DEC File No.
R5-11122-2017

-by-

ANDREW PATENAUDE and W.W. PATENAUDE SONS, INC.,

Respondents.

This administrative enforcement proceeding concerns allegations that Andrew Patenaude and W.W. Patenaude Sons, Inc. (respondents) violated numerous provisions of ECL article 27 and 6 NYCRR parts 372 and 373 relating to the generation, storage, and disposal of hazardous waste at a facility located at 3 Best Avenue, Stillwater, Saratoga County, New York (facility). Respondents were operating a commercial painting company from this location.

Staff of the New York State Department of Environmental Conservation (DEC or Department) commenced this administrative proceeding by serving a notice of hearing and complaint dated June 28, 2017, on respondents by certified mail and first class mail. Respondents filed an answer dated July 17, 2017, denying the alleged violations in the complaint and asserting one affirmative defense. Administrative Law Judge (ALJ) Richard A. Sherman of the Department's Office of Hearings and Mediation Services was assigned to this matter.

By its complaint, Department staff alleges that respondents violated 19 provisions of ECL article 27, 6 NYCRR part 372, and 6 NYCRR part 373. Specifically, staff alleges that respondents violated the following:

1. 6 NYCRR 373-1.2(c), by failing to obtain a 6 NYCRR part 373 permit to construct or operate a new hazardous waste management facility (complaint ¶¶ 3, 4);
2. 6 NYCRR 372.2(a)(2), by failing to make hazardous waste determinations for waste being generated (complaint ¶¶ 5, 6);
3. 6 NYCRR 372.2(a)(8)(ii), by storing hazardous waste onsite for in excess of 90 days (complaint ¶¶ 7, 8);

4. 6 NYCRR 373-1.1(d)(1)(iii)(a), by failing to have secondary containment at a facility that stores over 8,800 gallons of liquid waste (complaint ¶¶ 9, 10);

5. 6 NYCRR 372.2(a)(8)(ii), by failing to mark the date of accumulation on drums and containers of waste (complaint ¶¶ 11, 12);

6. 6 NYCRR 373-3.9(b), by failing to transfer hazardous waste from containers in poor condition (complaint ¶¶ 13, 14);

7. 6 NYCRR 373-3.9(d), by failing to keep containers of stored hazardous waste closed when not adding or removing contents (complaint ¶¶ 15, 16);

8. 6 NYCRR 373-3.9(d)(2), by failing to ensure containers of hazardous waste are not handled in a manner that may rupture the container (complaint ¶¶ 17, 18);

9. 6 NYCRR 373-3.9(d)(3), by failing to mark "hazardous waste" on containers of hazardous waste (complaint ¶¶ 19, 20);

10. 6 NYCRR 373-3.9(e), by failing to inspect containers of hazardous waste at least weekly (complaint ¶¶ 21, 22);

11. 6 NYCRR 373-3.2(h)(1); by failing to post "no smoking" signs by drums containing ignitable or reactive waste (complaint ¶¶ 23, 24);

12. 6 NYCRR 373-3.2(g)(4), by failing to maintain required training records and other documents at the facility (complaint ¶¶ 25, 26);

13. 6 NYCRR 373-3.2(g)(1)(i-iii), by failing to provide formal training intended to ensure compliance with 6 NYCRR subpart 373-3 (complaint ¶¶ 27, 28);

14. 6 NYCRR 373-3.2(g)(2), by failing to maintain training records at the facility (complaint ¶¶ 29, 30);

15. 6 NYCRR 373-3.2(g)(3), by failing to have formal training regarding compliance with 6 NYCRR subpart 373-3 (complaint ¶¶ 31, 32);

16. 6 NYCRR 373-3.2(g)(5), by failing to maintain required training records regarding 6 NYCRR subpart 373-3 compliance training at the facility (complaint ¶¶ 33, 34);

17. 6 NYCRR 373-3.3(b) by failing to operate a hazardous waste management facility in a manner to reduce the likelihood of fire, explosion, or release (complaint ¶¶ 35, 36);

18. 6 NYCRR 373-3.4(b)(1), by failing to have a contingency plan for the facility (complaint ¶¶ 37, 38); and

19. ECL 27-0914, by disposing (through abandonment of the site) hazardous waste without authorization (complaint ¶¶ 39, 40). [1]

Respondents raised an affirmative defense based on a foreclosure proceeding that the New York Business Development Corporation commenced in or about 2015 by which respondents were required to vacate the facility. Respondents contend that, since the foreclosure, they did not have any control or access to the site. Furthermore, respondents claim that the New York Business Development Corporation informed respondents that the New York Business Development Corporation would dispose of any hazardous material that was on site and "charge back" respondents for disposal costs (*see* Hearing Report at 5).

[1] Notwithstanding previous direction (*see e.g. Matter of RGLL, Inc. and FRJH, Inc.*, Decision and Order of the Commissioner, Dec. 29, 2009, at 5 n 4), Department staff failed to number the causes of action in its complaint. To address this, the ALJ has numbered each violation as a separate cause of action (*see* Hearing Report at 4 n 2), and I am utilizing the ALJ's approach and numbering here.

Department staff seeks a civil penalty in the amount of six hundred twenty-five thousand dollars ($625,000) and an order directing respondents to properly store, test, transport, and dispose of all abandoned hazardous waste at the facility, and to correct all other violations as set forth in the complaint.

The ALJ prepared the attached hearing report, in which he recommends that I:

- dismiss respondents' affirmative defense (*see* Hearing Report at 19);
- hold respondents Andrew Patenaude and W.W. Patenaude Sons, Inc., liable for violations of ECL 27-0914 and numerous provisions of 6 NYCRR parts 372 and 373 (*see* Hearing Report at 7-19);
- assess a civil penalty of six hundred twenty-five thousand dollars ($625,000) against respondents as Department staff has requested; and
- direct respondents to test all waste remaining at the site and to properly dispose of all waste that is determined to be hazardous waste.

I adopt the ALJ's findings of fact and conclusions of law as set forth in the hearing report but modify the recommendations as to penalty and remedial relief as addressed in my comments below.

Background

As set forth in the ALJ's hearing report, respondent Andrew Patenaude is President and Chief Executive Officer (CEO) of W.W. Patenaude Sons, Inc. (*see* Hearing Report at 2 [Finding of Fact No. 2]). Respondent W.W. Patenaude Sons, Inc., is a domestic business corporation, incorporated in 1973, which was formerly located at 3 Best Avenue, Stillwater, New York (*see* Hearing Report at 2 [Finding of Fact No. 1]). Respondents operated a commercial painting company at that location, but ceased operations at the facility on or about August 21, 2015 (*see* Hearing Report at 3 [Finding of Fact No. 9]).

Prior to the cessation of operations at the facility, Department staff received telephone complaints on April 9, 2015, regarding an uncovered pile of used sand blast silicate stored outside the facility (*see* Hearing Report at 2 [Finding of Fact No. 3]; Exhibit 30). Department staff conducted an inspection on April 21, 2015 (April 2015 inspection). By DEC letter dated May 12, 2015 (May 2015 DEC Letter), Department staff advised respondents that "no violations were observed during [the April] inspection of the facility" (Hearing Report at 2 [Finding of Fact No. 6]; Exhibit 16). Department staff characterized respondents as conditionally exempt small quantity generators (*see* DEC Inspection Form [April 2015 inspection] Part IV, at 1-5, attached to Exhibit 16) to which a number of hazardous waste regulatory requirements would not apply or would only apply in modified form (*see* Exhibit 13).

On August 17, 2015, the Department received a telephone call that containers and drums were outside on the property (*see* Hearing Report at 3 [Finding of Fact No. 7]). On August 21, 2015, and August 24, 2015, Department staff conducted hazardous waste compliance inspections at the facility and issued a notice of violation to respondents dated November 2, 2015, which identified a number of violations of 6 NYCRR parts 370-374 and 376 (*see* Hearing Report at 3

[Findings of Fact Nos. 8, 10, and 12], Exhibits 3, 18, and 22). In the inspection form relating to the August 21, 2015, inspection, Department staff characterized respondents as large quantity generators to which a wider array of hazardous waste regulatory requirements applied (*see* DEC Inspection Form [August 21, 2015 inspection] Part IV, at 1-5, attached to Exhibit 22).[2]

Department staff conducted further compliance inspections at the facility on February 16, 2017, and May 26, 2017 (*see* Hearing Report at 3-4 [Findings of Fact Nos. 13 and 14]). This proceeding was subsequently commenced.

Liability

The ALJ initially determined that both respondents were responsible for the overall operation of the facility and were liable as "operators" (*see* Hearing Report at 6). The ALJ concluded, however, that Department staff did not meet its burden to prove that either respondent was an owner of the facility (*see id.*). The ALJ then undertook an evaluation of each of the violations identified by staff.

The ALJ determined that Department staff failed to prove by a preponderance of the record evidence that respondents:

- violated 6 NYCRR 373-1.2(c), by failing to obtain a permit pursuant to 6 NYCRR part 373 to construct or operate a new hazardous waste management facility (complaint ¶¶ 3, 4) (*see* Hearing Report at 7)(first cause of action);
- violated 6 NYCRR 373-1.1(d)(1)(iii)(a) by failing to have secondary containment at a facility that stores over eight thousand, eight hundred (8,800) gallons of liquid waste (*see* Hearing Report at 10)(fourth cause of action); and
- violated 6 NYCRR 373-3.2(g)(2) by "ha[ving] no training records at the facility" (*see* Hearing Report at 16)(fourteenth cause of action).

I have reviewed the record and concur with the ALJ's dismissal of these three causes of action.

The ALJ determined that respondents violated each of the remaining regulatory provisions that staff had cited, including:

- 6 NYCRR 372.2(a)(2), by failing to make required hazardous waste determinations for waste being generated at the facility (*see* Hearing Report at 7-9) (second cause of action);
- 6 NYCRR 372.2(a)(8)(ii), by storing hazardous waste onsite in excess of 90 days (*see* Hearing Report at 9-10) (third cause of action);
- 6 NYCRR 372.2(a)(8)(ii), by failing to mark the date of accumulation on drums and containers of waste (*see* Hearing Report at 10-11) (fifth cause of action);
- 6 NYCRR 373-3.9(b), by failing to transfer hazardous waste from containers in poor condition (*see* Hearing Report at 11) (sixth cause of action);

[2] The record is unclear whether it was solely the consolidation and abandonment of product and waste material at the facility that led to a reclassification of generator status (*see* Transcript at 198-201).

