STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Articles 17 and 71 of the New York State Environmental Conservation Law, Article 12 of the New York State Navigation Law, and Titles 6 and 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

- by -

RABEE HOLDINGS INC., ROUTE 9D HOLDINGS INC. and ROUTE 376 HOLDINGS INC.,

Respondents.

RULING

NYSDEC File No. R3-20190321-58

PROCEEDINGS

This ruling addresses a July 31, 2019 contested motion for order without hearing (the "Motion"), filed with the Office of Hearings and Mediation Services by staff of the New York State Department of Environmental Conservation ("DEC" or "Department"). Pursuant to section 622.12(a) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), Department Staff may serve a motion for order without hearing in lieu of or in addition to a notice of hearing and complaint. Here, Department Staff served the motion on respondents in lieu of a notice of hearing and complaint.[1]

The Motion alleges that respondents Rabee Holdings Inc., Route 9D Holdings Inc. and Route 376 Holdings Inc. ("respondents") violated the terms of a January 2018 order on consent (the "2018 Order"). The 2018 Order addressed violations at three different abandoned gasoline stations to which respondents acquired title from Dutchess County by tax sale. Respondent Rabee Holdings Inc. acquired the 538 Route 52, Glenham, New York facility (the "Glenham Facility"); respondent Route 9D Holdings Inc. acquired the 2755 West Main Street, Wappingers Falls, New York facility (the "West Main Street Facility"); and respondent Route 376 Holdings Inc. acquired the 1592 Route 376, Wappingers Falls, New York facility (the "Route 376 Facility"). The properties are referred to in this ruling collectively as the "Facilities."

Department Staff alleged that respondents violated the 2018 Order, as well as provisions of New York State Environmental Conservation Law ("ECL") Articles 17 and 71. In addition, Department Staff alleged that respondent Route 376 Holdings Inc. violated Article 12 of the New York State Navigation Law ("NL"), Part 613 of 6 NYCRR, and Part 32 of 17 NYCRR. Department Staff sought an order imposing a civil penalty of $22,500 on respondents, as well as payment of $12,750, the suspended portion of a civil penalty agreed to as part of the 2018 Order. Department Staff also requested that respondent Route 376 Holdings Inc. be assessed a penalty

[1] According to the affidavit of service of Donna Holmes, sworn to August 5, 2019, respondents were served by certified mail on August 1, 2019, with a delivery date of August 2, 2019.

of $17,500 in connection with a petroleum spill at that property, and be ordered to fully investigate and remediate the spill.

In support of its motion, Department Staff filed the July 31, 2019 affirmation of John K. Urda, Esq. (the "Urda Affirmation"), with attached exhibits; and the affidavit of Joshua P. Cummins, P.E., sworn to July 31, 2019 (the "Cummins Affidavit"), with attached exhibits. A list of the exhibits is attached to this ruling.

On August 29, 2019, respondents served the following documents in response to the Motion: the August 29, 2019 Affirmation of Dean S. Sommer, Esq. (the "Sommer Affirmation"); the Affidavit of Steven Lowitt, sworn to August 28, 2019 (the "Lowitt Affidavit"); the Affidavit of Deborah Thompson, sworn to August 27, 2019 (the "Thompson Affidavit"); the Affidavit of Michael Carr, sworn to August 29, 2019 (the "Carr Affidavit"); and the Affidavit of Rabee Nesheiwat, sworn to August 28, 2019 (the "Nesheiwat Affidavit"). Exhibits provided with those affidavits are listed in the attachment to this ruling. The parties attempted to resolve the matter through mediation, but were unsuccessful.

By notice of motion dated January 30, 2020, respondents moved to supplement the record with respect to the allegations in the fourth and fifth causes of action in Department Staff's motion. The motion to supplement the record ("Motion to Supplement") was accompanied by the Affirmation of Joseph F. Castiglione, Esq. (the "Castiglione Affirmation"), and the Affidavit of Michael Carr (the "Carr Supplemental Affidavit"), both dated January 30, 2020. Department Staff opposed the motion in the February 5, 2020 Affirmation of Joyce Juidice, Esq. (the "Juidice Affirmation").

As detailed below, Department Staff has met its burden and established as a matter of law that respondents committed some, but not all, of the violations set forth in the motion. Because there are outstanding factual disputes that require adjudication, further proceedings are necessary.

Positions of the Parties

The Motion alleged that respondents violated Section 71-1929 of the ECL by failing to comply with the terms of the 2018 Order. Section 71-1929 provides that any person who violates any of the provisions of the statute, the regulations, or orders of the Commissioner "shall be liable to a penalty of not to exceed thirty-seven thousand five hundred dollars per day for each violation."

Department Staff also contended that respondents violated various provisions of the petroleum bulk storage ("PBS") regulations at Part 613 of 6 NYCRR in connection with the activities undertaken at the Route 376 Facility. According to Department Staff, respondent Route 376 Holdings Inc. also illegally discharged petroleum at the Route 376 Facility, and failed to contain and clean up the discharge, in violation of Sections 173 and 176 of the Navigation Law, and Section 32.5 of 17 NYCRR.

Department Staff requested that the Commissioner issue an order:

(1) finding that Rabee Holdings Inc., Route 9D Holdings Inc. and Route 376 Holdings Inc. violated the 2018 Order and Section 71-1929 of the ECL on nine counts;

(2) finding that Route 376 Holdings Inc. violated Sections 613-1.9(f), 613-2.6(b)(1), and 613-2.6(e) of 6 NYCRR;

(3) finding that Route 376 Holdings Inc. violated Sections 173 and 176 of the Navigation Law, and Section 32.5 of 17 NYCRR;

(4) imposing a civil penalty payable to the Department pursuant to Section 71-1979 of $22,500 (twenty-two thousand five hundred dollars) on Rabee Holdings Inc., Route 9D Holdings Inc. and Route 376 Holdings Inc., for violations of the 2018 Order;

(5) directing Rabee Holdings Inc. Route 9D Holdings Inc. and Route 376 Holdings Inc. to submit the $12,750 (twelve thousand, seven hundred fifty dollar) penalty suspended under the 2108 Order, payable to the Department;

(6) imposing a civil penalty of $7,500 (seven thousand five hundred dollars), pursuant to Section 71-1979 of the ECL for violations of Sections 613-1.9(f), 613-2.6(b)(1), and 613-2.6(e) of 6 NYCRR, payable to the Department;

(7) imposing a civil penalty of $10,000 (ten thousand dollars) on Route 376 Holdings Inc., pursuant to Section 192 of the Navigation Law, payable to the New York State Environmental Protection and Spill Compensation Fund;

(8) directing Route 376 Holdings Inc. to fully investigate, clean up, and remove the contamination from NYSDEC Spill No. 1809704, pursuant to a Department-approved work plan.

Because there are outstanding material issues of fact, this ruling makes no determination with respect to the relief requested by Department Staff.

Respondents denied the allegations, and asserted that the evidence established that respondents voluntarily undertook an investigation and cleanup at three long-abandoned retail service stations foreclosed upon by Dutchess County. According to respondents, the prior existing conditions at the service stations "were well known but long ignored by the Department." Sommer Affirmation, ¶ 3. Respondents argued that "[t]he Order's requirement was simple, it was to remove the tanks from the abandoned facilities in a little less than one year." Nesheiwat Affidavit, ¶ 26.

Noting that two of the facilities (the Glenham Facility and the West Main Street Facility) were cited with no violations in the Motion except for one alleged violation of each failing to submit a work plan, respondents maintained that those two facilities "are considered by Department Staff to have been addressed properly by the Respondents in a timely manner." Nesheiwat Affidavit, ¶ 40. Consequently, respondents took the position that because the work at the Route 376 Facility was undertaken in essentially the same way, Department Staff's

allegations with respect to any violations at that site were baseless. Respondents stated that from the time of the effective date of the 2018 Order on January 18, 2018 to the recipe of the July 31, 2019 Motion, "the companies did not receive one Notice of Violation."

