

# **EXHIBIT A**

**STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

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In the Matter of the Alleged Violations of Article 27, Title 13 and Article 71, Title 27 of the New York State Environmental Conservation Law and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

- by -

**20 Rewe Street, Ltd.,  
Respondent.**

**RULING ON MOTION  
FOR ORDER  
WITHOUT HEARING**

**DEC Case No.  
R2-20210416-52**

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**PROCEDURAL HISTORY**

In this administrative enforcement proceeding, staff of the New York State Department of Environmental Conservation (DEC or the Department) alleges that respondent 20 Rewe Street, Ltd. (respondent) violated provisions of Department regulations regarding inactive hazardous waste disposal sites, 6 NYCRR part 375. Department staff served a motion for order without hearing in lieu of complaint on respondent pursuant to 6 NYCRR 622.2 and 622.12 on July 1, 2022. Respondent filed an opposition to the motion, dated October 4, 2022, staff filed a reply on November 18, 2022 and respondent filed a sur-reply on January 5, 2023. (*See Appendix.*)

Staff alleges three causes of action:

1. Respondent violated 6 NYCRR 375-1.11(b)(2)(i) when it prevented a proposed remedial program at the site.
2. Respondent violated 6 NYCRR 375-1.11(b)(2)(ii) when it conducted activities at the site that could foreseeably expose the public and the environment to a significant increased threat of harm.
3. Respondent violated 6 NYCRR 375-1.11(d)(1) when it failed to provide the department notice of a change in use before engaging in activities likely to disrupt or expose contamination.

Staff also raised an issue in its reply regarding the respondent's representative Chris Carpentieri. The respondent allegedly identified Chris Carpentieri as an attorney when dealing with staff but he has not been authorized to practice law in New York State since 2006.

### Findings of Fact

1. Michael Haggerty is a project manager in the Division of Environmental Remediation in the central office of the Department. He has been employed by the Department since 2006. His duties include managing remediation of inactive hazardous waste disposal sites. (*See* Affidavit of Michael Haggerty sworn to March 29, 2022 [Haggerty aff] ¶¶ 1, 3.)
2. Edward Sailer of Sailer Environmental, Inc., is an Associate and Business Line Manager at Fuss & O'Neill, Inc. (F&O) and the former President of Sailer Environmental, Inc. (SEI). F&O acquired SEI in 2018. (*See* Affidavit of Edward N. Sailor, sworn to October 4, 2022 [Sailer aff] ¶ 1.) He has a Bachelor of Science degree in Environmental Science and has been a Master Level Certified Hazardous Materials Manager (CHMM) since January 1995. He also has been a Connecticut Licensed Environmental Professional (LEP) since August 1997 and asserts that he meets the definition of a "Qualified Environmental Professional" as defined in 6 NYCRR 375-1.2(ak)(2). (*See* Sailer aff ¶ 2.)
3. Chris Carpentieri is a consultant to James Holiber, Chief Counsel of 20 Rewe Street, Ltd. (*see* Affidavit of Chris Carpentieri in Opposition to Motion For Order without Hearing, sworn to October 4, 2022 [Carpentieri Opp aff] at 1).
4. The respondent 20 Rewe Street, Ltd. (respondent) is a business corporation (*see* NYS Department of State Entity Information for 20 Rewe Street, Ltd., Affirmation of Jonathon Agosta dated June 7, 2022 [Agosta affirmation], exhibit A) which has owned the real property located at 171 Lombardy Street, Brooklyn, New York (the Site) since 1996 (*see* deed from A&I Realty Company Limited Partnership to 20 Rewe Street Ltd, recorded December 2, 1996, Agosta affirmation, exhibit B). The Site includes two addresses: 514 Varick Avenue and 171 Lombardy Street (*see* Significant Threat Determination Worksheet, dated October 30, 2013, attached to Site Classification Report dated January 13, 2014, Haggerty aff, exhibit B [Site Classification Report].)
5. The Site is located on the northeast corner of Lombardy Street and Varick Avenue, and is completely covered by two brick buildings (*see* Site Classification Report at 1). The Site is listed in the Registry of Inactive Hazardous Waste Disposal Sites as NYSDEC Site Number 224182 (*see* Haggerty aff ¶ 6; Site Classification Report). A residential area is located two blocks southwest of the Site and Newtown Creek is located approximately four blocks east of the Site (*see* Site Classification Report at 2).
6. The Department investigated the Site for the presence of tetrachloroethene (PCE) between 2011 and 2013 as part of the Meeker Avenue Plume Trackdown investigation (*see id.*). In 2013, the URS Corporation prepared a Site Characterization, Meeker Avenue Plume Trackdown - Phase VII Report (November 2013) (Phase VII Report) for the Department (*see* Sailer aff, exhibit H). Michael Haggerty has been the project manager for the Site since 2018 (*see* Haggerty aff ¶ 5).
7. PCE, also referred to as PERC, is used in dry-cleaning, degreasing metal parts and manufacturing other chemicals. It is found in paint and spot removers, water repellents,

brake and wood cleaners, glues, and suede protectors. In humans, inhalation of airborne PCE may affect the central nervous system, the liver, kidneys, blood, immune system, vision, and the reproductive system and it has been associated with several types of cancer. (See Tetrachloroethene (PERC) in Indoor and Outdoor Air - September 2013 Fact Sheet, Agosta affirmation, exhibit C.) PCE is a volatile organic compound (VOC) (see Phase VII Report, Table 2-1: Summary of Parameters Analyzed/ Site Characterization - Meeker Avenue Plume Trackdown, at 152-154; see also 6 NYCRR 375-6.8[a]).