- 6 NYCRR 373-3.9(d), by failing to keep containers of stored hazardous waste closed when not adding or removing contents (*see* Hearing Report at 11-12) (seventh cause of action);
- 6 NYCRR 373-3.9(d)(2), by failing to ensure that containers of hazardous waste were not handled in a manner that may rupture the containers (*see* Hearing Report at 12) (eighth cause of action);
- 6 NYCRR 373-3.9(d)(3), by failing to mark "Hazardous Waste" on containers of hazardous waste (*see* Hearing Report at 12-13) (ninth cause of action);
- 6 NYCRR 373-3.9(e), by failing to inspect containers of hazardous waste at least weekly (*see* Hearing Report at 13) (tenth cause of action);
- 6 NYCRR 373-3.2(h)(1), by failing to post "no smoking" signs by drums containing ignitable or reactive waste (*see* Hearing Report at 14) (eleventh cause of action);
- 6 NYCRR 373-3.2(g)(4), by failing to maintain required training records and other documents at the facility (*see* Hearing Report at 14-15) (twelfth cause of action);
- 6 NYCRR 373-3.2(g)(1)(i-iii), by failing to provide formal training intended to ensure compliance with 6 NYCRR subpart 373-3 (*see* Hearing Report at 15-16) (thirteenth cause of action);
- 6 NYCRR 373-3.2(g)(3), by failing to have formal training for hazardous waste management at the facility (*see* Hearing Report at 16-17) (fifteenth cause of action);
- 6 NYCRR 373-3.2(g)(5), by failing to maintain required training records for its employees (*see* Hearing Report at 17) (sixteenth cause of action);
- 6 NYCRR 373-3.3(b), by failing to operate the facility in a manner to reduce likelihood of fire, explosion, or release (*see* Hearing Report at 17-18) (seventeenth cause of action);
- 6 NYCRR 373-3.4(b)(1), by failing to have a contingency plan for the facility (*see* Hearing Report at 18) (eighteenth cause of action); and
- ECL 27-0914, by disposing (through abandonment of the site) hazardous waste without authorization (*see* Hearing Report at 18-19) (nineteenth cause of action).

Based upon my review of the record, I concur with the ALJ's determinations that respondents violated the above-referenced statute and regulations.

With respect to respondents' affirmative defense, the ALJ concluded that the legal theory of respondents' affirmative defense was "not clear" (Hearing Report at 19). The ALJ stated that respondents' factual assertions about their having to vacate the premises and their having no control or access to the facility since the foreclosure would not eliminate their liability for the violations alleged in the complaint (*id.*). I agree. Furthermore, the record does not support the argument that respondents had no control or access in that they were engaged in certain activities, such as engaging a contractor that removed waste from the facility, which allowed for some access.

Remedial Relief

Department staff requested an order directing respondents to properly store, test, transport, and dispose of all abandoned waste at the facility and to correct all other violations as set forth in the complaint (*see* Complaint at [unnumbered] page 7, III A. and B.). The ALJ

recommended that respondents be directed to test all waste remaining at the site and to properly dispose of all waste that is determined to be hazardous waste.

By letter dated August 17, 2021, to Deputy Commissioner Louis A. Alexander (2021 Letter), Department staff requested a modification to the Department's prayer for relief. Specifically, the 2021 Letter stated that staff is withdrawing Section III of its complaint, and that respondent's attorney had no objection to this withdrawal of Section III (*see* 2021 Letter at 1).

Section III of staff's complaint read as follows:

> "III. Ordering Respondents to do the following: By the Effective Date of the Commissioner's Order, Respondent shall:
>
> A. Properly store, test, transport and dispose of all of the abandoned hazardous waste at the Facility.
> B. Correct all other violations set forth in this complaint.
> C. Such other and further relief as the Commissioner of the New York State Department of Environmental Conservation shall deem just and appropriate[.]"

In an earlier e-mail communication from Department staff to ALJ Sherman, staff indicated that the site had been remediated by a new owner (DEC email dated August 10, 2021 to ALJ Richard Sherman [DEC 2021 e-mail]). The costs that the new owner expended on the remediation is not part of the record before me.

Department staff's request to withdraw Section III of the complaint is hereby granted.

Civil Penalty

Department staff seeks a penalty in the amount of six hundred twenty-five thousand dollars ($625,000) for respondents' violations of ECL article 27 and 6 NYCRR parts 372 and 373. As noted in the hearing report, many of the proven violations would allow for the imposition of daily penalties and would amount to a maximum penalty in the millions of dollars (*see* Hearing Report at 20).

The ALJ concluded that the staff-requested civil penalty totaling six hundred twenty-five thousand dollars ($625,000) was authorized and appropriate. Considering the remediation that would be required at the facility, the ALJ proposed that the civil penalty be allocated as follows: a payable penalty of two hundred thousand dollars ($200,000), with the remaining four hundred twenty-five thousand dollars ($425,000) being suspended contingent upon respondents' compliance with the terms and conditions of this order including, but not limited to, the undertaking and completion of the contamination cleanup and removal at the facility. Suspending a portion of a civil penalty, contingent upon the undertaking and completion of the remediation activities by a respondent, depending upon the circumstances of the matter, may be a reasonable and appropriate approach. With staff's withdrawal of the request for remedial relief, however, this basis for suspending a portion of the civil penalty no longer applies.

For purposes of calculating a penalty, staff is to consider the guidelines in DEE-1: Civil Penalty Policy (June 20, 1990) (DEE-1). As DEE-1 explains, in an adjudicatory hearing, Department staff should request a specific penalty amount, and should provide an explanation of how that amount was determined, with reference to:

-- the potential statutory maximum;
-- the DEE-1 guidance;
-- any program specific guidance document(s). In this instance, the U.S. EPA RCRA Civil Penalty Policy revised as of June 2003[3] (RCRA [Resource Conservation and Recovery Act] Civil Penalty Policy) and any other related documents should have been considered;
-- other similar cases; and
-- as relevant, any aggravating and mitigating circumstances relevant to the matter.

A number of factors, including: the economic benefit of noncompliance; the gravity of the violations (including the actual or potential environmental harm); the culpability of respondent's conduct as well as any other penalty adjustments are to be considered (*see* DEE-1 at § IV. C, D and E; *see also Matter of Waste-Away Carting Inc.,* Interim Decision and Order of the Commissioner, dated February 12, 2020 at 4).

In evaluating staff's request for a civil penalty of six hundred twenty-five thousand dollars ($625,000), I have considered the analysis that staff presents in its closing brief (*see* DEC Staff Closing Brief received on May 9, 2019 by the Office of Hearings and Mediation Services [DEC Staff Closing Brief]). Staff's assertion that the potential statutory maximum penalties for the violations here would be in the millions of dollars is correct. Staff also appropriately identifies various factors for consideration (including, among others, economic benefit of non-compliance, a gravity component, and the extent of respondents' cooperation) (*see* DEC Staff Closing Brief at 13-14).

Based on the record before me, it does not appear that staff utilized the RCRA Civil Penalty Policy, which evaluates among other things the seriousness of the violation and any good faith efforts to comply with applicable requirements. Furthermore, staff have not provided an explanation as to why that policy was not consulted or was otherwise not applicable. Pursuant to the policy, factors to be considered include (1) determining a gravity-based penalty from a penalty assessment matrix; (2) adding a "multi-day" component to account for a violation's duration; (3) adjusting the penalty amount upwards or downwards based upon case-specific circumstances; and (4) adding the appropriate economic benefit gained through non-compliance (*see* RCRA Civil Penalty Policy at § I).

[3] The RCRA Civil Penalty Policy has been used to calculate civil penalties in a number of DEC adjudicatory hearings involving hazardous waste violations, *see e.g. Matter of Hydramec, Inc.,* Order of the Commissioner, Nov. 13, 2017; *Matter of Bissco Holding, Inc.* Decision and Order of the Commissioner, dated July 24, 2017; *Matter of Thompson Corners, LLC,* Decision and Order of the Commissioner, dated Sept. 15, 2010; *Matter of Giambrone and Marcon Erectors, Inc.*, Decision and Order of the Commissioner, March 17, 2010 [*Matter of Giambrone*]; and *Matter of Accent Stripe, Inc.,* Order of the Commissioner, dated Jan. 25, 2008.

I note that staff does not provide any specific calculation by which it arrived at a civil penalty of this magnitude. Nor has staff set forth a proposed a penalty for any of the specific violations or indicated which, if any of the violations, were more significant. Where, as here, staff is recommending a substantial penalty, a more detailed explanation of the rationale in support of the recommended penalty is warranted. Among other factors to be considered is that the record does not indicate any prior violations at the facility (*see* Transcript at 149-150). Also, the transition between the status as a conditionally exempt small quantity generator status and large quantity generator status which is an important consideration is unclear, particularly as to the determination of the commencement and duration of certain of the violations.

I have also considered the letter dated May 12, 2015, by which Department staff advised respondents that "no violations were observed during [an April 21, 2015] inspection of the facility" (Hearing Report at 2 [Finding of Fact No. 6]; *see also* Hearing Exhibit 31 [no violations based upon a RCRA inspection]). Department staff countered that violations were present at the time of the 2015 inspection but for a variety of reasons, including respondents' assertions that much of the material was usable while other waste was going to be disposed, a more detailed inspection was not undertaken at that time (*see* Transcript at 173-174; *see also* Department Staff Closing Reply Brief dated May 20, 2019, at 3-4). Subsequent inspections by Department staff, beginning at the time when respondents ceased commercial operations at the facility, identified several hazardous waste violations at the facility arising from respondents' past activities (*see* Hearing Report at 3-4 [Findings of Fact Nos 8-15).

During the course of the hearing, respondents took issue with the Department's characterization of the contents of the drums and containers, arguing that various containers did not contain hazardous waste or were otherwise empty. Respondents have maintained that they have not had any control over the facility since mid-2015 (*see id.* at 3 [Finding of Fact No. 9]), but as noted previously, even if this were true, it would not, in and of itself, negate their liability for violations arising from their activities at that location or the civil penalties that would be assessed.

For purposes of penalty determination in this matter, I have considered DEE-1 and the RCRA Civil Penalty Policy, the potential for harm and the extent of deviation from a statutory or regulatory requirement, the period of time of the violations, the economic benefit of noncompliance and various adjustment factors (including any good faith efforts, and circumstances relating to the facility). I take note that ECL 71-2705, which is the statutory authorization for imposing penalties in this proceeding, authorizes a civil penalty of up to thirty-seven thousand, five hundred dollars ($37,500) for each violation of ECL article 27 and its implementing regulations, and an additional penalty of up to thirty-seven thousand, five hundred dollars ($37,500) for each day the violation continues.

In addition to the record before me, I have reviewed other administrative decisions that have addressed hazardous waste-related violations and, although no exact equivalence exists with respect to the number of violations, their duration, the specific regulatory provisions violated and the factual circumstances, the civil penalties assessed (even taking into account the

passage of time from those earlier cases to the pending proceeding) were substantially lower than what staff has requested here.[4]

Based on my review of this record, relevant guidance, and administrative precedent, I hereby assess a civil penalty, jointly and severally, upon respondents for the sixteen (16) violations in the amount of ninety-five thousand dollars ($95,000). Such payment shall be paid within sixty (60) days of the service of this order upon respondents.