Respondents' consultant stated that Department Staff's allegations were not consistent "with usual enforcement actions in this Region," and that in light of respondents' initiative to clean up a number of sites contaminated by others many years ago, and then redevelop those sites, "the allegations as to the failure to submit work plans is reflective of a punitive intent without any factual basis." Carr Affidavit, ¶ 15. Mr. Nesheiwat asserted that it was his belief "that the Department could have worked with us in a reasonable schedule to conduct the work; [and] cooperated with us since were cleaning up sites based on what others had done." Nesheiwat Affidavit, ¶ 23. He went on to contend that "[i]nstead, the Department's focus was on punishment; leading us to think that we were not just 'new owners,' but we were 'sucker owners' in the eyes of the Department." Id., ¶ 23. According to respondents, the Department's Region 3 staff had taken "a punitive and wholly unproductive position with the regulated community." Id., ¶ 41.

FINDINGS OF FACT

The following findings of fact are established for purposes of this proceeding:

1. Respondents, Rabee Holdings Inc., Route 9D Holdings Inc., and Route 376 Holdings Inc. are commonly-owned active domestic New York State business corporations, each with an office at 989 Noxon Road, Lagrangeville, New York. Urda Affirmation, ¶ 4, Exhibit A.

2. In separate deeds, each dated December 15, 2016, each respondent acquired title by tax sale from Dutchess County to a different abandoned gasoline station. Urda Affirmation, Exhibit B. Rabee Holdings Inc. acquired the property and PBS facility at 538 Route 52, Glenham, New York; Route 9D Holdings Inc. acquired the property and PBS facility at 2755 Main Street, Wappingers Falls, New York; and Route 376 Holdings Inc. acquired the property and PBS facility at 1592 Route 376, Wappingers Falls, New York. Urda Affirmation, Exhibit B.

3. On October 18, 2017, Department Staff served notices of violation ("NOVs") on each of the respondents, citing violations of Part 613 of 6 NYCRR for failing to permanently close abandoned PBS tank systems, and directing proper closure and removal of the tank systems at the three sites within thirty days, in accordance with the Part 613 closure requirements. Urda Affirmation, Exhibit D.

4. Respondents entered into an order on consent (No. R3-20171201-208) (the "2018 Order") to resolve the alleged violations. The effective date of the 2018 Order was January 29, 2018. Urda Affirmation, Exhibit E.

5. The 2018 Order included a Schedule of Compliance. Urda Affirmation, Exhibit E, at 4-5. The Schedule of Compliance provided that "[w]ithin 15 days of the effective

date of this Order, the Respondents shall cap and secure all fill ports and manways at the subject PBS facilities." Urda Affirmation, Exhibit E, at 4 (Paragraph II (1)). The 2018 Order went on to require that:

> II. 2. Within 30 days of the effective date of this Order, the Respondents shall submit to Department staff three workplans, including implementation schedules, providing for the full and proper permanent closure of each of the subject PBS facilities in accordance with all applicable provisions of 6 NYCRR Part 613, including pre-closure notice, proper closure, site assessment, closure documentation, and post-closure registration (the "Closure Activities") within the following timeframes:
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> (i) The Closure Activities at PBS #3-171735 (538 Route 32, Glenham) shall commence no later than March 15, 2018 and conclude no later than May 31, 2018;
>
> (ii) The Closure Activities at PBS #3-171786 (2755 West Main Street, Wappingers Falls) shall commence no later than August 1, 2018 and conclude no later than October 31, 2018; and
>
> (iii) The Closure Activities at PBS #3-171808 (1592 Route 376, Wappingers Falls) shall commence no later than October 1, 2018 and conclude no later than December 31, 2018.

Urda Affirmation, Exhibit E, at 4-5. The 2018 Order does not contain any other language as to deadlines for specific deliverables.

6. The 2018 Order stated that respondents "admit these violations and affirmatively waive the right to a public hearing in this matter in the manner provided by 6 NYCRR Part 622 . . . and waive the right to a public hearing in any matter that may arise under the terms of this Order." Urda Affirmation, Exhibit E, ¶ 16. The 2018 Order provided further that "[a]ny failure to comply with the terms of this Order may subject the Respondents to further enforcement action." Id., at 6 (Paragraph III).

7. Under the terms of the 2018 Order, respondents were assessed a civil penalty of $45,500. Of that amount, $12,750 was suspended, "provided the Respondents comply strictly with the terms of this Order." Urda Affirmation, Exhibit E, at Article I, B, p. 4. The 2018 Order provided that if respondents violated any term of the 2018 Order, the whole amount of the civil penalty would be due within 15 days of receiving a notice of noncompliance from the Department. Id.

8. On December 18, 2018, Department Staff observed a discharge of petroleum at the Route 376 Facility. Mastro Affidavit, ¶ 11. Department Staff notified respondents' environmental consultant, who reported the spill. Mastro Affidavit, ¶ 13; Thompson Affidavit, ¶ 16. The discharge was assigned Spill No. 18-09704. Thompson Affidavit, ¶ 16; Mastro Affidavit, ¶14, Exhibit A.

9. United Pump and Tank, Inc. was dispatched to the Route 376 Facility on December 18, 2018. Lowitt Affidavit, ¶ 3.

DISCUSSION

Summary Judgment Standard

Pursuant to Section 622.12(a) of 6 NYCRR, Department Staff may serve a motion for order without hearing in lieu of, or in addition to, a complaint. Section 622.12(d) provides that a motion for order without hearing will be granted if, upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party.

A motion for summary judgment must be decided on the evidence presented by the parties, not on argument. Such evidence may include relevant documents and affidavits of individuals with personal knowledge of the disputed facts. Summary judgment is to be granted only where it is clear that there are no material issues of fact to be adjudicated (*see Vega v Restani Constr. Corp*., 18 N.Y.3rd 499, 503 (2012) (holding that summary judgment is "to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact" (internal quotation marks and citations omitted))).

Once the moving party has put forward a *prima facie* case, the burden shifts to the non-moving party to produce evidence sufficient to establish a triable issue (*see Matter of Locaparra*, Commissioner's Decision and Order, at 4 (June 16, 2003)). It is the moving party's initial burden to make a *prima facie* showing of entitlement to summary judgment for each element of the violations alleged, or any defenses raised. After the moving party has done so, the burden shifts to the opposing party to put forth its proof.

As discussed below, applying the summary judgment standard, Department Staff's motion for order without hearing is granted in part, and denied in part.

First Cause of Action

The first cause of action includes nine counts. The allegations relate to respondents' alleged failure to complete the required closure activities at the Facilities. Department Staff requested a civil penalty of $2,500 for each of the nine alleged violations of the 2018 Order and Section 71-1929 of the ECL, for a total civil penalty of $22,500.

First Cause of Action: First Count (Glenham Facility)

In the first count of the first cause of action, Department Staff alleged that respondents violated the 2018 Order and Section 71-1929 of the ECL by failing to submit the work plan for closure of the Glenham Facility. Urda Affirmation, ¶ 44. The 2018 Order required respondents to submit a work plan, including implementation schedules, for the Glenham Facility within thirty days of the effective date of the 2018 Order. 2018 Order, at 4-5.

The effective date of the 2018 Order was January 29, 2018. 2018 Order, at 10. Department Staff's witness, Joshua Cummins, stated that the 2018 Order required respondents to submit the work plan "within 30 days, or by February 28, 2018." Cummins Affidavit, ¶ 7. According to Mr. Cummins, respondents failed to submit the work plan. Id. In its Motion, Department Staff alleged that the violation commenced on March 1, 2018. Urda Affirmation, ¶ 44.

