NEW YORK STATE: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of the New York State Navigation Law (ECL) article 12, and Title 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) part 32 by	Ruling on Department Staff's Second Motion for Order without Hearing dated March 8, 2005 and Order to Consolidate
	DEC No. R2-20030109-9
Robani Energy, Inc., and Crystal Transportation Corp., RESPONDENTS.	
	August 3, 2005

Proceedings

With a cover letter dated March 8, 2005, Staff for the Department of Environmental Conservation (Department staff) served an amended complaint, and a second notice of motion for order without hearing both dated same upon legal counsel for Robani Energy, Inc. (Robani) and Crystal Transportation, Corp. (Crystal), pursuant to 6 NYCRR 622.12. Department staff contends that during an oil delivery on April 9, 1999, Robani and Crystal discharged more than 90 gallons of No. 2 fuel oil into the basement of a house located at 60 Hamilton Terrace, New York, New York 10032.

In three causes of action, the amended complaint alleges that Respondents violated various provisions of the Navigation Law article 12, and its implementing regulations (17 NYCRR part 32).[1] The March 8, 2005 amended complaint alleges further that the petroleum spill was not reported to the Department until December 10, 2002 some 1340 days (or about 44 months) after the petroleum discharge allegedly occurrred, and that remediation of the site had been delayed further. Department staff seeks an order from the Commissioner that would, among other things, assess each Respondent a total civil penalty of $93,425 pursuant to Navigation Law § 192.

[1] Before the hearing commences, Department staff shall clarify whether the reference to 17 NYCRR 32.5 (sic) in paragraphs 21, 22 and 23 of the March 3, 2005 amended complaint should be a reference to 17 NYCRR 32.3 as in paragraph 16.

To the March 8, 2005 amended complaint, Department staff attached Exhibits A, B, and C. Copies of letters dated January 9, 2003 from the Department to Robani and to Crystal concerning the alleged petroleum spill at 60 Hamilton Terrace are collectively identified as Exhibit A. The letters required Robani and Crystal, respectively, to excavate oil-contaminated soil from 60 Hamilton Terrace, have a portion of the contaminated soil analyzed for volatile and semi-volatile compounds, and remove and dispose of all oil-contaminated soil from 60 Hamilton Terrace. Exhibit B is a copy of a letter dated February 5, 2005 from Christopher P. Foley, Esq., from McCormick, Dunne & Foley, New York, New York, counsel for Robani. Exhibit C is a copy of the June 28, 2004 ruling concerning Department staff's April 21, 2004 motion for order without hearing (the first motion).

To the second notice of motion for order without hearing, Department staff attached an affirmation by John K. Urda, Esq., Assistant Regional Attorney, dated March 8, 2005. Exhibit A to Mr. Urda's March 8, 2005 affirmation is an affirmation by Gary Rawlins, Esq. dated June 12, 2002 (the Rawlins affirmation) with additional attachments identified as Exhibits A, B, C, and D. Exhibit A to the June 12, 2002 Rawlins affirmation consists of a service contract authorization, and comprehensive plan for fuel oil delivery between Eli Avila and Robani.

Exhibit B to the Rawlins affirmation is an excerpt from Robert Pearson's testimony from the trial related to a civil action initiated by Eli and Elena Avila (the Avilas) against Robani and Crystal. Mr. Pearson is the President of Robani. Exhibit C to the Rawlins affirmation is an excerpt from Gilbert Rella's testimony from the above mentioned trial. Mr. Rella is the President of Crystal. The pages from the transcript (Exhibits B and C to the June 12, 2002 Rawlins affirmation) are not numbered.

Exhibit D to the Rawlins affirmation is the copy of a ticket issued by Keith Williams, an Industrial Waste Investigator from the NYC Department of Environmental Protection (NYC DEP) to Mr. Pearson. Mr. Williams issued the ticket to Mr. Pearson on May 21, 1999. The ticket charges a violation of the Administrative Code of the City of New York, and concerns the alleged petroleum discharge at 60 Hamilton Terrace.