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

I. Respondents Andrew Patenaude and W.W. Patenaude Sons, Inc. are adjudged, jointly and severally, to have violated:

A. 6 NYCRR 372.2(a)(2), by failing to make hazardous waste determinations for waste being generated (second cause of action);
B. 6 NYCRR 372.2(a)(8)(ii), by storing hazardous waste onsite for in excess of 90 days (third cause of action);
C. 6 NYCRR 372.2(a)(8)(ii), by failing to mark the date of accumulation on drums and containers of waste (fifth cause of action);
D. 6 NYCRR 373-3.9(b), by failing to transfer hazardous waste from containers in poor condition (sixth cause of action);
E. 6 NYCRR 373-3.9(d), by failing to keep containers of stored hazardous waste closed when not adding or removing contents (seventh cause of action);
F. 6 NYCRR 373-3.9(d)(2), by failing to ensure that containers of hazardous waste are not handled in a manner that may rupture the containers (eighth cause of action);
G. 6 NYCRR 373-3.9(d)(3), by failing to mark "hazardous waste" on containers of hazardous waste (ninth cause of action);
H. 6 NYCRR 373-3.9(e), by failing to inspect containers of hazardous waste at least weekly (tenth cause of action);
I. 6 NYCRR 373-3.2(h)(1), by failing to post "no smoking" signs by drums containing ignitable or reactive waste (eleventh cause of action);
J. 6 NYCRR 373-3.2(g)(4), by failing to maintain required training records and other documents at the facility (twelfth cause of action);

[4] One proceeding relevant to the pending matter is *Matter of Giambrone* which involved violations of respondents Douglas Giambrone and Marcon Erectors, Inc. of the statutes and regulations governing the generation, storage and disposal of hazardous waste and the discharge of polychlorinated biphenyls and petroleum at the site. In *Matter of Giambrone*, staff sought a civil penalty of $135,000 ($113,000 for twelve hazardous waste violations and $22,000 for two Navigation Law violations). In that matter, a prior owner, Ashland Oil Company (and not the respondents), conducted an environmental investigation and remediated the property. In the pending proceeding, as noted, a new owner (and not the respondents) has remediated the facility (*see* DEC 2021 email). Furthermore, in *Matter of Giambrone* a significant aggravating factor was the willful action of respondents in cutting down a tank that resulted in the release of PCBs and petroleum to the environment. After taking into account that four of the RCRA violations resulted primarily from a contractor's improper activities at the facility, the Commissioner reduced the total civil penalty assessed against respondents Giambrone and Marcon Erectors, Inc. to $109,500 (*see Matter of Giambrone*, at 22).

K. 6 NYCRR 373-3.2(g)(1)(i-iii), by failing to provide formal training intended to ensure compliance with 6 NYCRR subpart 373-3 (thirteenth cause of action);
L. 6 NYCRR 373-3.2(g)(3), by failing to have formal training regarding hazardous waste management (fifteenth cause of action);
M. 6 NYCRR 373-3.2(g)(5), by failing to maintain required training records regarding 6 NYCRR subpart 373-3 compliance training at the facility (sixteenth cause of action);
N. 6 NYCRR 373-3.3(b), by failing to operate a hazardous waste management facility in a manner to reduce the likelihood of fire, explosion, or release (seventeenth cause of action);
O. 6 NYCRR 373-3.4(b)(1), by failing to have a contingency plan for the facility (eighteenth cause of action); and
P. ECL 27-0914, by disposing (through abandonment of the site) hazardous waste without authorization (nineteenth cause of action).

II. Department staff's first, fourth and fourteenth causes of action are dismissed.

III. Department staff's request dated August 17, 2021 to withdraw Section III of its complaint is granted.

IV. Respondents Andrew Patenaude and W.W. Patenaude Sons, Inc. are hereby assessed, jointly and severally, a civil penalty in the amount of ninety-five thousand dollars ($95,000).

V. Within sixty (60) days of service of this order upon respondents Andrew Patenaude and W.W. Patenaude Sons, Inc., respondents shall pay the civil penalty in the amount of ninety-five thousand dollars ($95,000) by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation.

VI. Respondents Andrew Patenaude and W.W. Patenaude Sons, Inc. shall submit the civil penalty payment and all other submissions, as well as any questions or correspondence regarding this order, to the following:

Deborah Gorman, Esq.[5]
Office of General Counsel (Remediation Bureau)
NYS Department of Environmental Conservation
625 Broadway, 14th Floor
Albany, New York 12233-1500

[5] The DEC attorney who represented the Department throughout this proceeding, including the hearing and the preparation and filing of Department's papers and closing briefs, has retired. Following his retirement, DEC Attorney Deborah Gorman was subsequently assigned to this matter as a point of contact.

VII. The provisions, terms and conditions of this order shall bind respondents Andrew Patenaude and W.W. Patenaude Sons, Inc. and their agents, successors, and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: /s/
Basil Seggos
Commissioner

Dated: March 2, 2022
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1550

In the Matter

- of -

the Alleged Violations of the Environmental Conservation Law (ECL) of the State of New York, and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR)

- by -

ANDREW PATENAUDE and
W.W. PATENAUDE SONS, INC.,

Respondents.

DEC Case No. R5-11122-2017

HEARING REPORT

- by -

/s/
Richard A. Sherman
Administrative Law Judge

September 6, 2019

PROCEEDINGS

Staff of the New York State Department of Environmental Conservation (Department or DEC) commenced this administrative enforcement proceeding by service of a notice of hearing and complaint, dated June 28, 2017 on respondents Andrew Patenaude and W.W. Patenaude Sons, Inc. (WWPS), by certified mail and by first class mail. The complaint alleges that respondents violated numerous provisions of ECL article 27 and 6 NYCRR parts 372 and 373 relating to the generation, storage and disposal of hazardous waste at a facility (facility) located at 3 Best Avenue, Stillwater, New York (site). Respondents filed an answer, dated July 17, 2017 denying the violations alleged in the complaint and asserting one affirmative defense.

Pursuant to 6 NYCRR 622.9(e), this office provided a written notice of hearing (notice) to respondents by letter dated February 28, 2019. The notice advised the parties that the hearing would be held on April 3, 2019 at the Department's Region 5 Sub-office, 232 Golf Course Road, Warrensburg, New York. The notice further advised that the hearing would be held in accordance with the provisions of the Department's uniform enforcement hearing procedures (6 NYCRR part 622).

Department staff was represented by Benjamin Conlon, Esq., and Deborah Gorman, Esq., DEC Office of General Counsel. The Department called one witnesses: Steve Paszko, Assistant Engineer, DEC Division of Environmental Remediation. Respondents were represented by Stephen J. Waite, Esq., Waite & Associates, P.C. Mr. Waite called no witnesses.

At the close of the hearing, the parties requested the opportunity to file written closing briefs. As agreed by the parties, closing briefs were to be filed within three weeks of the parties' receipt of the hearing transcript (*see* tr at 224-225). I circulated the transcript to the parties on April 18, 2019 and the parties timely filed their respective closing briefs.

Department staff timely requested authorization to file a response to respondents' closing brief (*see* letter to the parties dated Apr. 4, 2019 [advising the parties that I would hold the record open for ten days after closing briefs were filed to afford the parties an opportunity to request authorization to file replies]). I granted staff's request and the parties timely filed their respective replies. No party requested the opportunity to file a further response and, therefore, the hearing record closed on June 7, 2019, ten days after this office received the hard copy of respondents' reply brief.

As detailed below, on the basis of the record established in this proceeding, this hearing report recommends that the Commissioner issue an order (i) adjudging respondents to have violated ECL 27-0914 and numerous provisions of 6 NYCRR parts 372 and 373; (ii) assessing a civil penalty in the amount of $625,000; and (iii) directing respondents to test all waste remaining at the site and to properly dispose of all waste that is determined to be hazardous waste.

FINDINGS OF FACT

1. Respondent WWPS is a domestic business corporation, incorporated in 1973, that was formerly located at 3 Best Avenue, Stillwater, New York (*see* transcript [tr] at 18-19 [Steve Paszko testimony describing his first visit to the facility]; exhibit 15 [Apr. 17, 2015 email from Andrew P. Patenaude noting that WWPS is located at 3 Best Avenue, Mechanicville]; New York State Department of State, Corporation & Business Entity Database, https://appext20.dos.ny.gov/corp_public/CORPSEARCH.SELECT_ENTITY [stating the WWPS was incorporated on Jan. 2, 1973 and has its principle executive office at 3 Best Avenue, Mechanicville, New York] [accessed June 3, 2019][1]).

2. Respondent Andrew Patenaude is the President and Chief Executive Officer (CEO) of W.W. Patenaude Sons, Inc. (*see* exhibit 15 [Apr. 17, 2015 email from Andrew P. Patenaude noting his title]; exhibit 19 at 5 [authorization "to commence services" signed on Sept. 17, 2015 by Andrew P. Patenaude, as "Pres/CEO" of W.W. Patenaude Sons, Inc.]; exhibit 21 [Oct. 14, 2015 email from Andrew P. Patenaude noting his title]; *see also* New York State Department of State, Corporation & Business Entity Database, https://appext20.dos.ny.gov/corp_public/CORPSEARCH.SELECT_ENTITY [stating that Andrew P. Patenaude is the Chief Executive Officer of W.W. Patenaude Sons, Inc.] [accessed June 3, 2019]).

3. On April 9, 2015 the Department received a telephone complaint regarding a large pile of used sand blast silicate stored outside and uncovered at the facility (*see* exhibit 30; tr at 21, 90-91 [Paszko testimony regarding the complaint]). The complainant was concerned that chemicals could be leaching from the pile into the soil (*id.*).

4. On April 15, 2015 Department staff conducted a preliminary inspection of the facility, met with respondent Patenaude, and requested documentation relating to past disposal practices at the facility (tr at 21-23, 30-31; exhibit 1 [photographs from Apr. 15, 2015 inspection], exhibit 15 [documents from respondents regarding sand blast and waste paint disposal]).

5. On April 21, 2015 Department staff conducted a hazardous waste compliance inspection at the facility (exhibit 16 [staff letter to respondents concerning the Apr. 21, 2015 "Hazardous Waste Compliance Inspection," with a completed DEC "Inspection Form" attached]).

6. By letter dated May 12, 2015, Department staff advised respondents that "no violations were observed during the inspection" of the facility on April 21, 2015 (exhibit 16 at 1).

[1] Each of the documents cited states that the facility address is in the City of Mechanicville. The complaint, however, states that the facility is located at "3 Best Avenue, Stillwater, New York." I take official notice that the Town of Stillwater and City of Mechanicville border each other and that the site is located in the Town of Stillwater near the municipal boundary with the City of Mechanicville.

7. On August 17, 2015 the Department received a telephone complaint stating that the facility was closed, but that containers and drums remained outside on the property (*see* exhibit 31; tr at 37-39 [Paszko testimony regarding the complaint]).

8. On August 21, 2015 Department staff conducted a hazardous waste compliance inspection at the facility (tr at 39-40 [Paszko testimony that he did a "formal RCRA inspection" on Aug. 21, 2015]; exhibit 2 [site photographs taken Aug. 21, 2015]; exhibit 18 [staff letter to respondents concerning the Aug. 21, 2015 inspection]; exhibit 22 [staff letter to respondents concerning the Aug. 21, 2015 "Hazardous Waste Compliance Inspection," with attached "Inspection Form"]).