Respondents asserted that the work plan was submitted on February 2, 2018. Carr Affidavit, ¶ 12. Respondents' witness stated further that "[t]he allegations as to the submission of the work plans are particularly troublesome because DEC employee Josh Cummins . . . called me on July 1, 2019 to ask me if I had copies of the work plans submitted to the Department for [the Glenham Facility], and if I could resubmit them because Department staff had apparently misplaced or lost the copies we previously provided to the Department." Carr Affidavit, ¶ 11.

Ruling: Department Staff's Motion with respect to the first count of the first cause of action is denied. The parties dispute the date on which the work plan was submitted, and the date is an element of the alleged violation. Moreover, another fact question is raised by the work plan itself, which indicates that the document was signed on February 12, 2018 by Kevin Bradley, who prepared the work plan, and by Mr. Carr, who reviewed it. Carr Affidavit, Exhibit B. The e-mail transmitting the report is also dated February 12, 2018. Id. In either case, it appears that the work plan was submitted before February 28, 2018, contrary to Department Staff's allegation in the Motion.

In addition, respondents' counsel's affirmation referred to Department Staff's failure to comment on the work plan "for more than 7 months," while, as noted above, respondents' witness stated that Department Staff called to request replacement copies on July 1, 2019, more than a year after submission of the work plan. Sommer Affirmation, ¶ 12; Carr Affidavit, ¶ 11. Under the circumstances, respondents have raised a triable issue of fact concerning the violation alleged in the first count of the first cause of action.

First Cause of Action: Second Count (West Main Street Facility)

The second count of the first cause of action alleges that respondents failed to submit a work plan for closure in connection with the facility at 2755 West Main Street, Wappingers Falls, New York. Urda Affirmation, ¶ 45. Department Staff noted that the work plan was due by February 29, 2018, and alleged that the work plan was never submitted. Cummins Affidavit, ¶ 7.

Respondents acknowledged that the work plan was not submitted until June 8, 2018, but pointed out that Department Staff did not comment on the work plan for over seven months, and as was the case with respect to the work plan for the Glenham Facility, apparently lost the first submission. Carr Affidavit, ¶¶ 11-12. In addition, respondents took the position that the allegations were unwarranted "because we never received any prior notice from Department staff that work plans were not submitted." Carr Affidavit, ¶ 10. Respondents went on to observe that Department Staff did not comment on the work plan for more than seven months, and that all of

the other documentation that was to be submitted subsequent to the work plans was submitted in a timely manner. Sommer Affirmation, ¶ 46; Carr Affidavit, ¶ 14.

Ruling: Department Staff's Motion with respect to the second count of the first cause of action is granted. Respondents admit that the work plan was not submitted within 30 days after the effective date of the 2018 Order. Respondents' arguments regarding the lost submissions, Department Staff's failure to review, and the timeliness of other submissions, go the amount of penalty to be assessed, not liability.

First Cause of Action: Third Count (Route 376 Facility)

The third count of the first cause of action alleged that respondents violated the Consent Order and Section 71-1929 of the ECL by failing to submit a work plan for closure for the Route 376 Facility. Urda Affirmation, ¶ 46. According to Department Staff's witness, a work plan was not submitted for this location. Cummins Affidavit, ¶ 7.

Unlike the two other facilities, respondents did not provide a copy of the work plan, and do not indicate when the work plan was submitted. Instead, respondents argued that they "completed the tank excavation/removal work in accordance with the Order consistent with the work plans timely submitted for the other two locations but misplaced by the Department staff." Sommer Affirmation, ¶ 13. This statement does not address the specific allegation by Department Staff that a work plan was not submitted for the Route 376 Facility. Instead, respondents referred to Department Staff's failure to comment on the work plans and closure reports, concluding that "[b]ut for the voluntary action of Respondents, the Department likely would have continued its negligent inaction that was the status quo prior to Respondents taking title. Thankfully, the Respondents took care of the environment despite the Department's decades long unwillingness to act." Sommer Affirmation, ¶ 52.

Ruling: Department Staff's Motion is granted as to the third count of the first cause of action. Respondents did not provide evidence that the work plan was submitted within thirty days of the 2018 Order's effective date, sufficient to raise a factual issue in response to Department Staff's allegations. Respondents' arguments regarding Department Staff's actions can be considered in determining the appropriate penalty for this violation.

First Cause of Action: Fourth Count (Route 376 Facility)

The fourth count of the first cause of action alleges a violation of the Consent Order and Section 71-1929 of the ECL, for failure to commence closure activities at the Route 376 facility by submitting pre-work notification of the tank removal by October 1, 2018. Urda Affirmation, ¶ 47. The dispute with respect to this count of the first cause of action relates to the interpretation of the terms of the 2018 Order.

The 2018 Order's schedule of compliance provides, in pertinent part, as follows:

> II. 2. Within 30 days of the effective date of this Order, the Respondents shall submit to Department staff three workplans,

including implementation schedules, providing for the full and proper permanent closure of each of the subject PBS facilities in accordance with all applicable provisions of 6 NYCRR Part 613, including pre-closure notice, proper closure, site assessment, closure documentation, and post-closure registration (the "Closure Activities") within the following timeframes:

(iv) The Closure Activities at PBS #3-171735 (538 Route 32, Glenham) shall commence no later than March 15, 2018 and conclude no later than May 31, 2018;
(v) The Closure Activities at PBS #3-171786 (2755 West Main Street, Wappingers Falls) shall commence no later than August 1, 2018 and conclude no later than October 31, 2018; and
(vi) The Closure Activities at PBS #3-171808 (1592 Route 376, Wappingers Falls) shall commence no later than October 1, 2018 and conclude no later than December 31, 2018.

2018 Order, at 4-5. The 2018 Order does not contain any other language as to deadlines for specific deliverables.

According to Department Staff, respondents failed to commence Closure Activities by October 1, 2018. Department Staff took the position that "the first required Closure Activity was submission of pre-closure notice." Urda Affirmation, ¶ 19. The Cummins Affidavit states that respondents failed to submit the pre-closure notice for the Route 376 Facility by October 1, 2018. Cummins Affidavit, ¶ 9. The Cummins Affidavit goes on to state that "[r]ather, the Department received two pre-closure notices for the Route 376 Facility, dated December 10, 2018 (for five USTs) and December 17, 2018 (for one UST and one AST) – some ten to eleven weeks late." Id.; Cummins Affidavit, Exhibit A.

Respondents asserted that Department Staff's interpretation of the 2018 Order is incorrect. Respondents noted that the pre-work notification form was submitted before the tank extraction process began. Sommer Affirmation, ¶ 55; Thompson Affidavit, ¶ 30. Respondents contended that the 2018 Order "contains no requirement for the pre-closure notification to be submitted by October 1, 2018." Nesheiwat Affidavit, ¶ 25; Sommer Affirmation, ¶ 56. Respondents argued that Department Staff "wrongly allege that the requirement in Paragraph II 2 (iii) [sic] to 'commence Closure Activities' is synonymous with the submission of the 'pre-work notification of tank system approvals." Sommer Affirmation, ¶ 57.

Deborah Thompson of DT Consulting Services, Inc., respondents' contractor, included in her affidavit a copy of a December 10, 2018 e-mail to Mr. Cummins for pre-closure notification of four fuel USTs at the Route 376 Facility, in which she states "[p]lease see attached pre-work notification form. Let me know if you need anything further." Thompson Affidavit, ¶ 32. On December 20, 2018, Ms. Thompson again e-mailed Mr. Cummins, transmitting pre-closure notification for one UST and one above ground storage tank. Thompson Affidavit, ¶ 34. According to Ms. Thompson, Mr. Cummins responded by e-mail on December 20, 2018, telling her to "[m]ove forward with removal plans" at the Facility. Thompson Affidavit, ¶ 35.