Department staff also included an affidavit by Jeffery Vought sworn to March 7, 2005 (the Vought affidavit) with Exhibit

A, which is a copy of NYSDEC Spill Report Form for Spill No. 0209311.

With the consent of Department staff, the return date for responses to the second notice of motion for order without hearing was extended in contemplation of settlement. Subsequently, by its attorney, Mr. Foley, Robani filed an affirmation dated June 2, 2005 opposing Department staff's motion (the Foley affirmation).

Attached to the June 2, 2005 Foley affirmation are Exhibits A through H. Exhibit A is a copy of Department staff's January 15, 2003 complaint against Robani and Crystal (the first complaint), wherein Department staff alleged that Robani and Crystal violated Navigation Law §§ 173, 175 and 176, as well as 17 NYCRR 32.5.

Exhibit B is a copy of Crystal's answer dated January 31, 2003 from its attorney, Brian T. Stapleton, Esq. from Carroll, McNulty & Kull, LLC, New York, New York. Crystal's January 31, 2005 answer responds to Department staff's January 15, 2003 complaint. Exhibit C is a copy of Robani's answer dated February 4, 2003 from its attorney Mr. Foley, which responds to the January 15, 2003 complaint. Exhibit D is a copy of the ruling dated June 28, 2004 concerning Department's staff first notice of motion for order without hearing. The June 28, 2004 ruling denied Department staff's motion.

Exhibit E to the Foley affirmation is a copy of Department staff's March 8, 2005 amended complaint. Exhibit F is an excerpt from Keith Williams' testimony presented at the trial regarding the civil action brought by the Avilas to recover damages from Robani and Crystal.

Exhibit G is an except from Wayne Jackson Gallway's testimony from the previously mentioned trial. Mr. Gallway owned and resided at 60 Hamilton Terrace from January 1996 until January 1999.

Exhibit H is an excerpt from Neil Peterson's testimony from the previously mentioned trial. Mr. Peterson is a geologist employed by World-Wide Geoscience in Houston, Texas, and testified as an expert witness.

By its attorney, Brian T. Stapleton, Esq. from Carroll, McNulty & Kull, LLC, New York, New York, Crystal filed an affirmation opposing Department staff's motion dated June 6, 2005 (the Stapleton affirmation). In his affirmation (¶ 4), Mr. Stapleton states that Crystal "incorporates each and every statement of fact and those specific arguments of law made by attorney Foley in his Affirmation in Opposition to Mr. Urda's Motion as if those facts and arguments were fully repeated here."

Background

The Department has initiated three other administrative enforcement actions related to the petroleum spill that allegedly occurred at 60 Hamilton Terrace on April 9, 1999. One action commenced with service of a notice of hearing and complaint dated January 15, 2003 upon Robani and Crystal. The January 15, 2003 complaint asserted that Robani and Crystal delivered the fuel oil to 60 Hamilton Terrace on April 9, 1999, and that Robani and Crystal allegedly violated various provisions of Navigation Law article 12. As noted above, a copy of Department staff's January 15, 2003 complaint is attached as Exhibit A to the Foley affirmation.

With respect to the January 15, 2003 complaint, Department staff, later moved for an order without hearing against Robani and Crystal with a notice of motion dated April 21, 2004. However, the Department staff's April 21, 2004 motion alleged that Robani and Crystal violated 6 NYCRR 613.8. On June 28, 2004, I issued a ruling that denied Department staff's motion for order without hearing against Robani and Crystal, because the charges in the January 15, 2003 complaint concerning alleged violations of the Navigation Law were inconsistent with the charges alleged in the April 21, 2004 motion for order without hearing concerning alleged violations of 6 NYCRR part 613.