9. On or about August 21, 2015 respondents ceased commercial operations at the facility and relocated to 1050 Elizabeth Street Extension, Mechanicville (answer ¶ 4 [respondents' statement that "[u]p until a foreclosure proceeding was commenced by [the New York Business Development Corporation], Respondents operated a commercial painting company out of Premises"]; answer ¶ 10 [respondents' statement that "for the last two years [respondents] have not had any control over the Premises" (the answer is dated July 17, 2017)]; tr at 39-40 [Paszko testimony that he was advised by respondents employees during a site visit on August 21, 2015 that respondents were vacating the site that day]; tr at 50-51 [Paszko testimony that during a site visit on August 24, 2015 he determined that respondents had vacated the site and relocated to "the old mechanical warehouse, Elizabeth Street Extension"]; tr at 98-99 [Paszko testimony concerning respondents' operations at 1050 Elizabeth Street Extension]).

10. On August 24, 2015 Department staff conducted an onsite follow-up inspection to the August 21, 2015 hazardous waste compliance inspection (tr at 49-50; exhibit 3 [site photographs taken Aug. 24, 2015]).

11. In September 2015 a contractor shipped 43,350 pounds of hazardous waste from the facility to a disposal facility located in Canada (*see* exhibit 25 at 7, 17 [Uniform Hazardous Waste Manifests, signed by respondent Patenaude, detailing shipments of "WASTE Paint" from the facility to Canada on Sept. 22 and 23, 2015]).

12. Department staff issued a Notice of Violation, dated November 2, 2015, to respondents wherein staff stated that it had identified 17 "violations of the regulations set forth at 6 NYCRR Parts 370-374 and 376" (exhibit 22 at 1, attachment 1 [listing 17 alleged violations]; tr at 81-82).

13. On February 16, 2017 Department staff conducted a site visit at the facility and photographed the conditions observed (tr at 100; exhibit 7 [site photographs taken Feb. 16, 2017]).

14. On May 26, 2017 Department staff conducted a site visit at the facility and photographed the conditions observed (tr at 109; exhibit 9 [site photographs taken May 26, 2017]).

15. By letter dated November 10, 2017 Department staff advised respondents that two environmental assessments undertaken at the site had found "inorganic metal contamination . . . in surface soils and spent sand blast media spread throughout the site" and that the contamination "will require removal and disposal at a regulated facility permitted to accept this type of waste" (exhibit 29; *see also* exhibits 27, 28 [copies of the environmental assessment reports noting the contaminated soil and sand blast media]).

DISCUSSION

Department staff bears the burden of proof on all its charges and must prove the factual allegations underlying those charges by a preponderance of the evidence (*see* 6 NYCRR 622.11[b][1], [c]). Where a respondent asserts an affirmative defense, the respondent bears the burden of proof and must prove facts in support of the defense by a preponderance of the evidence (*see* 6 NYCRR 622.11[b][2], [c]).

Department Staff's Allegations

By its complaint, Department staff alleges that respondents violated 19 provisions of ECL article 27, 6 NYCRR part 372, or 6 NYCRR part 373. Specifically, staff alleges that respondents violated the following: [2]

1. 6 NYCRR 373-1.2(c) by failing to obtain a 6 NYCRR part 373 permit to construct or operate a new hazardous waste management (HWM) facility (complaint ¶¶ 3, 4).

2. 6 NYCRR 372.2(a)(2) by failing to make hazardous waste determinations for waste being generated (complaint ¶¶ 5, 6).

3. 6 NYCRR 372.2(a)(8)(ii) by storing hazardous waste onsite for in excess of 90 days (complaint ¶¶ 7, 8).

4. 6 NYCRR 373-1.1(d)(1)(iii)(a) by failing to have secondary containment at a facility that stores over 8,800 gallons of liquid waste (complaint ¶¶ 9, 10).

5. 6 NYCRR 372.2(a)(8)(ii) by failing to mark the date of accumulation on drums and containers of waste (complaint ¶¶ 11, 12).

6. 6 NYCRR 373-3.9(b) by failing to transfer hazardous waste from containers in poor condition (complaint ¶¶ 13, 14).

7. 6 NYCRR 373-3.9(d) by failing to keep containers of stored hazardous waste closed when not adding or removing contents (complaint ¶¶ 15, 16).

[2] Department staff did not number the violations alleged in its complaint. For ease of reference, I have numbered the alleged violations in the order that they are set forth in the complaint and will refer to each of the alleged violations as a separate cause of action corresponding to the numbers below.

8. 6 NYCRR 373-3.9(d)(2) by failing to ensure containers of hazardous waste are not handled in a manner that may rupture the container (complaint ¶¶ 17, 18).

9. 6 NYCRR 373-3.9(d)(3) by failing to mark "hazardous waste" on containers of hazardous waste (complaint ¶¶ 19, 20).

10. 6 NYCRR 373-3.9(e) by failing to inspect containers of hazardous waste at least weekly (complaint ¶¶ 21, 22).

11. 6 NYCRR 373-3.2(h)(1) by failing to post "no smoking" signs by drums containing ignitable or reactive waste (complaint ¶¶ 23, 24).

12. 6 NYCRR 373-3.2(g)(4) by failing to maintain required training records and other documents at the facility (complaint ¶¶ 25, 26).

13. 6 NYCRR 373-3.2(g)(1)(i-iii) by failing to provide formal training intended to ensure compliance with 6 NYCRR subpart 373-3 (complaint ¶¶ 27, 28).

14. 6 NYCRR 373-3.2(g)(2) by failing to maintain training records at the facility (complaint ¶¶ 29, 30).

15. 6 NYCRR 373-3.2(g)(3) by failing to have formal training regarding compliance with 6 NYCRR subpart 373-3 (complaint ¶¶ 31, 32).

16. 6 NYCRR 373-3.2(g)(5) by failing to maintain required training records regarding 6 NYCRR subpart 373-3 compliance training at the facility (complaint ¶¶ 33, 34).

17. 6 NYCRR 373-3.3(b) by failing to operate HWM facility in a manner to reduce the likelihood of fire, explosion, or release (complaint ¶¶ 35, 36).

18. 6 NYCRR 373-3.4(b)(1) by failing to have a contingency plan for the facility (complaint ¶¶ 37, 38).

19. ECL 27-0914 by disposing (through abandonment of the site) hazardous waste without authorization (complaint ¶¶ 39, 40).

Respondents' Answer

By their answer, respondents generally deny the allegations set forth in the complaint and raise one affirmative defense. Respondents admit that "[u]p until a foreclosure proceeding was commenced by [the New York Business Development Corporation (NYBDC)], Respondents operated a commercial painting company out of the Premises" (answer ¶ 4). Respondents argue, however, that they "were required by NYBDC to vacate the Premises" and that they have had no control or access to the facility since the foreclosure (*id.* ¶¶ 6, 10). Respondents also assert that "NYBDC informed Respondents that NYBDC would dispose of any hazardous material on site, and charge back Respondents for . . . disposal costs" (*id.* ¶ 7).

Causes of Action

As set forth in the complaint, respondents' liability is premised on Department staff's allegation that respondents "are the owners and/or operators" of the facility (complaint ¶ 1). For the reasons discussed below, I conclude that staff failed to meet its burden to demonstrate that either respondent is or was the owner of the facility. I also conclude, however, that staff met its burden to demonstrate that respondents were operators of the facility.

Pursuant to 6 NYCRR 370.2(b)(137) an owner is "the person who owns a facility or part of a facility." At the hearing, Department staff did not proffer documentation to establish the ownership of the facility. Further, although staff's witness testified that, to his knowledge, ownership of the facility has not changed, he did not identify the owner (tr at 219 [Paszko testimony that the ownership of the facility has not changed and that the mortgagee "do[es]n't own [the site], to my knowledge"]).

In its closing brief, Department staff provides excerpts from "publicly available" records to establish ownership of the facility (staff brief at 3-4). Setting aside the propriety of introducing these excerpts in its closing brief rather than at the hearing,[3] the excerpts do not establish that either respondent is an owner of the facility. Rather, it appears from staff's submission that title to the site resides in the estate of James M. Patenaude (*id.*).

I conclude that Department staff did not meet its burden to prove that either respondent is an owner of the facility.

With regard to whether respondents are operators of the facility, the controlling regulation defines the operator as "the person responsible for the overall operation of a facility" (6 NYCRR 370.2[b][136]). A "person" is defined to include, among other things, "an individual [or a] corporation" (6 NYCRR 370.2[b][141]).

It is undisputed that respondent WWPS is a domestic business corporation and that it operated a commercial painting company at the site until on or about August 21, 2015 (findings of fact ¶¶ 1, 9). It is also undisputed that respondent Patenaude is the president and CEO of respondent WWPS (findings of fact ¶ 2; *see also* tr at 119-120 [Paszko testimony that respondent Patenaude was the point of contact between the Department and respondent WWPS with regard to hazardous waste issues at the site]). Notably, respondents admit that "Respondents operated a commercial painting company" at the site until foreclosure proceedings were commenced in August 2015 (answer ¶ 4; *see also* findings of fact ¶ 9). At the hearing, respondents did not proffer evidence to refute the foregoing.

I conclude that each respondent is a person responsible for the overall operation of the facility and, therefore, each respondent is an operator as contemplated by the regulations.

[3] In *Matter of Reale*, the Acting Commissioner held that "[t]he submission of new evidence in closing briefs in the Department's administrative proceedings generally is not allowed" (*id.,* Decision and Order of the Acting Commissioner, Dec. 1, 2010, at 7).

First Cause of Action

Department staff alleges that respondents violated 6 NYCRR 373-1.2(c) by failing to obtain a permit pursuant to 6 NYCRR part 373 to construct or operate a new hazardous waste management (HWM) facility (complaint ¶¶ 3, 4).

Pursuant to 6 NYCRR 370.2(b)(129) a "[*n*]*ew hazardous waste management facility or new facility* means a facility which began operation or for which construction commenced after November 19, 1980."

At the hearing, Department staff did not proffer evidence to demonstrate that the facility at issue was "new" as defined by 6 NYCRR 370.2(b)(129). Indeed, staff's witness testified that some of the waste at the site may have been there for "decades" (tr at 104). He further testified that the Patenaudes may have been in business since "the '50s maybe, the '60s" (tr at 150). I also note that the New York State Department of State, Division of Corporations website states that WWPS was incorporated on January 2, 1973 (*see* findings of fact ¶ 1).

Department staff did not meet its burden to show that WWPS operated a "new" hazardous waste facility at the site as alleged in the complaint. Accordingly, the first cause of action is dismissed.

Second Cause of Action

Department staff alleges that respondents violated 6 NYCRR 372.2(a)(2) by failing to make required hazardous waste determinations for waste being generated at the facility (complaint ¶¶ 5, 6).