Ruling: Department Staff's Motion as to the fourth count of the first cause of action is granted. The plain language of the 2018 Order required that respondents commence Closure Activities "no later than October 1, 2018." On this record, the only requirement in the 2018 Order schedule of compliance that occurred before October 1, 2018 was the submission of the work plans. While the 2018 Order does not contain a specific requirement that the pre-closure notice be submitted by October 1, 2018, there is nothing in the submissions that would establish that respondents undertook any of the Closure Activities on or before October 1, 2018. Respondents pointed out that Department Staff did not issue any notices of violation, and that the pre-closure notifications "were substantively complete, served their intended purpose, and were properly submitted." Sommer Affirmation, ¶ 89. These factors may be considered in determining the appropriate penalty amount.

First Cause of Action: Fifth Count (Route 376 Facility)

In the fifth count of the first cause of action, Department Staff alleged that respondents violated the 2018 Order and Section 71-1929 of the ECL by failing to complete proper closure of the tank system at the Route 376 Facility by December 31, 2018. Urda Affirmation, ¶ 48. Department Staff asserted that this violation ran from January 1, 2019 "at least through January 3, 2019, when Department staff observed piping still in the ground, in noncompliance with 6 NYCRR 613-2.6(b)(2). According to Department Staff, "the actual date of final removal is unknown." Urda Affirmation, ¶ 48.

Section 613-1.3(bk) of 6 NYCRR defines a tank system to include "all associated piping and ancillary equipment." Section 613-2.6(b)(2) of 6 NYCRR states that "to permanently close a UST system: (i) . . . [a]ll connecting and fill lines must be disconnected and removed or securely capped or plugged."

In his affidavit, Mr. Cummins stated that he visited the Route 376 Facility on January 3, 2019 and "observed unexcavated, uncapped and unplugged piping, part of the gasoline UST systems, extending underground from the abandoned UST field to the dispenser island." Cummins Affidavit, ¶12. Mr. Cummins referred to a Tank Closure Summary Report provided by respondents' contractor, Deborah Thompson. Cummins Affidavit, Exhibit B. The report indicates that the tanks were removed by December 21, 2018, and that "[a]ll associated product and vent lines were ultimately drained (as necessary) removed and properly disposed of during tank closure activities." Cummins Affidavit, Exhibit B, at 2.3(000006). The report goes on to state that "a short run (~12') of piping was removed post tank closures as the canopy needed to be safely decommissioned prior to their extraction from the subsurface." Id. Mr. Cummins stated that during the January 3, 2019 site visit, he observed that the gasoline dispenser area canopy "was not necessarily an obstacle to pipe removal – but even if it was, the Respondent neither alerted me of an issue nor contacted me to request an extension of time to complete the required Closure Activity." Cummins Affidavit, ¶ 14.

Ms. Thompson's affidavit stated that "[d]uring the winter there were some construction completion delays at the 376 Route Facility [sic] project and although most of the removal of over 300 tons of contaminated materials and 4,000 gallons of groundwater were completed in December 2018, as mandated under the Order, some piping on the ground was not removed from

that facility until January 14, 2019." Thompson Affidavit, ¶ 31. According to Ms. Thompson, she notified Department employees Melissa Mastro and Meagan Lenna via e-mail on December 17, 2018 that four UST tanks had been removed. Thompson Affidavit, ¶ 33. In that e-mail, Ms. Thompson advised Department Staff that petroleum contaminated soil was encountered within the gasoline UST excavation, and samples of that soil were being analyzed for disposal. Id. Ms. Thompson recommended live loading due to the nature of the site and the lack of space to stage soil, and indicated that the analysis and approval from the disposal facility "will likely take 7-10 business days." Id. The e-mail went on to state that "'[w]e will also need to remove the canopy (which the lag will give us time to do so)." Id.

Respondents argued that Department Staff did not conduct any follow-up inspection, and never sent respondents an NOV for the piece of piping observed on January 3, 2019. Sommer Affirmation, ¶ 93-94; Nesheiwat Affidavit, ¶ 29. According to respondents, "[t]he tank extractions and removal of impacted soil, if any, was [sic] the overriding goal of the 2018 Order for the 376 Route [sic] Facility. . . . [a]nd the extraction and soil removal were completed by the applicable December date." Sommer Affirmation, ¶ 95. Respondents took the position that the alleged violation of the 2018 Order for not properly closing the tank system "is simply a post hoc rationalization 'got you' violation concocted by the Department Staff attorney and Mr. Cummins on July 31, 2019 (the date of the Cummins Affidavit) to punish Respondent for refusing to pay the penalty demanded in May," which led to respondents' request for a hearing. Sommer Affirmation, ¶ 101.

Ruling: Department Staff's Motion with respect to the first count, fifth cause of action is denied. Department Staff were notified on December 17, 2018 by respondents' consultant that the soil analysis and approval would likely take 7-10 business days. Even assuming a lag of seven business days, the process would still have extended past the December 31, 2018 deadline for completion of Closure Activities set forth in the 2018 Order. Department Staff were notified of this delay, and the record does not reflect that Department Staff objected.

Furthermore, as respondents observed, the Cummins Affidavit does not include any contemporaneous written report with respect to the January 3, 2019 inspection, nor does the record indicate that any follow up inspection took place. Moreover, there is a substantial and material issue of fact raised by respondents because of the dispute as to whether the gas dispenser area canopy may have interfered with removal of the piece of pipe. A hearing should be held to address this count of the first cause of action.

First Cause of Action: Sixth Count (Route 376 Facility)

The sixth count of the first cause of action alleged that respondents failed to submit a site assessment report for the Route 376 Facility by December 31, 2018. Urda Affirmation, ¶ 49. According to Department Staff, the requirement in Paragraph II(2)(iii) of the 2018 Order to conclude Closure Activities at the Route 376 Facility "no later than December 31, 2018" requires completion of the work and submission of the site assessment.

Department Staff asserted that the site assessment was not submitted until May 23, 2019, and consisted of a February 28, 2019 Tank Closure Summary Report "containing a site

assessment and some closure documentation." Urda Affirmation, ¶ 21; Cummins Affidavit, ¶ 15. According to Department Staff, respondents "submitted the report only after Department staff had notified them of their violations of the 2018 Order, seemingly as an afterthought." Urda Affirmation, ¶ 21. Department Staff also contended that the site assessment was incomplete, because the report did not "include sampling along the piping run from the gasoline UST pit to the dispensers – a standard requirement of spill assessments." Cummins Affidavit, ¶ 19.

The Thompson Affidavit states that "[a]fter the removal of the USTs, there was some miscommunication between my company and the Respondents, and the Tank Report which I finished on February 28, 2019 and forwarded to Respondents was not submitted to the Department until May 22, 2019, because Respondents believed the Report had been sent to the Department when I provided it to Respondents. I didn't change the Report after it was completed on February 28, 2018 [sic]. . . The Tank Report includes all of the necessary materials for a site assessment and closure documentation as required under Paragraph II 2 of the 2018 Order." Thompson Affidavit, ¶ 36. According to Ms. Thompson, "[y]ou can't submit all post closure documentation on the same compliance date for pulling the tanks; that is just not logical or practical and not how the spill [sic] has functioned for decades." Thompson Affidavit, ¶ 12. Ms. Thompson goes on to state that she does not understand why Department Staff did not raise any comments or concerns regarding the tank report, either informally or through a comment review report. Thompson Affidavit, ¶ 38.

Respondents maintained that Department Staff found the site assessment to be acceptable on May 23, 2019, because Department Staff alleged that the violation ended on that date. Sommer Affirmation, ¶ 112; Urda Affirmation, ¶ 49. According to respondents, "[i]n short, the tank extraction and cleanup were properly conducted, the tank closure and site assessment report were submitted in May, and now the Department seeks $52,000.00 in penalties without even finding something wrong with the work performed or the report submitted." Sommer Affirmation, ¶ 112.

Ruling: Department Staff's Motion as to the sixth count of the first cause of action is granted. Respondents have not provided any explanation as to why they delayed removing the tanks until mid-December, when the 2018 Order provided that the Closure Activities, including the site assessment, were to begin no later than October 2018, and be completed by the end of December 2018. Notwithstanding the miscommunication between the consultant and respondents as to the submission of the site assessment, it is undisputed that the documentation was not submitted until May of 2019.