In addition, Department staff commenced two enforcement actions against the Avilas. The Avilas owned the property located at 60 Hamilton Terrace where the alleged petroleum spill occurred on April 9, 1999. The first action against the Avilas commenced with service of a notice of hearing and complaint dated April 22, 2003, which asserted that the Avilas violated 6 NYCRR 613.8 by failing to notify the Department of the alleged petroleum spill at 60 Hamilton Terrace on April 9, 1999 within two hours after Eli Avila discovered it. Relying on the April 22, 2003 complaint, Department staff subsequently filed a notice

of motion for an order without hearing dated April 16, 2004 (the first motion). The Avilas opposed Department staff's April 16, 2004 motion.

After considering the parties' papers, I issued a ruling dated June 28, 2004, which granted Department staff's April 16, 2004 motion for order without hearing with respect to Eli Avila's liability. However, I discovered Department guidance documents outside the record of Staff's April 16, 2004 motion and the Avilas' opposition papers, which related to the applicability of 6 NYCRR part 613 to the Avilas. Upon review of these guidance documents, I revisited the issue of whether 6 NYCRR part 613 applied to the Avilas, and later vacated the June 28, 2004 ruling with a ruling dated August 18, 2004.

Then, with a cover letter dated March 8, 2005, Department staff filed an amended complaint and a second notice of motion for order without hearing against the Avilas. In the March 8, 2005 amended complaint, Department staff alleged that the Avilas violated Navigation Law § 175 and 17 NYCRR 32.3 by failing to report the petroleum spill at 60 Hamilton Terrace within two hours after its occurrence. I issued a ruling dated August 3, 2005, which denied Department staff's second motion for order without hearing. The ruling concluded that material issues of fact and law were preserved relating to liability and relief, and that a hearing would be necessary.

The subject of this ruling is the amended complaint and second notice of motion for order without hearing dated March 8, 2005, which Department staff served upon counsel for Robani and Crystal.

Discussion

Motion for Order without Hearing

In the second motion, Department staff moves, pursuant to 6 NYCRR 622.12, for an order without hearing against Robani and Crystal. That provision is governed by the same principles that govern summary judgment pursuant to Civil Practice Law and Rules (CPLR) § 3212. Section 622.12(d) provides that a contested 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. The Commissioner has

provided extensive direction concerning the showing the parties must make in their respective motions and replies, and how the parties' filings will be evaluated (*see Matter of Richard Locaparra, d/b/a L&L Scrap Metals*, DEC Case No. 3-20000407-39, Final Decision and Order of the Commissioner, June 16, 2003).

Amendment of Pleadings

With the second motion for order without hearing, Department staff moves to amend the January 15, 2003 complaint, pursuant to 6 NYCRR 622.5 (*see* ¶ 11 of the amended complaint dated March 8, 2005).

Robani and Crystal oppose the motion to amend the January 15, 2003 complaint. They argue that Department staff neither requested leave nor obtained permission to amend the January 15, 2003 complaint. According to Robani and Crystal, Department staff's service of the March 8, 2005 amended complaint has caused confusion because the second motion for order without hearing is predicated on an unauthorized pleading. They argue further that Department staff should not be allowed to amend the January 15, 2003 complaint because the June 28, 2004 ruling denied the first motion for order without hearing dated April 21, 2004, and concluded that a hearing would be necessary to determine liability and relief. Robani and Crystal are still waiting for that hearing. They request that I deny Department staff's second motion for an order without hearing dated March 8, 2005. (*See* ¶ 13-18 of the Foley affirmation.)

Pursuant to 6 NYCRR 622.5, pleadings may be amended. A party may amend its pleading once without the ALJ's permission at any time before the period for responding expires, or if no response is required, at least 20 days before the hearing commences (*see* 6 NYCRR 622.5[a]). With the ALJ's permission, a party may amend its pleading at any time prior to the Commissioner's final decision absent prejudice to the ability of any other party to respond, consistent with the CPLR (*see* 6 NYCRR 622.5[b]).