Pursuant to 6 NYCRR 372.2(a)(2), "[a] person who generates a solid waste must determine if that waste is a hazardous waste using the . . . method" prescribed by the regulation. A generator is "any person, by site, whose act or process produces hazardous waste as defined in Part 371 of this Title, or whose act first causes a hazardous waste to become subject to regulation" (6 NYCRR 370.2[b][83]).

As discussed above (*see supra* at 6), respondents are the operators of the facility. The record establishes beyond dispute that respondents' operations at the site generated large amounts of hazardous waste (*see e.g.* findings of fact ¶ 11; tr at 45 [Paszko testimony that "there are drums scattered throughout the facility, some of which were empty, some of which were full"]; exhibits 2, 3, 7, 9 [various photographs depicting dozens of 55-gallon drums and hundreds of other containers at the facility]; exhibit 25 [records documenting that tens of thousands of pounds of hazardous waste were transported from the facility in September 2015]; tr at 59-61 [Paszko testimony concerning a "large pile of sandblast media" at the site that was either "solid waste, or hazardous waste"]; exhibit 1, photograph 1.0 [depicting the pile of sand blast media at the site]; exhibit 4, photograph 4.0 [depicting the sand blast media after the pile was spread and leveled at the site]).

It was not until after respondents were no longer operating a commercial painting business at the site that a significant portion of the waste generated by the facility was profiled, determined to be hazardous waste, and removed from the facility (*see* exhibit 21 [Oct. 14, 2015 email from respondent Patenaude with attached documentation of hazardous waste removal from the site during September 2015]). Department staff's witness testified that "the material that was disposed of, in September 2015, was profiled [by the contractor]. None of that waste was profiled on my initial inspection, in April [2015], or in August [2015]" (tr at 122 [Paszko testimony that this demonstrated respondents' "failure to make a hazardous-waste determination"]).

The removal of hazardous waste from the site in September 2015 was undertaken by a contractor in accordance with a contact signed by respondent Patenaude as President and CEO of respondent WWPS (*see* exhibit 19 at 5 [authorization for the contractor to commence services]). The contractor shipped a large quantity of hazardous waste from the facility to a disposal facility located in Canada (*see* exhibit 21 [respondent Patenaude email with attached records of hazardous waste shipments], 25 [contractor email with attached records of hazardous waste shipments]).

The record reflects that the contractor shipped a total of 43,350 pounds of hazardous waste from the facility (*see* exhibit 25 at 7, 17 [Uniform Hazardous Waste Manifests, signed by respondent Patenaude, detailing shipments of "WASTE Paint" from the facility to Canada on September 22 and 23, 2015]). The contractor was not paid for the services rendered in relation to the removal of the hazardous waste (*see* tr at 72, 139 [Paszko testimony that the contractor was not paid for the work that was performed]; exhibit 24 [email from contractor stating that the "contract was with Patenaude" and that the contractor did not get paid]) and did not complete the profiling and removal of waste from the facility (*see* exhibit 7 [photographs depicting hundreds of containers, including dozens of 55-gallon drums, that remained at the site as of Feb. 16, 2017]).

Because of the large amount of hazardous waste that was stored at the site, the facility is deemed to be a large quantity generator of hazardous waste (*see* tr at 48 [Paszko testimony that he determined that respondents were large quantity generators "[b]ased on the volume of material that was stored at the site"]; *see also* 6 NYCRR 370.2[b][173] [defining a "small quantity generator" as "a generator who . . . stores less than 6,000 kilograms[4] of [nonacute hazardous] waste at any one time"]).

The record contains no evidence that respondents made the required hazardous waste determination with respect to the extensive amount of waste that Department staff observed at the facility at the time of staff's initial hazardous waste compliance inspection on April 21, 2015.

[4] 6,000 kilograms equates to approximately 13,228 pounds. I note that the regulation does not separately define "large quantity generator." Rather, a large quantity generator is a generator that does not qualify as a small quantity generator (*see* DEC website at https://www.dec.ny.gov/chemical/60838.html [describing the levels of generator status and stating that a small quantity generator may "store no more than 13,200 pounds of hazardous waste"]).

In April 2015 Department staff requested that respondents provide documentation to show that respondents were undertaking appropriate analysis of the waste generated at the facility, and that respondents were properly disposing all hazardous waste (tr at 31). In response, respondent Patenaude provided staff with documentation of a "waste sandblast material shipment . . . and last waste paint shipments" from the facility (exhibit 15 at 1 [Apr. 17, 2015 email from respondent Patenaude]). This documentation shows that hazardous waste was last transported from the facility in January 2013 (*id.* 1, 5 [hazardous waste manifest from 2013]). Accordingly, despite the large volume of hazardous waste generated at the facility, the record establishes that respondents failed to profile and dispose of any hazardous waste at the facility from January 2013 through August 24, 2015, the date that respondents vacated the site.

I note that staff sent a letter to respondents in May 2015 stating that "no violations were observed" during the April 21, 2015 inspection (*see* findings of fact ¶ 6). Mr. Paszko testified, however, that his determination that there were no violations was premised upon representations made by Mr. Patenaude (tr at 35 [Paszko testimony that he "was confident [at that time] that Mr. Patenaude was going to properly dispose of that material" and that Paszko preferred money be "spent on proper disposal, rather than any fines or penalties for . . . any violations observed at the site"]; 174 [Paszko testimony that, at the time of his initial inspection, Mr. Patenaude "told me that most of [the material at the site that appeared to be waste] was a viable material, that he could take it to his new base of operations and use it [and] that a lot of that stuff wasn't waste"]). As detailed above, subsequent to staff's "no violation" determination, a contractor profiled and removed 43,350 pounds of hazardous waste from the facility.

Department staff established that respondents generated large volumes of hazardous waste at the facility and that respondents did not make the required hazardous waste determination in relation to that waste. Accordingly, respondents are liable for violating 6 NYCRR 372.2(a)(2) as alleged under the second cause of action.

Third Cause of Action

Department staff alleges that respondents violated 6 NYCRR 372.2(a)(8)(ii) by storing hazardous waste onsite for in excess of 90 days (complaint ¶¶ 7, 8).

Pursuant to 6 NYCRR 372.2(a)(8)(ii), with certain exceptions that are not applicable here, "a generator may accumulate hazardous waste onsite of generation for a period of 90 days or less" provided the storage complies with the enumerated provisions of 6 NYCRR 373-1.1(d).

As discussed under the second cause of action, the record demonstrates that respondents stored tens of thousands of pounds of hazardous waste at the facility. There is no record of hazardous waste removal from the facility at any time between January 2013, when a single 55-gallon drum of hazardous waste was shipped from the facility (*see* exhibit 15 at 5), until mid-September 2015 when 43,350 pounds of hazardous waste was shipped from the facility to a disposal facility located in Canada (*see* findings of fact ¶ 11).

I conclude that Department staff has met its burden to prove that respondents stored hazardous waste onsite for more than 90 days. Accordingly, respondents are liable for violating 6 NYCRR 372.2(a)(8)(ii) as alleged under the third cause of action.

Fourth Cause of Action

Department staff alleges that respondents violated 6 NYCRR 373-1.1(d)(1)(iii)(a) by failing to have secondary containment at a facility that stores over 8,800 gallons of liquid waste (complaint ¶¶ 9, 10).

Pursuant to 6 NYCRR 373-1.1(d)(1)(iii)(a), "[i]f the amount of liquid hazardous waste stored in containers in [exempt storage] areas exceeds 8,800 gallons, the entire volume of liquid hazardous waste must be stored within an area meeting the secondary containment requirements of section 373-2.9(f)(1) of this Part."

In support of this cause of action, Department staff states that its expert established through his testimony that there was no secondary containment for the drums storing hazardous waste liquids at the Site (staff closing brief at 7 [citing Paszko testimony at 112]). Department staff does not, however, cite any record evidence that establishes respondents stored in excess of 8,800 gallons of liquid hazardous waste (*id.*).

Although the record establishes that respondents stored large quantities of hazardous waste at the facility, it is not clear that the amount of liquid hazardous waste stored in containers at the site exceeded 8,800 gallons. Staff's witness testified that "if you go from the fifty-five gallon drums, down to aerosol cans and even smaller containers, I'd say you . . . have thousands of containers . . . at the facility" (tr at 80). He also testified, however, that he did not know the contents of the unlabeled containers at the site and that some of the drums and other containers were empty (tr at 45-46). I conclude that there is insufficient evidence in this record to determine whether respondents stored more than 8,800 gallons of liquid hazardous waste.[5]

Department staff failed to meet its burden to establish that over 8,800 gallons of liquid hazardous waste were stored at the facility. Accordingly, the fourth cause of action is dismissed.

Fifth Cause of Action

Department staff alleges that respondents violated 6 NYCRR 372.2(a)(8)(ii) by failing to mark the date of accumulation on drums and containers of waste (complaint ¶¶ 11, 12).

Pursuant to 6 NYCRR 372.2(a)(8)(ii), with certain exceptions that are not applicable here, a generator may accumulate hazardous waste onsite for a period of 90 days or less,

[5] Although the record establishes that a contractor removed over 40,000 pounds of hazardous waste from the facility in September 2015 (*see* findings of fact ¶ 11), staff did not establish that this amount, whether combined with other hazardous waste at the site or by itself, equates to 8,800 gallons of liquid waste, nor did staff establish what percentage of this waste was in liquid form. The weight of a gallon of liquid varies by the type of liquid involved. I note, for reference purposes only, that 8,800 gallons of water weighs over 70,000 pounds.

provided that "[t]he date upon which each period of accumulation begins [is] clearly marked and visible for inspection on all containers, tanks or storage areas."

Department staff's witness testified that none of the containers he observed at the facility had accumulation dates on them (tr at 106, 125-126; *see also* exhibits 1, 2, 3, 7, 9 [numerous photographs depicting hundreds of containers at the site, none depicting clearly marked and visible accumulation dates]).

I conclude that Department staff has met its burden to prove that respondents stored hazardous waste in containers at the facility without clearly marking the accumulation date on the containers. Accordingly, respondents are liable for violating 6 NYCRR 372.2(a)(8)(ii) as alleged under the fifth cause of action.

Sixth Cause of Action

Department staff alleges that respondents violated 6 NYCRR 373-3.9(b) by failing to transfer hazardous waste from containers in poor condition (complaint ¶¶ 13, 14).

Pursuant to 6 NYCRR 373-3.9(b), "[i]f a container holding hazardous waste is not in good condition, or if it begins to leak, the owner or operator must transfer the hazardous waste from this container to a container that is in good condition or manage the waste in some other way that complies with the requirements of this Subpart."

Department staff's witness testified that he observed a leaking 55-gallon drum and several other leaking containers at the facility, none of which were being addressed prior to his inspection of the site (tr at 42-46, 126-128). He further testified that "there were containers that were leaking [and] containers in poor condition" (tr at 132). Various documentation in the record corroborates this testimony (*see e.g.* exhibit 2, photographs 2.1, 2.3, 2.5, 2.6, 2.7 [depicting leaking and rusting containers]; exhibit 3, photographs 3.8, 3.12, 3.41, 3.42, 3.44, 3.45, 3.54 [depicting leaking, dented, and rusting containers]; exhibit 17 [NYSDEC Spill Report Form, spill date Aug. 21, 2015, documenting a spill of "solvents"]; *see also* tr at 42-45 [Paszko testimony that the spill report (exhibit 17) relates to the spill from a punctured 55-gallon drum that is depicted in exhibit 2, photographs 2.5, 2.6]).