Moreover, as noted in the Cummins Affidavit, respondents never contacted Department Staff with questions or concerns regarding the required Closure Activities, or the schedule set forth in the 2018 Order, and "neither sought an extension of time, nor informed the Department of any problem meeting the required timeframe" other than, as discussed above, the delay in sampling and analysis of petroleum contaminated soil and the removal of the canopy. Cummins Affidavit, ¶ 22. Respondents' arguments with respect to Department Staff's inaction or failure to communicate regarding the site assessment, or the assertion that the language of the 2018 Order

is ambiguous, are insufficient to overcome the undisputed fact that the report was not submitted in accordance with the Order.

First Cause of Action: Seventh Count (Route 376 Facility)

In the seventh count of the first cause of action, Department Staff alleged that respondents failed to submit tank closure documentation to the Department for the Route 376 Facility by December 31, 2018. Urda Affirmation, ¶ 50. As discussed in connection with the sixth count, respondents submitted a Tank Closure Report to the Department in May of 2019. Mr. Cummins' affidavit states that "some tank closure documentation" was received as part of that report, "almost five months late." Cummins Affidavit, ¶ 16. According to Department Staff, the violation was continuing, "as complete and acceptable documentation has not been submitted to date." Urda Affirmation, ¶ 50.

Respondents repeated their arguments regarding the interpretation of the 2018 Order, and denied that the closure report was required to be submitted by December 31, 2018. According to respondents, the tanks were removed by December 31, 2018, and "[w]hatever threat may have existed, the Department had tolerated such a condition for decades." Sommer Affirmation, ¶ 121. Respondents went on to contend that they "obtained no economic benefit and gained no advantage of any kind by the Tank Report being submitted in May 2019." Sommer Affirmation, ¶ 127; Nesheiwat Affidavit, ¶ 31. According to respondents, "clearly time was not of the essence," because the Department had yet to comment upon the report, and "it is obvious that the Department does not think that the submission date is important." Sommer Affirmation, ¶ 128.

Respondents also maintained that because Department Staff had not commented on the closure documentation, it was impossible for respondents "to understand the basis for the Department's allegation that the closure documentation can't be approved." Sommer Affirmation, ¶ 133; Thompson Affidavit, ¶ 37. Respondents also disputed the reasons offered by Mr. Cummins regarding the insufficiency of the closure documentation, and the site assessment included in that documentation. Sommer Affirmation, ¶¶ 134-139.

Ruling: Department Staff's Motion as to the seventh count of the first cause of action is granted. As discussed in connection with the sixth count, respondents have not offered any explanation sufficient to excuse their failure to submit the post-closure registration application on or before December 31, 2018, as required by the 2018 Order. Instead, it appears from the record that most, if not all, of the Closure Activities did not begin until December of 2018, despite the requirement in the 2018 Order that such activities were to commence no later than October 1. The adequacy of the closure documentation submitted, and any delay by Department Staff in responding to the submission, may be considered as appropriate in connection with determining the appropriate penalty.

First Cause of Action: Eighth Count (Route 376 Facility)

Department Staff's eighth count of the first cause of action alleged that respondents failed to submit a post-closure PBS registration to the Department for the Route 376 Facility by December 31, 2018. Urda Affirmation, ¶ 51.

Respondents argued, as was the case in connection with the previous counts of the first cause of action, that the 2018 Order did not require submission of the post-closure registration by December 31, 2018. Respondents stated that they cannot submit the post-closure registration "until Department staff provide the Respondents with either an approval of the May 23, 2019 Tank Report [dated February 28, 2018[sic]] or comments on any deficiencies." Sommer Affirmation, ¶ 146; Thompson Affidavit, ¶ 37. According to respondents, "[t]o date, the Department continues to refuse to comment on the Report." Sommer Affirmation, ¶ 146.

Respondents also maintained that "[s]ince the tank extraction Closure Activities could have been completed as late as December 31, 2018 and the closure documentation is prepared after the tank excavation, the Department staff interpretation that closure documentation must be submitted under the 2018 Order by the same date as concluding tank extractions is illogical and inconsistent with a reading of the entirety of the requirements in Paragraph II 2." Sommer Affirmation, ¶ 148. This argument does not take into account the fact that under the terms of the 2018 Order, the work at the Route 376 Facility was to begin no later than October 1, 2018, and conclude no later than December 31, 2018. Moreover, the Closure Activities enumerated in the 2018 Order include "post closure registration."

Ruling: Department Staff's motion with respect to the eighth count of the first cause of action is granted. Respondents have not raised an issue of fact with respect to respondents' claim that Department Staff's lack of approval or comment upon the Tank Report precludes respondents from submitting the post-closure registration. The Closure Activities enumerated in the 2018 Order included the submission of post-closure registrations for the Route 376 Facility, and respondents have not offered any explanation as to why the work at that site apparently did not begin until December of 2018, despite the requirement in the 2018 Order that such activities were to commence on or before October 1, 2018. Consequently, respondents cannot rely upon an alleged delay by Department Staff as a basis to excuse non-compliance with the terms of the 2018 Order.

First Cause of Action: Ninth Count (Route 376 Facility)

The ninth count of the first cause of action alleges that respondents failed to pay a suspended penalty within 15 days of receiving a notice of non-compliance from the Department on May 22, 2019. Urda Affirmation, ¶ 52. The 2018 Order assessed a $45,500 civil penalty, of which $12,750 was suspended "provided the Respondents comply strictly with the terms of this Order. If the Respondents violate any term of this Order, the whole amount of the suspended penalty shall be due within 15 days of receiving a notice of noncompliance from the Department." 2018 Order, at I B, p. 4.[2] By e-mail dated May 22, 2019, counsel for Department Staff notified respondents of the violations of the 2018 Order, specifically, that tank closure activities "were neither commenced by October 1, 2018 nor concluded by December 31, 2018." Urda Affirmation, Exhibit E. The e-mail went on to state that "[t]he suspended portion of the civil penalty is therefore due within 15 days."

[2] Mr. Nesheiwat's affidavit states that he paid $30,000 of the unsuspended portion of the penalty. Nesheiwat Affidavit, ¶ 39.

Respondents contended that Department Staff had "misconstrued their powers under the 2018 Order regarding the $12,750 suspended penalty." Sommer Affirmation, ¶ 152. Noting that the suspended penalty was due if the respondents violated any term of the 2018 Order, respondents argued that "Department staff have no inherent power within the Department to make a final agency determination of a 'violation' of the Order as the power is reserved to the Commissioner after an adjudication and finding of a violation pursuant to 6 NYCRR Part 622. Department staff improperly attempt to exercise the power of prosecutor, judge and jury – all without an opportunity for the Respondent to be heard." Id., ¶ 154. Respondents observed that the 2018 Order's suspended penalty provision "includes no waiver of the right to a hearing to determine if Respondents have committed a violation of the Order." Id., ¶ 157.

Ruling: Department Staff's motion with respect to the ninth count of the first cause of action is granted. "To determine whether or not a hearing is available in a dispute regarding an order on consent, one would look to the terms of the order on consent." *Matter of Nassau Cty. Dept. of Public Works*, Ruling, 2004 WL 2756433, * 2 (Nov. 29, 2004) (citations omitted).