Pursuant to CPLR 3025, pleadings may be amended without leave in a manner similar to what is authorized by 6 NYCRR 622.5(a) (*see* CPLR 3025[a]). They may be amended and supplemented with leave at any time, and leave must be freely given as may be just (*see* CPLR 3025[b]). With leave, pleadings

may be amended to conform to the evidence upon such terms as may be just (*see* CPLR 3025[c]).

For the reasons outlined below, I grant Department staff's request to amend the January 15, 2003 complaint. The basis for denying the first motion for order without hearing dated April 21, 2004 was the inconsistent nature of the allegations in the January 15, 2003 complaint compared to the allegations in the April 21, 2004 motion. The former alleged violations of the Navigation Law, and the latter alleged a violation of 6 NYCRR 613.8. The June 28, 2004 ruling directed Department staff to comply with the requirement at 6 NYCRR 622.3(a)(1)(iii) by providing Robani and Crystal with a concise statement of the matters asserted. Therefore, the June 28, 2004 ruling essentially granted leave to Staff to amend the complaint, and provided Robani and Crystal notice that a concise statement from Staff would be forthcoming.

Although the June 28, 2004 ruling did find that a hearing would be necessary, the administrative enforcement action that commenced with service of the January 15, 2003 complaint could not continue until Department staff had complied with my directive to provide a concise statement of the matters asserted, contrary to Robani and Crystal's argument. Department staff has now complied with my directive by serving an amended complaint.

Robani and Crystal have not been prejudiced by service of the March 8, 2005 amended complaint. First, as noted above, the June 28, 2004 ruling provided Robani and Crystal with notice that a concise statement from Department staff would be forthcoming. Here, the concise statement has taken the form of the March 8, 2005 amended complaint.

Second, the violations alleged in the March 8, 2005 amended complaint are the same as those alleged in the original complaint dated January 15, 2003. First, Robani and Crystal allegedly violated Navigation Law § 176 by failing to contain the petroleum discharge at 60 Hamilton Terrace on April 9, 1999 (*see* ¶ 14 of the January 15, 2003 complaint [Exhibit A to the Foley affirmation], and ¶ 25 of the March 8, 2005 amended complaint). Second, Robani and Crystal allegedly violated Navigation Law § 175 by failing to notify the Department of the petroleum discharge (*see* ¶ 16 of the January 15, 2003 complaint [Exhibit A to the Foley affirmation], and ¶ 21 of the March 8, 2005 amended complaint). Third, Robani and Crystal allegedly violated

Navigation Law § 173 when they discharged petroleum to the surface and ground waters of the State without a permit (*see* ¶ 18 of the January 15, 2003 complaint [Exhibit A to the Foley affirmation], and ¶ 18 of the March 8, 2005 amended complaint).

Because there has been no prejudice to Robani and Crystal, I, therefore, grant Department staff's motion to amend the January 15, 2003 complaint.

Liability

Navigation Law § 173(1) prohibits the discharge of petroleum. A prohibited discharge includes "any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of petroleum into the waters of the state or onto lands from which it might flow or drain into said waters" (Navigation Law § 172[8]). Also, the "waters" of the state include both surface and groundwaters, whether natural or artificial (*see* Navigation Law § 172[18]).

Courts have taken judicial notice that even when there is "nothing in the record to positively demonstrate" that spilled oil might have flowed through the ground into groundwater, or the nature and extent of the resulting harm, "judicial notice can be taken of the common knowledge that oil can seep through the ground into surface and groundwater ... and thereby cause ecological damage" (*Merrill Transport Co. v State of New York*, 94 AD2d 39, 42-43 [3d Dept 1983], *lv denied* 60 NY2d 555).

1. First Cause of Action (Navigation Law § 173)

Department staff's papers establish, among other things, that the Avilas, who in April 1999 resided at 60 Hamilton Terrace, agreed to purchase fuel oil from Robani. Robani had an oral agreement with Crystal for Crystal to deliver the fuel oil from Robani to the Avilas. Furthermore, on April 9, 1999, Crystal transported 90 gallons of No. 2 fuel oil from Robani and delivered it to the Avilas at 60 Hamilton Terrace. Shortly after Crystal delivered the fuel oil, Robani received a telephone call from Eli Avila, who said there was oil on his basement floor. Robani immediately sent a service man named Jose Vera to 60 Hamilton Terrace. When Mr. Vera arrived at 60 Hamilton Terrace on April 9, 1999, he observed fuel oil on the basement floor. (*See* Exhibit B to the Rawlins Affirmation.)