I conclude that Department staff has met its burden to prove that respondents stored hazardous waste in containers that were in poor condition and in containers that leaked. Accordingly, respondents are liable for violating 6 NYCRR 373-3.9(b) as alleged under the sixth cause of action.

Seventh Cause of Action

Department staff alleges that respondents violated 6 NYCRR 373-3.9(d) by failing to keep containers of stored hazardous waste closed when not adding or removing contents (complaint ¶¶ 15, 16).

Pursuant to 6 NYCRR 373-3.9(d)(1) "[a] container holding hazardous waste must always be closed during storage, except when it is necessary to add or remove waste."

Department staff's witness testified that he observed several open containers at the facility (*see e.g*. tr at 45-46 [Paszko testimony regarding the open 55-gallon drum depicted in exhibit 2, photograph 2.4]; tr at 106-107, 128-129 [Paszko testimony regarding open containers at the site]). Various documentation in the record corroborates this testimony (*see e.g.* exhibit 2, photograph 2.4, 2.11, 2.19; exhibit 3, photographs 3.2, 3.6, 3.9, 3.10, 3.11, 3.12, 3.13).

I conclude that Department staff has met its burden to prove that respondents failed to keep containers of stored hazardous waste closed when not adding or removing contents. Accordingly, respondents are liable for violating 6 NYCRR 373-3.9(d)(1) as alleged under the seventh cause of action.

Eighth Cause of Action

Department staff alleges that respondents violated 6 NYCRR 373-3.9(d)(2) by failing to ensure that containers of hazardous waste were not handled in a manner that may rupture the container (complaint ¶¶ 17, 18).

Pursuant to 6 NYCRR 373-3.9(d)(2) "[a] container holding hazardous waste must not be opened, handled or stored in a manner which may rupture the container or cause it to leak."

As noted under the sixth cause of action, Department staff's witness testified that he observed a leaking 55-gallon drum and several other leaking containers at the facility, none of which were being addressed prior to his inspection of the site (tr at 42-46, 126-128). He also testified that "there were containers that were leaking [and] containers in poor condition" (tr at 132). Documentation in the record corroborates this testimony (*see e.g.* exhibit 2, photographs 2.1, 2.3, 2.5, 2.6, 2.7 [depicting leaking and rusting containers]; exhibit 3, photographs 3.8, 3.12, 3.41, 3.42, 3.44, 3.45, 3.54 [depicting leaking, dented, and rusting containers]; exhibit 17 [NYSDEC Spill Report Form, spill date Aug. 21, 2015, documenting a spill of "solvents"]; *see also* tr at 42-45 [Paszko testimony that the spill report (exhibit 17) relates to the spill from a punctured 55-gallon drum that is depicted in exhibit 2, photographs 2.5, 2.6]).

I conclude that Department staff has met its burden to prove that respondents failed to ensure that containers of hazardous waste were not handled in a manner that might rupture the container. Accordingly, respondents are liable for violating 6 NYCRR 373-3.9(d)(2) as alleged under the eighth cause of action.

Ninth Cause of Action

Department staff alleges that respondents violated 6 NYCRR 373-3.9(d)(3) by failing to mark "Hazardous Waste" on containers of hazardous waste (complaint ¶¶ 19, 20).

Pursuant to 6 NYCRR 373-3.9(d)(3), "[c]ontainers holding hazardous waste must be marked with the words 'Hazardous Waste' and with other words identifying their contents."

Department staff's witness testified that he observed "drums scattered throughout the facility, some of which were empty, some of which were full. They're not marked. We have no idea what are in the drums" (tr at 45 [Paszko testimony regarding numerous drums depicted in exhibit 2, photograph 2.3]; *see also* tr at 131-132 [Paszko testimony that only one drum that he observe had a "partial marking" indicating it contained hazardous waste, but the marking was incomplete and of questionable accuracy given that the drum appeared to have been "marked years and years ago"[6]]). He also testified that he observed "various drums and containers throughout the interior of the building [at the site] -- some of which are marked, some of which aren't" (tr at 46 [Paszko testimony regarding hundreds of containers depicted in exhibit 2, photographs 2.10 – 2.13]).

I conclude that Department staff has met its burden to prove that respondents failed to mark containers holding hazardous waste with the words "Hazardous Waste" and other words identifying the containers' contents. Accordingly, respondents are liable for violating 6 NYCRR 373-3.9(d)(3) as alleged under the ninth cause of action.

Tenth Cause of Action

Department staff alleges that respondents violated 6 NYCRR 373-3.9(e) by failing to inspect containers of hazardous waste at least weekly (complaint ¶¶ 21, 22).

Pursuant to 6 NYCRR 373-3.9(e), "[a]t least weekly, the owner or operator must inspect areas where containers are stored, looking for leaking containers and for deterioration of containers and the containment system caused by corrosion or other factors."

Department staff's witness testified that he concluded that respondents were not undertaking weekly inspections of the facility "because there were containers that were leaking. There were containers in poor condition. There were incompatibles that were comingled. Just -- everything was just thrown in haphazardly throughout the facility" (tr at 132). He also testified, however, that he did not ask respondent Patenaude whether he was undertaking weekly inspections of the facility (*id.*).

I conclude that Department staff has met its burden to prove that respondents failed to inspect containers of hazardous waste at least weekly. Although staff did not ask respondents whether they conducted weekly inspections of the facility, a reasonable inference may be drawn from the overall condition of the facility, and the specific conditions of many containers at the facility, that respondents were not undertaking the required inspections. Accordingly, respondents are liable for violating 6 NYCRR 373-3.9(e) as alleged under the tenth cause of action.

[6] The witness testified that he photographed the partially labeled drum, but he did not cite to a photograph in the record. I note that exhibit 3, photographs 3.13 and 3.14, depict a drum with a torn and scraped label on which the words "hazardous waste" are still legible.

Eleventh Cause of Action

Department staff alleges that respondents violated 6 NYCRR 373-3.2(h)(1) by failing to post "no smoking" signs by drums containing ignitable or reactive waste (complaint ¶¶ 23, 24).

Pursuant to 6 NYCRR 373-3.2(h)(1), "[w]hile ignitable or reactive waste is being handled, the owner or operator must confine smoking and open flame to specially designated locations. 'No Smoking' signs must be conspicuously placed wherever there is a hazard from ignitable or reactive waste."

Department staff's witness testified that containers of hazardous waste that were stored in the garage at the facility at the time of his inspection on August 21, 2015 "were thrown in [t]here haphazardly with no consideration for incompatibles, or condition of the containers" and that "[i]f you mix incompatible materials, you can produce heat, which can produce fire, or you can produce poisonous gas, depending on what those materials are" (tr at 46-47 [Paszko testimony describing containers depicted in exhibits 2.10, 2.11, 2.12, 2.13]). He also testified that "everything was just thrown in haphazardly throughout the facility" (tr at 132), and that, because of the size of the facility "[q]uite a few" no smoking signs were needed to comply with the regulations and that the signs should have been posted "throughout the facility. Not just the garage, but the other buildings as well" (tr at 133).

I conclude that Department staff has met its burden to prove that respondents failed to conspicuously place no smoking signs wherever there is a hazard from ignitable or reactive waste. Accordingly, respondents are liable for violating 6 NYCRR 373-3.2(h)(1) as alleged under the eleventh cause of action.

Twelfth through Sixteenth Causes of Action

In its closing brief, Department staff groups causes of action twelve through sixteen together (*see* staff brief at 10-12). Each of these causes of action relates to the regulatory requirements for training, or associated recordkeeping requirements, that apply to hazardous waste facilities. Staff's closing brief sets forth the applicable regulatory provisions (*id.* at 10-11) and argues that the testimony of its witness, Mr. Paszko, establishes respondents' liability for each cause of action (*id.* at 12).

Twelfth Cause of Action

Department staff alleges that respondents violated 6 NYCRR 373-3.2(g)(4) by failing to maintain required training records and other documents at the facility (complaint ¶¶ 25, 26).

Pursuant to 6 NYCRR 373-3.2(g)(4), "[t]he owner or operator must maintain . . . documents and records at the facility" regarding, among other things, the name and job description of each employee whose job relates to hazardous waste management, and a written description of the type and amount of training that these employees are to be given, along with records that document that the required training (or job experience) has been completed.

Department staff asserts that "training requirements and records were required for the facility and the facility did not have any records and had not conducted any training" (staff closing brief at 12). Staff asserts that the testimony of its witness established respondents' liability for this violation (*id.*). Staff's witness testified that respondents are "a large-quantity generator, so they have stringent requirements for training of personnel . . . dealing with hazardous waste" and that respondents had maintained no training records (tr at 134; *see also* tr at 164 [Paszko testimony that the review of a facility's records is a critical component of a hazardous waste compliance inspection]).

I conclude that Department staff has met its burden to prove that respondents failed to maintain training documents and records at the facility as required. Accordingly, respondents are liable for violating 6 NYCRR 373-3.2(g)(4) as alleged under the twelfth cause of action.

Thirteenth Cause of Action

Department staff alleges that respondents violated 6 NYCRR 373-3.2(g)(1)(i-iii) by failing "to provide any formal training program related to hazardous waste management" (complaint ¶¶ 27, 28).

Pursuant to 6 NYCRR 373-3.2(g)(1),

> "(i) Facility personnel must successfully complete a program of classroom instruction or on-the-job training that teaches them to perform their duties in a way that ensures the facility's compliance with the requirements of this Subpart. The owner or operator must ensure that this program includes all the elements described in the document required under subparagraph (4)(iii) of this subdivision.
>
> "(ii) This program must be directed by a person trained in hazardous waste management procedures, and must include instruction which teaches facility personnel hazardous waste management procedures (including contingency plan implementation) relevant to the positions in which they are employed.
>
> "(iii) At a minimum, the training program must be designed to ensure that facility personnel are able to respond effectively to emergencies by familiarizing them with emergency procedures, emergency equipment and emergency systems, including where applicable: (a) procedures for using, inspecting, repairing and replacing facility emergency and monitoring equipment; (b) key parameters for automatic waste feed cutoff systems; (c) communication or alarm systems; (d) response to fires or explosions; (e) response to ground-water contamination incidents; and (f) shutdown of operations."

Department staff asserts that "training requirements and records were required for the facility and the facility . . . had not conducted any training" (staff closing brief at 12). Staff asserts that the testimony of its witness established respondents' liability for this violation (*id.*). Staff's witness testified that respondents are "a large-quantity generator, so they have stringent

requirements for training of personnel . . . dealing with hazardous waste" and that respondents had not satisfied the training requirements (tr at 134).