Respondents' assertion that the 2018 Order does not waive respondents' right to hearing is incorrect. Although the civil penalty provision (Section I) does not include such a waiver, Paragraph 16 of the 2018 Order states, in pertinent part, that "[t]he Respondents admit these violations and affirmatively waive the right to a public hearing in this matter in the manner provided by 6 NYCRR Part 622 . . . and waive the right to a public hearing in any matter that may arise under the terms of this Order." As the Fourth Department noted in *Matter of Ludlow's Sanitary Landfill, Inc. v. N.Y.S. Dep't of Envt'l Conservation*, "[i]t was not a violation of due process to deny petitioner a hearing. Pursuant to the terms of the consent order, petitioner waived its right to a hearing . . . as consideration for the Department's agreement to suspend the civil penalty and to grant petitioner further time" to come into compliance. 12 A.D.2d 8, at 9 (4th Dept. 1985) (citations omitted); *Matter of Delford Industries*, Hearing Report, at 35 (April 13, 1989) (noting that "no hearing was necessarily required" to fix respondent's liability upon receiving notification of noncompliance; Department Staff "could have simply ordered the payment of the suspended penalty subject only to judicial review . . . instead [Department Staff] chose to prosecute the violations of the Consent Order administratively, thus providing Delford the hearing forum to contest its liability under the Consent Order"); *adopted by* Commissioner's Decision and Order, at 4 (April 13, 1989) (stating that when respondent received the notice to pay the suspended penalty, "its obligation to comply was unconditional"). Suspended penalties are based upon past violations, and "are part of the total penalty assessed against a respondent for the violations to which the order on consent applies." *Matter of Corona Heights Trading Inc.*, Commissioner's Order, at 4 (Feb. 20, 2014).

In any event, in this proceeding Department Staff has moved for an order without hearing in lieu of a notice of hearing and complaint. As a result, respondents have been afforded the right to be heard in response to Department Staff's Motion. As the moving party, Department Staff has the burden to prove the allegations in the Motion, and Department Staff has established violations of the 2018 Order in the second, third, fourth, sixth and seventh counts of the first cause of action. Respondents have not been denied due process; rather, they have failed to raise a factual dispute that would require adjudication.

Second Cause of Action

In the second cause of action, Department Staff alleged that respondent Route 376 Holdings failed to submit a report of the required assessment of the excavation zone within 90 days after permanent closure, as required by Sections 613-2.6(b)(1), and failed to transmit a copy of the records demonstrating compliance with the closure requirements of Section 613-2.6 to the Department within thirty days after permanent closure, in violation of Section 613-2.6(e) of 6 NYCRR. Urda Affirmation, ¶¶ 56-57. For this cause of action, Department Staff requested a $3,750 civil penalty. Id., ¶ 58.

According to respondents, the allegations in the second cause of action "are nothing more than a restatement of the failure to submit closure documentation alleged in the First Cause of Action, Seventh Count." Sommer Affirmation, ¶ 162. Respondents argued that Department Staff had impermissibly engaged in "claim splitting," which "prohibits two actions on the same claim or parts thereof." *Charles E.S. McLeod, Inc. v. R. B. Hamilton Moving and Storage*, 89 A.D.2d 863, 864 (2nd Dept. 1982); *Matter of C and J Enterprises, LLC*, Ruling on Motion to Dismiss and Motion to Amend Complaint, at 5 (April 14, 2017). The rule is intended to prevent "vexatious and oppressive litigation." *White v. Adler*, 289 N.Y.2d 34, 42 (1942).

Respondents took the position that Department Staff was seeking to increase the amount of the civil penalty. Respondents maintained that there was no requirement in the 2018 Order that respondents were to "independently comply with the requirements of 6 NYCRR § 613-2.6(b)(1) and 6 NYCRR § 613-2.6(e) regardless of the provisions of the Order." Sommer Affirmation, ¶ 175. It should be noted, however, that the 2018 Order's schedule of compliance required respondents to "submit to Department staff three workplans, including implementation schedules, providing for the full and permanent closure of each of the subject PBS facilities in accordance with all applicable provisions of 6 NYCRR Part 613." 2018 Order, at II.2, p. 4-5. Respondents contended that the alleged core set of facts recited to support the seventh count of the first cause of action were the same as those that formed the basis of the second cause of action.

Respondents also argued that the two regulations cited require the submission of tank closure documentation 90 days after permanent closure, which, in respondents' view, "is at variance with the Department staff's own interpretation of the 2018 Order Paragraph II which is that the tank removal and the tank closure report had to somehow be completed at the same time." Sommer Affirmation, ¶ 163.

Ruling: Department Staff's Motion is denied as to the second cause of action. As respondents argued, "[t]he alleged core set of facts cited by Department staff in the Urda Affirmation and the Cummins Affidavit to support the First Cause of Action Seventh Count is the same core set of facts used as the basis of the Second Cause of Action." Sommer Affirmation, ¶ 176. Respondents cited to *Matter of Steck*, Commissioner's Order, at 5 (March 29, 1993), which held that "[i]n the case of a regulation that reiterates a statutory prohibition, separate penalties cannot be supported since the proof would be identical." The Order in *Matter of Steck* relied upon *Blockburger v. United States*, 284 U.S. 299, 304 (1932), where the Court found that "where the same act or transaction constitutes a violation of two distinct statutory

provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not."

The Supplemental Order in *Matter of Wilder* applied the same principles as those articulated in *Blockburger* and *Steck*, stating that, in the context of Departmental enforcement proceedings, "[w]here one regulation contains at least one element that the second does not, but the second regulation contains no element not included in the first, or where two regulations contain identical elements, a single violation is presumed and a single penalty authorized, absent a clear indication of contrary regulatory intent." *Matter of Wilder*, Hearing Report on Motion for Order Without Hearing, at 17 (Aug. 17, 2005), *adopted by* Supplemental Order of the Acting Commissioner, at 2 (Sept. 25, 2005); *see also Matter of Hua Li Fish House Inc.*, Summary Report, at 5 (Dec. 9, 2019) (concluding that the portion of Department Staff's complaint that alleged a violation of an order on consent did not provide a separate and independent basis for the award of a separate penalty under the statute and regulations), *adopted by* Commissioner's Order, at 1-2 (Dec. 13, 2019).

This reasoning is applicable here. The Schedule of Compliance in Paragraph II of the 2018 Order provides that respondents were to submit workplans "providing for the full and proper permanent closure of each of the subject PBS facilities in accordance with all applicable provisions of 6 NYCRR Part 613." 2018 Order, at 4-5. In its Motion, Department Staff has established that respondents violated the provisions of the 2018 Order, but have not shown that there is a violation of the regulations that would require proof of an additional fact beyond the proof necessary to demonstrate that respondents failed to comply with the 2018 Order. Under the circumstances, a separate penalty for a violation of Part 613 is not authorized.

Third Cause of Action

Department Staff's third cause of action alleged that respondent Route 376 Holdings Inc. failed to submit a post-closure registration application documenting permanent closure within 90 days of closing the Route 376 Facility, in violation of Sections 613-1.9(f), 613-2.6(b)(1), and 613-2.6(e) of 6 NYCRR. Urda Affirmation, ¶ 59. Department Staff requested a $3,750 penalty for this alleged violation. Id., ¶ 60.

Respondents raised similar arguments as those advanced in connection with the second cause of action, including claim splitting, and disputed Department Staff's interpretation of the 2018 Order. According to respondents, "the 2018 Order did not include a separate requirement to comply with both its Schedule of Compliance and the independent requirements of 6 NYCRR Part 613." Sommer Affirmation, ¶ 194; Nesheiwat Affidavit, ¶ 25.

Ruling: Department Staff's motion is denied with respect to the third cause of action. As discussed in connection with the second cause of action, in this instance, penalties for both a violation of the 2018 Order and Sections 613-1.9(f), 613-2.6(b)(1), and 613-2.6(e) of 6 NYCRR are not authorized. Nevertheless, it should be noted that respondents' argument that Department Staff's interpretation of the 2018 Order would require post-closure registration within 90 days of permanent closure, while Section 613-2.6(b)(1) would require submission within thirty days, overlooks the fact that if respondents had begun the work at the Route 376 Facility on or before

October 1, 2018, as required in the 2018 Order, rather than waiting until the end of December, the post closure registration could have been timely submitted under either scenario.