Department staff's motion papers do not offer any legal arguments about why Robani and Crystal should each be held individually liable for the violation alleged in the first cause of action. Robani asserts that it is not liable for the petroleum discharge at 60 Hamilton Terrace because Crystal delivered the oil (*see* ¶ 22 to the Foley affirmation). As noted above, the Stapleton affirmation (*see* ¶ 4) incorporates by reference each and every statement made in the Foley affirmation. Consequently, it appears that Crystal admits to delivering the fuel oil to 60 Hamilton Terrace and causing the petroleum spill there.

The March 8, 2005 amended complaint (*see* ¶ 4) alleges that more than 90 gallons of No. 2 fuel oil were discharged. In his testimony from the civil action, which Department staff offers to support the second motion for order without hearing, Mr. Pearson states that Crystal delivered 90 gallons on April 9, 1999, but only two to three gallons of No. 2 fuel oil were spilled in the Avilas' basement(*see* Exhibit B to the Rawlins affirmation). Mr. Rella testified at the trial that the amount of oil on the basement floor was "the size of a quarter" (Exhibit C to the Rawlins affirmation).

Department staff has offered nothing to support its claim that the alleged petroleum discharge was more than 90 gallons. Rather, the evidence filed by Staff in support of the second motion for order without hearing shows that substantially less petroleum may have been discharged. Given these circumstances, I conclude that Department staff did not meet its burden because Staff failed to submit evidence sufficient to demonstrate the absence of any material issues of fact (*see Alverez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Accordingly, with respect to the first cause of action, I deny Department staff's second motion for order without hearing.

2. Second Cause of Action (Navigation Law § 175)

When a petroleum discharge occurs, Navigation Law § 175 requires any person responsible for the discharge to notify the Department within two hours. The March 8, 2005 amended complaint alleges that Robani and Crystal violated Navigation Law § 175.

Department staff's evidence filed in support of the second motion for order without hearing is inconsistent, however. On the one hand, Mr. Rella states that he reported the petroleum

discharge to the Department within a week of April 9, 1999 (*see* Exhibit C to the Rawlins affirmation). On the other hand, the first time that the petroleum spill at 60 Hamilton Terrace was reported to the Department was on December 10, 2002 according to the Vought affidavit (*see* ¶ 5). Because the proof offered by Staff in support of the motion is inconsistent, there are material issues of fact related to whether and when the alleged petroleum discharge at 60 Hamilton Terrace was reported to the Department.

Moreover, there are material issues of fact about the amount of petroleum that may have been discharged in the Avila's basement on April 9, 1999. The amount of petroleum discharged is relevant to whether the discharge must be reported in light of the Department's guidance. Under certain circumstances, petroleum spills do not need to be reported. According to Section 1.1-1 of the Department's *Technical Field Guidance*, "Spill Reporting and Initial Notification Requirements," a petroleum spill does not need to be reported if it: (1) is less than five gallons, (2) has been contained and is under the control of the spiller, (3) has not reached the State's water or any land, and (4) has been cleaned up within two hours of discovery. (*Also see Final Guidance and Responsiveness Summary Regarding Petroleum Spill Reporting*, p. 6, Item 7.) All parties received copies of these guidance documents subsequent to the June 28, 2004 ruling concerning the first motion for order without hearing.