I conclude that Department staff has met its burden to prove that respondents failed to provide the mandated training to employees of the facility. Accordingly, respondents are liable for violating 6 NYCRR 373-3.2(g)(1)(i-iii) as alleged under the thirteenth cause of action.

Fourteenth Cause of Action

Department staff alleges that respondents violated 6 NYCRR 373-3.2(g)(2) by "ha[ving] no training records at the facility" (complaint ¶¶ 29, 30).

Pursuant to 6 NYCRR 373-3.2(g)(2), "[f]acility personnel must successfully complete the program required in [6 NYCRR 373-3.2(g)(1)] within six months after the date of their employment or an assignment to a facility, or to a new position at a facility. Employees must not work in unsupervised positions until they have completed the training requirements."

As noted above (*see supra* at 14), Department staff grouped the twelfth through sixteenth causes of action together in its closing brief. With respect to the fourteenth cause of action, the complaint alleges that respondents' failure to maintain records constitutes a violation of 6 NYCRR 373-3.2(g)(2). That provision, however, does not include a requirement for recordkeeping. Rather, as set forth the twelfth cause of action, the recordkeeping requirement is contained in 6 NYCRR 373 3.2(g)(4). I also note that Department staff cites to the same testimony of its witness in support of causes of action twelve through sixteen without expressly stating how that testimony establishes each separate cause of action.

I conclude that Department staff failed to demonstrate that respondents' failure to maintain training records at the facility, as alleged under the fourteenth cause of action, constitutes a violation of 6 NYCRR 373-3.2(g)(2). Accordingly, the fourteenth cause of action is dismissed.

Fifteenth Cause of Action

Department staff alleges that respondents violated 6 NYCRR 373-3.2(g)(3) by failing to have formal training for hazardous waste management at the facility (complaint ¶¶ 31, 32).

Pursuant to 6 NYCRR 373-3.2(g)(3), "[f]acility personnel must take part in an annual review of the initial training required in [6 NYCRR 373-3.2(g)(1)]."

Department staff asserts that "training requirements and records were required for the facility and the facility . . . had not conducted any training" (staff closing brief at 12). Staff asserts that the testimony of its witness established respondents' liability for this violation (*id.*). Staff's witness testified that respondents are "a large-quantity generator, so they have stringent requirements for training of personnel . . . dealing with hazardous waste" and that respondents had not satisfied any of the training requirements (tr at 134).

I conclude that Department staff has met its burden to prove that respondents failed to have facility personnel take part in an annual review of the initial training required by 6 NYCRR 373-3.2(g)(1). Accordingly, respondents are liable for violating 6 NYCRR 373-3.9(d)(3) as alleged under the fifteenth cause of action.

Sixteenth Cause of Action

Department staff alleges that respondents violated 6 NYCRR 373-3.2(g)(5) by failing to maintain required training records for its employees (complaint ¶¶ 33, 34).

Pursuant to 6 NYCRR 373-3.9(g)(5), "[t]raining records on current personnel must be kept until closure of the facility. Training records on former employees must be kept for at least three years from the date the employee last worked at the facility."

Department staff asserts that "training requirements and records were required for the facility and the facility did not have any records and had not conducted any training" (staff closing brief at 12). Staff asserts that the testimony of its witness established respondents' liability for this violation (*id*.). Staff's witness testified that respondents are "a large-quantity generator, so they have stringent requirements for training of personnel . . . dealing with hazardous waste" and that respondents had maintained no training records (tr at 134; *see also* tr at 164 [Paszko testimony that the review of a facility's records is a critical component of a hazardous waste compliance inspection]).

I conclude that Department staff has met its burden to prove that respondents failed to maintain required training records for its employees. Accordingly, respondents are liable for violating 6 NYCRR 373-3.2(g)(5) as alleged under the sixteenth cause of action.

Seventeenth Cause of Action

Department staff alleges that respondents violated 6 NYCRR 373-3.3(b) by failing to operate the facility in manner to reduce likelihood of fire, explosion, or release (complaint ¶¶ 35, 36).

Pursuant to 6 NYCRR 373-3.3(b), "[f]acilities must be maintained and operated to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil or surface water which could threaten human health or the environment."

Department staff's witness testified that the facility was not operated in a manner to reduce the possibility of a fire, explosion, or release of hazardous waste (tr at 134-135). He testified that he observed "drums scattered throughout the facility, some of which were empty, some of which were full. They're not marked. We have no idea what are in the drums" (tr at 45 [Paszko testimony regarding conditions depicted in exhibit 2]). He also testified that drums and containers "were thrown in [the garage] haphazardly with no consideration for incompatibles, or condition of the containers" (tr at 46 [Paszko testimony regarding the hundreds of drums and containers depicted in exhibit 2, photographs 2.8 – 2.13]). He testified that "incompatible

materials . . . can produce heat, which can produce fire, or . . . produce poisonous gas, depending on what those materials are" (*id.*; *see also* tr at 171 [Paszko testimony that conditions at the facility at the time of his first site inspection on April 21, 2015 posed a threat to human health and safety]; exhibit 2, photographs 2.1, 2.3, 2.5, 2.6, 2.7 [depicting leaking and rusting containers]; exhibit 3, photographs 3.8, 3.12, 3.41, 3.42, 3.44, 3.45, 3.54 [depicting leaking, dented, and rusting containers]).

I conclude that Department staff has met its burden to prove that respondents failed to operate the facility in a manner to minimize the possibility of a fire, explosion, or release of hazardous waste. Accordingly, respondents are liable for violating 6 NYCRR 373-3.3(b) as alleged under the seventeenth cause of action.

Eighteenth Cause of Action

Department staff alleges that respondents violated 6 NYCRR 373-3.4(b)(1) by failing to have a contingency plan for the facility (complaint ¶¶ 37, 38).

Pursuant to 6 NYCRR 373-3.4(b)(1), "[e]ach owner or operator must have a contingency plan for the facility. The contingency plan must be designed to minimize hazards to human health or the environment from fires, explosions, or any unplanned sudden or nonsudden release of hazardous waste or hazardous waste constituents to air, soil or surface water."

Department staff's witness testified that, when he undertakes an inspection of a hazardous waste facility, "it's really an inspection of all the records, the documentation that they have" (tr at 164). He further testified that he found no contingency plan for the facility (tr at 135).

I conclude that Department staff has met its burden to prove that respondents failed to have a contingency plan for the facility. Accordingly, respondents are liable for violating 6 NYCRR 373-3.4(b)(1) as alleged under the eighteenth cause of action.

Nineteenth Cause of Action

Department staff alleges that respondents violated ECL 27-0914 by disposing (through abandonment of the site) hazardous waste without authorization (complaint ¶¶ 39, 40).

Pursuant to ECL 27-0914(2), "[n]o person shall dispose of hazardous wastes without authorization." As defined under ECL 27-0901(2), "Disposal" includes "the abandonment, discharge, . . . spilling, leaking or placing of any substance so that such substance or any related constituent thereof may enter the environment."

Department staff's witness testified that, when respondents abandoned the facility, "all that material [that remained on site] became a waste" (tr at 201). The record establishes that, in September 2015, a contractor shipped 43,350 pounds of hazardous waste from the facility to a disposal facility located in Canada (findings of fact ¶ 11). Further, a similar amount of hazardous waste may remain in containers that are still at the site (*see* tr at 169 [Paszko testimony that "maybe half the hazardous waste was disposed of" by the contractor]; tr at 208 [Paszko testimony that the contractor hired to remove containerized hazardous waste from the

facility "realized that there was a lot more material there than they had estimated for [and] Mr. Patenaude . . . said that the costs [of removal] had gone up . . . from sixty thousand [dollars] to about a hundred twenty thousand [dollars]"]; *see also* exhibit 7, photographs 7.10-7.13, 7.27-7.29 [photographs taken on Feb. 16, 2017 depicting hundreds of containers, including dozens of 55-gallon drums, that remain at the site]; exhibit 19 [proposal from contractor, dated Sept. 16, 2015, estimating removal of waste from the site will cost $56,293.95]; answer ¶ 8 [respondents statement that, "[u]pon information and belief, approximately one-half of the material onsite [in 2015] was properly removed and disposed of by NYBDC"]).

The record establishes that, at the time respondents vacated the facility in August 2015, scores of tons of hazardous waste were left at the site. Although approximately half of the containerized hazardous waste has been removed, tens of thousands of pounds of hazardous waste remains on site.

I conclude that Department staff has met its burden to prove that respondents disposed of hazardous waste at the site without authorization. Accordingly, respondents are liable for violating ECL 27-0914(2) as alleged under the nineteenth cause of action.

Affirmative Defense

Respondents raise a single affirmative defense in their answer (*see* answer ¶¶ 4-10 [captioned "AS AND FOR AN AFFIRMATIVE DEFENSE"]). Therein, respondents acknowledge that they "operated a commercial painting company" at the site and that, as part of that operation, "[p]aint and other ancillary products remaining after completion of a project would be kept for use on future products" (*id.* ¶¶ 4, 5). Respondents assert that "a foreclosure proceeding was commenced by NYBDC" in or about 2015, and that respondents "were required by NYBDC to vacate the Premises" (*id.* ¶¶ 4, 6). Respondents further assert that, since the foreclosure, they "have not had any control over [or] access" to the site and that "NYBDC informed Respondents that NYBDC would dispose of any hazardous material on site, and charge back Respondents for such disposal costs" (*id.* ¶ 7, 10).

The legal theory of respondents' affirmative defense is not clear (*see* 6 NYCRR 622.4[f] [providing that Department staff may move for clarification of an affirmative defense where the defense fails to place staff "on notice of the facts and legal theory upon which respondent's defense is based"]). Accepted as true, the factual assertions set forth by respondents would not eliminate their liability for the violations alleged in the complaint. Respondents' liability arises from their decades-long operation of a commercial painting company at the site and the tens of thousands of pounds of hazardous waste that respondents generated, stored, and ultimately abandoned at the site. Whether respondents were required by NYBDC to vacate the site and, thereafter, were no longer in control of the site does not alter the analysis of their liability. At most, issues concerning respondents' current access to the site may be considered in any directive from the Commissioner regarding site remediation.

Moreover, although respondents bear the burden to plead and prove affirmative defenses (*see* 6 NYCRR 622.4[c]; 622.11[b][2], [c]), respondents did not proffer evidence or arguments in support of the affirmative defense set forth in the answer. Accordingly, the affirmative defense is dismissed.

Relief

By its complaint, Department staff requests that the Commissioner issue an order assessing a penalty of $625,000 (complaint, wherefore clause ¶ II). Staff further requests that the Commissioner direct respondents to "[p]roperly store, test, transport and dispose of all the abandoned hazardous waste at the Facility [and] [c]orrect all other violations set forth in this complaint" (*id.*, wherefore clause ¶ III).

-- Penalty

For the reasons discussed below, I recommend that the Commissioner issue an order assessing a penalty of $625,000, as requested by Department staff.