Fourth Cause of Action

The fourth case of action relates to the 1592 Route 376 Facility in Wappingers Falls, and alleges that an illegal discharge of petroleum took place at some time on or before December 18, 2018, in violation of Section 173 of the Navigation Law. Urda Affirmation, ¶¶ 61-62. Department Staff sought a penalty of $5,000 for this alleged violation. Id., ¶ 63.

Melissa Mastro, an engineer in the Department's Region 3 Spills Response Unit, first observed the leak early in the morning on December 18, 2018. Mastro Affidavit, ¶ 11, Exhibit B. In her affidavit, Ms. Mastro stated that she witnessed "several gallons of discharged petroleum product, that had leaked from an excavator parked at the Site and had pooled and soaked through the surface of an old broken-asphalt parking lot, about 20 feet away" from a tank excavation area. Mastro Affidavit, ¶ 12. Ms. Mastro notified Deborah Thompson, Route 376 Holdings Inc.'s environmental consultant, and Ms. Thompson reported the spill, which was assigned NYSDEC Spill No. 1809704. Mastro Affidavit, ¶¶ 7 and 14, Exhibits A and B; Thompson Affidavit, ¶ 16. According to Ms. Mastro, Ms. Thompson stated that she had dispatched a contractor to the site with instructions to "scrap[e] whatever they believed to be impacted and place it on the PCS [petroleum contaminated soil] pile." Mastro Affidavit, ¶ 14, Exhibit A.

Ms. Mastro returned to the Facility on December 31, 2018. Mastro Affidavit, ¶ 15. According to Ms. Mastro, she had not received any further communication with respect to the spill. Mastro Affidavit, ¶ 15. Ms. Mastro observed the area of the spill to be "clean, with fresh uncontaminated soil spread where I had observed the mess from the Spill. However, when I pushed the fresh soil with my boot, I found that the Spill was still present, concealed beneath a three-inch layer of dirt." Mastro Affidavit, ¶ 15, Exhibit A.

On December 18, 2018, the day Ms. Mastro first observed the spill, Ms. Thompson dispatched United Tank and Pump, Inc. ("United") to the site. United used pads and Speedi-Dri to absorb some of the petroleum, scraped up the remaining soil around the leak, and removed the soil to the PCS pile. According to Steven Lowitt, the president of United, "this was a very minor leak with a very small area of impacted soil." Lowitt Affidavit, ¶ 9. Mr. Lowitt stated that when he arrived at the site, "my major focus was to make sure the line leak was stopped and that the leaked hydraulic fluid did not reach a drain." Id., ¶ 14.

Mr. Lowitt stated that "Ms. Mastro never contacted me or my company to follow up on her alleged December 31, 2018 observations about the cleanup United performed on December 18, 2018." Id., ¶ 13. Mr. Lowitt went on to state that "this fluid leak occurred on pre-existing contaminated soil on the right side of the site. The minor leak spilled onto pre-existing contaminated soil which was all removed. The entire amount of pre-existing soil contaminated [including any added fluid from the leak not absorbed up] was properly disposed. The later removal of all the contaminated soil including the added fluid from the leak, which was known by Ms. Mastro and her DEC colleagues, which makes the spill allegations in this Motion seem

contrived." Id., ¶ 15. He stated further that "I have no doubt that Ms. Mastro kicked the clean dirt we placed on this small area of contamination and found some soil contamination. The soil contamination she alleged to have kicked was the pre-existing contaminated soil from the site clean-up." Id., ¶ 14. Mr. Lowitt concluded that "the leak was contained, and the cleanup properly performed . . . the leak was fully remediated." Lowitt Affidavit, ¶ 17.

As noted above, on January 30, 2020, respondents moved to supplement the record with respect to the fourth and fifth causes of action. The submissions included the affirmation of Joseph Castiglione, Esq., and the affidavit of Michael Carr, sworn to on January 30, 2020 ("Carr Affidavit II"). Mr. Carr, who is employed by American Petroleum Equipment and Construction Company, Inc. ("APECCO") was retained by respondents to oversee the work at the Glenham and West Main Street Facilities. Carr Affidavit II, ¶ 1.

Mr. Carr stated that he met with Ms. Mastro at the site in or about October of 2019, and that he discussed with her undertaking testing at the site "to establish that the alleged hydraulic fluid line leak had been properly remediated by the Respondents." Carr Affidavit II, ¶ 7. According to Mr. Carr, Ms. Mastro requested that APECCO "confirm the prior work by the Respondents' consultants to demonstrate that the alleged hydraulic fluid line leak had been effectively remediated." Carr Affidavit II, ¶ 8. Mr. Carr stated that during the site visit, Ms. Mastro identified three distinct areas for testing along the boundary of the site near the roadway, as well as a fourth sampling and testing location under the dispenser and piping area at the site. Id.

APECCO collected soil samples from four test pits, and following laboratory testing, the four samples all tested non-detect for contaminants. Carr Affidavit II, ¶ 17; Castiglione Affirmation, Exhibit A. Mr. Carr stated that "[a]s reflected by the testing and data, the alleged hydraulic fluid line leak was fully remediated by the Respondents. The data reflects there is no issue of environmental or other concern relating the remediation of the alleged hydraulic fluid line leak." Carr Affidavit II, ¶ 19. Respondents concluded that "the alleged minor line leak was fully and thoroughly addressed as of December 18, 2018, the same day the issue first arose. The actual conditions at the 376 Site have now been further investigated and tested as not reflecting any contamination." Castiglione Affirmation, ¶ 14.

Department Staff opposed the motion to supplement. According to Department Staff, respondents' motion to supplement "does not provide anything relevant to the Respondents' violations at issue in this matter – other than to belatedly address Department staff's requested Spill corrective actions and document that the proper investigation and remediation was finally completed." Jiudice Affirmation, ¶ 8. Department Staff asserted that, despite being told by respondents' consultant that evidence of closure would be forthcoming, such evidence was never submitted. Jiudice Affirmation, ¶ 5; Mastro Affidavit, ¶ 16.

Ruling: Department Staff's Motion with respect to the fourth cause of action is granted. It is undisputed that there was a leak of hydraulic fluid at the Route 376 Facility, and respondents' opposition to the Motion is not sufficient to establish a factual question as to whether the hydraulic fluid could have reached the waters of the State.

Section 172(8) of the Navigation Law defines a "discharge" to mean "any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of petroleum into the waters of the state or onto lands from which it might flow or drain into said waters." In *Merrill Transport Co. v. State*, the Third Department rejected the claimant's contention that the claimant had not discharged petroleum because the spill did not result in oil entering "'into the waters of the state or onto lands from which it might flow or drain into said waters.'" 94 A.D.2d 39, 42 (3rd Dept. 1983) (citations omitted). The court stated that "[w]hile there is nothing in the record to positively demonstrate that the spilled oil might have flowed into protected waters, judicial notice can be taken of the common knowledge that oil can seep through the ground into surface and groundwater near a highway and thereby cause ecological damage." *Id*. at 42-43. The court in *Domermuth Petroleum Equipment and Maintenance Corp. v. Herzog & Hopkins, Inc.* cited to *Merrill* in concluding that a trial court may take judicial notice that a particular spill on land was in danger of reaching groundwater, without any "specific proof" that it did. 111 A.D.2d 957, 959 (3rd Dept. 1985).