The papers filed in support of, and in opposition to, the second motion for order without hearing do not address the guidance criteria that must be met to obviate the need to report a petroleum spill. At hearing, the parties will have the opportunity to develop the record about the applicability of the criteria outlined in Section 1.1-1 of *Technical Field Guidance*, "Spill Reporting and Initial Notification Requirements." In addition, if it is determined that the guidance is applicable, the parties will have the opportunity at hearing to develop a factual record about whether Robani and Crystal were exempt from the reporting requirement outlined in Navigation Law § 175.

With respect to the second cause of action, I deny Department staff's second motion for order without hearing given the material issues of fact identified above.

3. Third Cause of Action (Navigation Law § 176)

Navigation Law § 176(1) requires any person who discharges petroleum in the manner prohibited by section 173 to immediately undertake steps to contain the discharge. The March 8, 2005 amended complaint alleges that Robani and Crystal violated Navigation Law § 176.

Robani and Crystal argue, and I agree, that Department staff did not offer a prima facie case to support this allegation. To establish a violation of Navigation Law § 176, Department staff must first demonstrate that a petroleum discharge prohibited pursuant to Navigation Law § 173 has occurred. As noted above, Department staff did not demonstrate the prerequisite condition as part of its second motion for order without hearing.

Moreover, the proof offered in support of, and in opposition to, the third cause of action is contradictory and, therefore, raises material issues of fact. For example, Mr. Vera used one or two bags of oil absorbant to clean up two to three gallons of No. 2 fuel oil on the Avilas' basement floor (*see* Exhibit B to the Rawlins affirmation). Mr. Williams from the NYC DEP determined that no further remediation was necessary when he inspected the 60 Hamilton Terrace on April 10, 1999 (*see* pp. 887, 893-894 from Exhibit F of the Foley affirmation). However, according to Mr. Vought's March 7, 2005 affidavit (¶ 11), "the Avila Spill has not been remediated." Accordingly, with respect to the third cause of action, I deny the second motion for order without hearing.

In addition to material issues of fact, a legal issue arises related to remediation. With respect to the civil action brought by the Avilas against Robani and Crystal, the Appellate Division affirmed the order of Supreme Court, New York County, entered August 21, 2003. The Appellate Division held that the "jury fairly concluded that the subject oil spill was promptly cleaned up and that any damages plaintiffs [*i.e.*, the Avilas] may have incurred from oil spillage was caused by prior spills and not by the oil delivery at issue." (*Eli Avila v. Robani Energy Inc.*, 12 AD3d 223 [1st Dept 2004].) Consequently, a question arises concerning whether the Commissioner is bound by the referenced judicial determination concerning the status of the petroleum cleanup at 60 Hamilton Terrace.

Relief

1. Civil Penalty

For each violation, Navigation Law § 192 authorizes a maximum civil penalty of $25,000 per day. Department staff provides a civil penalty calculation in the March 8, 2005 amended complaint. For the first cause of action, Department staff seeks a civil penalty of $25,000 from each Respondent.

With respect to the second cause of action, Department staff asserts that the violation continued from April 9, 1999, when the petroleum spill occurred, until December 10, 2002, which is a period of 1340 days. Department staff requested $25 per day from each Respondent. Therefore, the civil penalty for each Respondent related to the second cause of action would be $33,500 ($25 per day x 1340 days), based on Department staff's calculation.

For the third cause of action, Department staff asserts that the alleged violation continued until February 5, 2003, which is the date of a letter provided by Robani's counsel concerning Robani's and Crystal's agreement to remediate the site (*see* Exhibit B to the March 8, 2005 amended complaint). According to Department staff, the duration of the violation alleged in the third cause of action is 1397 days. The civil penalty for each Respondent related to the third cause of action would be $34,925 ($25 per day x 1397 days), based on Staff's calculation. Therefore, the total civil penalty requested by Department staff for the three causes of action alleged in the March 8, 2005 amended complaint would be $93,425 for each Respondent.