Department staff met its burden of proof and has established respondents' liability for the large majority of violations set forth in the complaint. Specifically, staff met its burden to prove the allegations under causes of action 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, and 19 (proven violations). Staff failed to meet its burden only in relation to causes of action 1, 4, and 14. The penalty provision applicable to the proven violations is set forth at ECL 71-2705, which states that:

> "[a]ny person who violates any of the provisions of, or who fails to perform any duty imposed by titles 9, 11 and 13 of article 27 or any rule or regulation promulgated pursuant thereto . . . shall be liable in the case of a first violation, for a civil penalty not to exceed thirty-seven thousand five hundred dollars and an additional penalty of not more than thirty-seven thousand five hundred dollars for each day during which such violation continues."

The Department's Civil Penalty Policy (Commissioner Policy DEE-1 [DEE-1], dated June 20, 1990) sets forth several factors that are to be considered when calculating a proposed penalty. The policy states that "[t]he starting point of any penalty calculation should be a computation of the potential statutory maximum for all provable violations" (DEE-1 § IV.B). As Department staff notes, because ECL 71-2705 provides for the imposition of daily penalties in the case of continuing violations, many of the proven violations expose respondents to a statutory maximum penalty in the tens of millions of dollars (*see* staff closing brief at 13 [stating that "[t]he potential statutory maximum penalties for the violations proven here [are] in the multiple tens of millions of dollars"]).

Under the second cause of action, for example, the evidence indicates that respondents failed for years to make the required hazardous waste determination for waste that was generated at the facility (*see supra* at 8-9 [noting that documentation from respondents shows that hazardous waste was last transported from the facility in January 2013]). Because the determination of whether a waste is a hazardous waste is critical to the regulatory scheme, this failure represents a significant violation of the hazardous waste regulations. Each failure by respondents to make a hazardous waste determination for waste generated at the site remains a

continuing violation until respondents correct the violation by making the required determination.

Using April 21, 2015 (the date of staff's first hazardous waste compliance inspection of the facility[7]) as the first day of the violation and continuing through June 28, 2017 (the date of the complaint), respondents' violation of the requirement to make hazardous waste determinations continued for 800 days.[8] As such, this violation alone would result in a maximum statutory penalty of $30,000,000.

Department staff states that "Respondents here have clearly [flouted] the law and the penalty must be such as to create a deterrence" (staff brief at 13). Staff suggests, without providing the underlying analysis, that the penalty requested may be less than the economic benefit that respondents have derived from their noncompliance with the law (*id.*). Although respondents clearly derived an economic benefit from their longstanding operation of the facility without having to bear the cost of compliance with the hazardous waste regulations, the record does not establish the extent of the economic benefit.

Nevertheless, as staff asserts, the gravity component of the penalty calculation is significant (staff brief at 14). The regulatory scheme involved is intended to prevent unlawful disposal or release of hazardous waste into the environment and respondents' operation was noncompliant with numerous regulatory provisions.

The proven violations demonstrate that respondents grossly mishandled large quantities of hazardous waste, failed to follow basic safety measures to reduce the likelihood of fire, explosion, or release of hazardous waste, and did not train their employees in the proper management of these wastes. Moreover, four months after the Department became aware of the existence of hazardous waste at the facility, respondents vacated the site and abandoned tens of thousands of pounds of hazardous waste. Staff's witness, Mr. Paszko, testified that "this is the most significant waste . . . I've seen, at any facility that I've inspected, that's not in compliance with the regulations" (tr at 105-106). Respondents' actions warrant the imposition of a substantial penalty.

I note that the Civil Penalty Policy allows for consideration of a respondent's ability to pay and states that "[t]he burden to demonstrate inability to pay rests with the respondent" (DEE-1 § IV.E.4). Although the record indicates that respondents may have been under financial distress at the time that they vacated the facility in 2015 (*see e.g.* tr at 191 [Paszko testimony that he was aware that the site in foreclosure, but that he did not know the details),

[7] Department staff was also at the facility on April 15, 2015, but that was in response to a complaint against the facility and staff did not conduct a hazardous waste compliance inspection at that time (*see* findings of fact ¶¶ 4-5).

[8] This calculation is conservative in that there is no indication in the record that respondents complied with the regulation for years prior to the date of Department staff's first hazardous waste compliance inspection of the facility, nor is there any indication that respondents made the required hazardous waste determinations for the waste that remained at the site after the complaint was filed.

respondents did not present argument or proffer evidence with regard to their ability to pay. Accordingly, I have not considered this factor.

In consideration of the factors discussed above, I conclude that Department staff's requested penalty of $625,000 is reasonable and appropriate. At the hearing, Mr. Paszko testified that he did not initially pursue enforcement in this matter because he "would rather see money spent on remediation, rather than fines and penalties . . . If we can get a site cleaned up and protect human health and the environment . . . that's our goal" (tr at 36-37). In recognition of this, and to incentivize respondents to undertake appropriate corrective action, I recommend that the Commissioner suspend $425,000 of the penalty, provided that respondents implement all corrective measures to the satisfaction of the Department.

-- Corrective Measures

By its complaint, Department staff seeks an order of the Commissioner directing respondents to "[p]roperly store, test, transport and dispose of all of the abandoned hazardous waste at the Facility [and] [c]orrect all other violations set forth in this complaint" (complaint at 7). In accordance with ECL 71-2705, any person who violates any of the provisions at issue in this proceeding may "be enjoined from continuing such violation."

As described herein, respondents are liable for the abandonment of a large quantity of hazardous waste at the site and a substantial amount of that waste remains in place. Accordingly, Department staff's request for "all of the abandoned hazardous waste at the Facility" to be properly tested, transported, and disposed is reasonable and appropriate. This requirement is not limited to the containerized waste at the facility, but rather applies to all waste remaining on site. Accordingly, a hazardous waste determination must be made for the sand blast media at the facility and, as warranted, the media must be properly disposed of as hazardous waste (*see* findings of fact ¶ 15).

There is some indication in the record that indicates respondents' access to the site may have been limited after the date that they ceased commercial operations at the site (*see* tr at 195 [Paszko testimony that respondent "Patenaude told me he had no control over the site"]; *see also* answer ¶ 10 [respondents' representation that they no longer have control or access to the site]). The record as a whole, however, indicates that respondents continued to have access to the site after they vacated the premises in August 2015.

On September 17, 2015 respondent Patenaude, as the President and CEO of respondent WWPS, executed a contract with TMC Environmental to, among other things, "[p]repare waste profile reports, manifests and other shipping documents" and "[s]chedule transportation of waste to [an] approved treatment storage and disposal facility (TSDF)" (exhibit 19 at 1, 5). The contract expressly states that the signatory "authorizes TMC to commence services . . . and grants access, at reasonable times, to the [site]" (*id.* at 5). The contract identifies respondent WWPS as the client and makes no reference to NYBDC having any obligation under the contract.

On November 2, 2015 Michael Steele, an employee of WWPS, took a soil sample at the site and provided it to a laboratory for analysis (*see* tr at 85; exhibit 23 at 6 [chain of custody record]). The documentation relating to this soil sample states that the "Client" is WWPS and that the laboratory report should be sent to respondent Patenaude (exhibit 23 at 6 [chain of custody record]).

Mr. Paszko testified that, after respondents ceased commercial operations at the facility, he would gain access to the site through a representative from NYBDC (tr at 101, 195). He also testified, however, that the NYBDC representative never advised him that respondent Patenaude was precluded from accessing the site or from addressing the remaining hazardous waste at the site (tr at 101, 103).

Regardless of the extent of respondents' ability to access the site, I recommend that the Commissioner direct respondents to complete the clean up and removal of all hazardous waste remaining at the site in accordance with a Department-approved removal plan. To the extent that there are any restrictions on respondents' access to the site, respondents should be directed to make all reasonable efforts to gain access for the purpose of implementing the removal plan.

CONCLUSIONS AND RECOMMENDATIONS

As detailed above, I conclude that Department staff has met its burden to establish that respondents violated ECL article 27 or its implementing regulations as alleged under causes of action 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, and 19. Staff failed to meet its burden in relation to causes of action 1, 4, and 14, and those causes of action are dismissed. I recommend that the Commissioner issue an order (i) assessing a civil penalty against respondents, jointly and severally, in the amount of $625,000, with $425,000 suspended provided that respondents comply with all terms and conditions of the order; and (ii) directing respondents to properly test, remove and dispose of all remaining hazardous waste at the site in accordance with a Department-approved removal plan.

EXHIBIT LIST

Matter of Andrew Patenaude and W.W. Patenaude Sons, Inc.
DEC Case No. R5-11122-2017

Exhibit No.	Rec'd (Y/N)	Description
1	Y	Site Photographs taken April 15, 2015
2	Y	Site Photographs taken August 21, 2015
3	Y	Site Photographs taken August 24, 2015
4	Y	Site Photographs taken September 22, 2015
5	N	Photographs of Elizabeth Street location taken February 3, 2017
6	Y	Site Photograph taken February 3, 2017
7	Y	Site Photographs taken February 16, 2017
8	N	Photographs of Elizabeth Street location taken February 21, 2017
9	Y	Photographs taken May 26, 2017
10	Y	Site Photographs taken August 29, 2017
11	Y	Site Photographs (undated) taken sometime after August 29, 2017
12	N	Timeline of Regulatory Oversight
13	Y	RCRA Generator Requirements
14	Y	Paszko Resume
15	Y	Email dated April 17, 2015 from respondent Patenaude to staff (includes attached Hazardous Waste Manifests)
16	Y	Letter dated May 12, 2015 from staff to respondents (enclosing Inspection Form from April 21, 2015 inspection)
17	Y	DEC Spill Report, spill date August 21, 2015
18	Y	Letter dated September 15, 2015 from staff to respondents (re: information request concerning August 21, 2015 inspection)
19	Y	Contract, signed by Andrew Patenaude on behalf of WWPS on September 17, 2015, authorizing TMC Environmental to commence removal of waste from the site
20	Y	Email dated September 26, 2015 from staff to respondent Patenaude (includes partial contractor list)
21	Y	Email dated October 14, 2015 from respondent Patenaude to staff (re: documents relating to waste disposal at site)
22	Y	Notice of Violation, dated November 2, 2015 (citing August 21, 2015 inspection)
23	Y	Letter from Adirondack Environmental Services dated November 3, 2015 to respondents (re: sample analysis)
24	Y	Email dated June 7, 2017 from NRC (re: non-payment for waste removal at site)
25	Y	Email dated June 9, 2017 from NRC (re: documentation/manifests of waste removal at site)

Exhibit No.	Rec'd (Y/N)	Description
26	Y	DEC Spill Report, spill date September 20, 2017
27	Y	Letter dated November 8, 2017 from Hanson Van Vleet to staff (re: Phase 2 sub-surface investigation results)
28	Y	Letter dated November 8, 2017 from Hanson Van Vleet to staff (re: Supplemental groundwater sampling results)
29	Y	Letter dated November 10, 2017 from staff to respondents (re: removal of sand blast media at site)
30	Y	DEC Spill Report, spill date April 9, 2015
31	Y	Email dated August 19, 2015 from staff re: spill complaint at site