A subsequent lower court decision in *Guidice v. Patterson Oil*, 51 Misc.3d 313 (Sup. Ct., NY Cty., 2016) concluded that "the nature of the land on which the oil spilled is the relevant consideration under the statute, and not the quantity of the spill. The statute does not set forth any minimum quantity of petroleum product that must be released before the statue's provisions apply, nor does it foreclose strict liability for 'de minimis' spills. Of course, a defendant may be able to demonstrate that a de minimis spill resulted in no damages, but damages are a separate question from liability." 51 Misc.3rd at 318 (citations omitted). The court took judicial notice of the fact that oil spilled onto ordinary land could seep through the ground, and found the defendant oil company strictly liable for a spill that occurred during a residential oil delivery into a basement oil tank.[3]

Respondents noted that "Ms. Mastro makes no allegation, nor does she provide any evidence, or ask for any presumption, that this minor leak might somehow either reach the ground or surface waters of New York. The reason for this is that there is no evidence of that occurring. The leak never reached the drain." Sommer Affirmation, ¶ 232. Respondents asserted that Ms. Mastro initially approved the cleanup approach outlined by Ms. Thompson in her December 18, 2018 e-mail, responding "Thank you!" in response to that e-mail, and never contacted either Ms. Thompson or Mr. Lowitt regarding her observations during the site visit on December 31, 2018. Sommer Affirmation, ¶¶ 233, p. 47 and 232, p. 48.[4] Respondents observed that Ms. Mastro did not provide any photographs of the site visit on December 31, 2018.

In this case, respondents' arguments are not sufficient to overcome the presumption that oil spilled onto land can seep through the ground. Respondents may be able to demonstrate that

[3] The court went on to state that "the Act must be read to allow some room for a defendant to demonstrate that the particular 'lands' upon which petroleum spilled are so disconnected from the ecosystems of this state that it would be physically impossible for spilled petroleum to flow or drain from those lands into state waters," giving as an example an industrial facility specifically designed to contain any spills onsite. *Id*. at 318-319. Respondents have made no such showing here.

[4] The paragraph numbering of the Sommer Affirmation on page 47 is duplicated on page 48. Therefore, the page numbers are noted in this citation, to avoid confusion.

the spill resulted in no damages, but that is a separate issue from liability for the discharge. In his affidavit, Mr. Lowitt stated that he "observed no fluid near the drain and the objective of this minor clean-up was achieved," and went on to note that United billed respondents $524.41 for this "very minor" cleanup. Lowitt Affidavit, ¶¶ 10 and 14. These facts, and respondents' other arguments concerning the discharge and the actions taken to address the leak, can be evaluated in determining what penalty is appropriate for this violation. In that regard, respondents' Motion to Supplement is granted. The additional information set forth in the Motion to Supplement should be considered as part of a hearing on the penalty to be assessed.

Fifth Cause of Action

The fifth cause of action pertains only to respondent Route 376 Holdings Inc. in connection with the alleged failure to clean up the discharge of petroleum at the site, based upon the same events discussed above with respect to the fourth cause of action. Specifically, Department Staff alleged a violation of Section 176 of the Navigation Law, and Section 32.5 of 17 NYCRR. Urda Affirmation, ¶ 64. For this violation, Department Staff sought a $5,000 civil penalty, and an order directing respondent Route 376 Holdings Inc. to fully investigate and remediate NYSDEC Spill No. 1809704 under a Department-approved work plan. Id., ¶¶ 66-67.

Ruling: Department Staff's motion with respect to the fifth cause of action is denied. On this record, Department Staff failed to establish that there are no material facts in dispute with respect to the allegations in the fifth cause of action. The parties dispute whether the cleanup activities at the Route 376 Facility adequately addressed the spill at the site. Those allegations, and respondents' arguments in opposition to the Motion, should be addressed at a hearing.

CONCLUSIONS OF LAW

As detailed above, Department Staff's Motion is granted in part, and denied in part. Specifically, this ruling concludes that the Motion should be granted with respect to the second, third, fourth, sixth, seventh, eighth, and ninth counts of the first cause of action. The Motion should also be granted as to the fourth cause of action.

There are material issues of fact that require adjudication relating to the first and fifth counts of the first cause of action, and the fifth cause of action. In addition, because Department Staff sought penalties for the same violations under the terms of the 2018 Order and Part 613 of 6 NYCRR, Department Staff's motion as to the second and third causes of action is denied. Accordingly, this ruling makes no determination regarding the civil penalty or injunctive relief requested by Department Staff.

FURTHER PROCEEDINGS

A hearing is necessary to resolve issues of material fact and to determine the appropriate relief. This office will contact the parties shortly after this ruling is issued to set a date for the hearing.

_____/s/_____

Maria E. Villa
Administrative Law Judge

Dated: October 31, 2020
Albany, New York

Matter of Rabee Holdings, Inc. et al.

EXHIBIT CHART

Exhibit No.	Description
Urda Affirmation, Exhibit A	NYS DOS Division of Corporations Entity Information: Rabee Holdings Inc.
Urda Affirmation, Exhibit B	December 15, 2016 Quitclaim Deeds: 538 Route 52, Fishkill, New York; 2755 West Main Street, Wappingers Falls, New York; 1592 Route 376, Wappinger, New York
Urda Affirmation, Exhibit C	PBS Facility Information Report: PBS No. 3-171808: 1592 Route 376, Wappingers, New York (printed July 17, 2019)
Urda Affirmation, Exhibit D	October 18, 2017 letters from R. Daniel Bendell, P.E., DEC Region 3, re: notice of violation (2755 Main Street Facility and Glenham Facility); October 17, 2017 letter from R. Daniel Bendell, P.E., DEC Region 3, re: notice of violation (1592 Route 376 Facility)
Urda Affirmation, Exhibit E	January 29, 2018 Order on Consent No. R3-20171201-208
Urda Affirmation, Exhibit F	May 22, 2019 e-mail from John K. Urda, Esq. to Rabee re: violations of Order on Consent
Urda Affirmation, Exhibit G	June 4, 2018 Order on Consent (Gas Land Holdings Corp.); No. R3-20180601-106
Cummins Affidavit, Exhibit A	December 10, 2018 and December 20, 2018 Pre-Work Notifications for Bulk Storage Tank Installation or Closure (1592 Route 376 Facility)
Cummins Affidavit, Exhibit B	February 28, 2019 Tank Closure Report (1592 Route 376 Facility)
Cummins Affidavit, Exhibit C	December 15, 2016 Notice of Violation (Gas Land Petroleum) – 1617 Route 22, Brewster, New York
Mastro Affidavit, Exhibit A	DEC Spill Report Form (Spill No. 1809704) – 1592 Route 376 Facility
Mastro Affidavit, Exhibit B	E-mail chain, December 17-18, 2018 (Mastro and Thompson)
Mastro Affidavit, Exhibit C	E-mail chain, January 4-January 10, 2019 (Mastro and Thompson)
Sommer Affirmation, Exhibit A	E-mail chain, November 1, 2017 (Sommer/Bendell/Urda) with attached documents and unexecuted Order on Consent
Sommer Affirmation, Exhibit B	June 10, 2019 letter from Dean Sommer, Esq. to John Urda, Esq. re: request for hearing
Lowitt Affidavit, Exhibit A	United Pump and Tank Inc. Invoice (12/20/2018)
Lowitt Affidavit, Exhibit B	Photographs (6)
Thompson Affidavit, Exhibit A	Resume: Deborah J. Thompson
Thompson Affidavit, Exhibit B	E-mail chain (December 17-18, 2018; Sommer/Thompson/Mastro
Carr Affidavit, Exhibit A	Resume: Michael B. Carr
Carr Affidavit, Exhibit B	E-mail chain (February 12, 2018) with attached Remedial Action Work Plan and Scope of Work (538 Route 52 Facility)

Exhibit No.	Description
Castiglione Affirmation, Exhibit A	Spill Closure Report: 1592 Route 376, Wappingers Falls (American Petroleum, January 2020)
Carr Supplemental Affidavit, Exhibit A	E-mail chain (October 2019; Carr and Mastro), with attached site map including proposed test pit locations
Carr Supplemental Affidavit, Exhibit B	E-mail chain (November 2019; Carr and Mastro), with attached November 14, 2019 letter from Michael Carr to Rabee Nesheiwat re: proposal for test pits and laboratory analytical work
Carr Supplemental Affidavit, Exhibit C	Spill Closure Report: 1592 Route 376, Wappingers Falls (American Petroleum, January 2020)