The appropriate civil penalty cannot be determined until the material issues of fact related to liability are resolved at a hearing. Although Department staff seeks an order from the Commissioner that would individually assess each Respondent separate civil penalties, Staff has offered no argument to support the requested assessment. Rather, the proof that Staff filed to support the second motion for order without hearing suggests that only Crystal should be held liable because Crystal delivered the No. 2 fuel oil to 60 Hamilton Terrace on April 9, 1999. At hearing, the parties will have the opportunity to present argument about what the appropriate civil penalty should be, and how it should be apportioned.

2. Remediation

Material issues of fact are preserved related to whether the site has been adequately remediated. On the one hand, the petroleum spill at 60 Hamilton Terrace has not been remediated, according to the Vought affidavit (*see* ¶ 11). On the other hand, Mr. Williams testified that the petroleum spill had been properly cleaned up and that no addition remediation was necessary (pp. 887, 893-984 of Exhibit F to the Foley affirmation). Moreover, the Appellate Division affirmed the order by Supreme Court, New York County, entered August 21, 2003 (*see Eli Avila v Robani Energy, Inc.*, 12 AD3d 223 [1st Dept 2004]), as previously noted.

Findings of Fact

Based on the foregoing discussion, the facts established as a matter of law are:

1. On April 9, 1999, Eli and Elena Avila (the Avilas) owned property at 60 Hamilton Terrace, New York, New York 10032, and in the basement was a fuel oil tank with a capacity of about 275 gallons.

2. The Avilas agreed to purchase No. 2 fuel oil from Robani Energy, Inc. (Robani).

3. Robani is a corporation licensed to do business in New York with principal offices located at Starr Ridge Road, Brewster, New York 10509.

4. Robani had an oral agreement with Crystal Transportation Co. (Crystal) for Crystal to deliver fuel oil from Robani to the Avilas, among other customers.

5. Crystal is a corporation licensed to do business in New York with principal offices located at 2010 White Plains Road, Bronx, New York 10462.

6. On April 9, 1999, Crystal transported 90 gallons of No. 2 fuel oil from Robani, and delivered it to the Avilas' residence at 60 Hamilton Terrace.

7. After Crystal delivered the fuel oil to 60 Hamilton Terrace on April 9, 1999, Robani received a telephone call from Eli Avila, who said there was oil on his basement floor. Robani

immediately sent a service man named Jose Vera to 60 Hamilton Terrace.

8. On April 10, 1999, Keith Williams from the NYC DEP inspected the property located at 60 Hamilton Terrace.

9. Jeffery Vought, Engineering Geologist I, from the Department's Region 2 office, inspected the Avilas' residence at 60 Hamilton Terrace on December 17, 2002, and observed the appearance of petroleum spill impacts in the basement.

10. On December 17, 2002, Mr. Vought also inspected 58 and 62 Hamilton Terrace. These properties are located on either side of the Avilas' residence. During his inspection of the neighboring properties, Mr. Vought did not detect any petroleum odors or other impacts from the spill at the neighboring properties.

Conclusion

Department staff failed to establish a prima facie entitlement to judgment as a matter of law that Robani and Crystal violated Navigation Law §§ 173, 175, and 176, or the implementing regulations.

Ruling

I deny Department staff's second motion for order without hearing dated March 8, 2005. There are many material issues of fact and law that require an adjudicatory hearing.

Consolidation and Further Proceedings

A hearing shall be convened as soon as possible. Common questions of fact exist between the captioned matter and the administrative enforcement action against the Avilas. Accordingly, the two matters will be consolidated (*see* 6 NYCRR 622.10[e][1]).

I would like to initiate a telephone conference call at 10:00 a.m. on August 23, 2005 to discuss the hearing schedule. Counsel shall advise me by August 17, 2005 whether they are available on August 23, 2005, or identify alternative dates when

they will be available for the telephone conference call. I will accept notification via e-mail. My address is provided below.

Upon receipt of this ruling, Mr. Urda shall provide Mr. Caliguiri with a copy of Department staff's second motion for order without hearing concerning the captioned matter. Also, Messrs. Foley and Stapleton shall provide Mr. Caliguiri with copies of Robani's and Crystal's pleadings.

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