8. The Phase VII Report documented that a former soap manufacturer and lacquer storage facility located on the Site was a source of soil and groundwater contamination. A shallow source of PCE contamination was identified at two monitoring well locations adjacent to the Site (DEC-080 and DEC-080D). During the Phase VII investigation, PCE was detected in the soil at DEC-080D between two and six feet below ground surface (bgs) and also in the groundwater at DEC-080 and DEC-080D (see Phase VII Report at 5-15—5-16.)
9. The Phase VII Report noted that “[Compound Specific Isotope Analysis] results indicate that a separate, unique PCE source exists at DEC-080 and DEC-080D ... which is not associated with the PCE source identified side gradient in DEC-016R and DEC-017” (Phase VII Report at 5-15—5-16).
10. On December 23, 2013, the Department sent respondent a letter notifying respondent that the Site would be listed in the Registry of Inactive Waste Disposal Sites in New York State, effective in 20 days (see letter from Kelly A. Lewandowski, P.E., to respondent, dated December 23, 2013, Agosta affirmation, exhibit J.)
11. On January 13, 2014, a public notice was issued stating that the Site was added to the registry of Inactive Hazardous Waste Disposal Sites as a Class 2 site presenting a significant threat to public health and/or the environment because the soil and groundwater were contaminated with chlorinated solvents, primarily PCE (see Site Classification Report at unnumbered pages 6-10.)
12. The Department sent the respondent a letter dated July 8, 2014 notifying respondent that the Department had documented a release of substances and the presence of hazardous wastes on or near the Site and confirmed the presence of the contaminant PCE at the site. The letter notified respondent that the Site was classified as a Class 2 site because of the significant threat posed to the environment and/or public health and requested that the respondent enter a consent order agreeing to implement and finance a remedial program. The letter further informed the respondent that if it did not enter a consent order, the Department would undertake the investigation and/or remediation of the PCE contamination and the costs incurred would be recoverable by the State from the responsible parties. (See Haggerty aff ¶ 7; Letter from Jessica Steinberg Albin, DEC Assistant Attorney, to respondent dated July 8, 2014, Haggerty aff, exhibit A.)

13. Christopher Carpentieri responded to the Department by letter dated February 19, 2015, stating that 20 Rewe Street had “reviewed the DEC’s Phase V Data Summary Report dated October 2009 and the data appendices (‘Phase V’). These data do not support DEC’s conclusions regarding the Site. If these conclusions are supported by additional data, please advise us so that we can review them as well.” (Carpentieri Opp aff, exhibit C.) The letter advised the Department that “20 Rewe St. will proceed with a site investigation to gather the data necessary to characterize the site.” (*Id.*)
14. The Department requested access to the Site to perform a remedial investigation and feasibility study by letter dated March 27, 2015, enclosing a Property Owner Access Acknowledgment form to sign and return (*see* Haggerty aff ¶ 8; March 27, 2015 letter from Jessica Steinberg Albin to respondent, Haggerty aff, exhibit C). The respondent did not grant access to the Site (*see* Haggerty aff ¶ 8).
15. SEI conducted a Phase I Environmental Site Assessment (ESA) from February through July 2015 by inspecting the Site and reviewing public files concerning the Meeker Avenue Plume Trackdown, including the Phase VII Report which was obtained through a Freedom of Information Law (FOIL) request to the Department (*see* Sailer aff ¶ 11).
16. In reviewing the Phase VII Report, SEI found that it provided information on soil and groundwater sampling adjacent to, but not on, the Site (*see* Sailer aff ¶ 12). In the course of conducting the Phase I ESA, Edward Sailer found no conclusive information regarding whether past owners or operators at the 171 Lombardy property had handled halogenated volatile organic compounds (HVOCs) (*see* Sailer aff ¶ 12).
17. SEI conducted a subsurface investigation of the Site from October 29 to November 3, 2015 (*see* Haggerty aff ¶ 11; Sailer aff ¶ 13; Environmental Site Investigation Report from Sailer Environmental, Inc., dated December 21, 2015 [SEI Report], Haggerty aff, exhibit F at 3-4). SEI’s soil sampling in 2015 confirmed that HVOCs were present in the shallow soils (less than 10 feet bgs) adjacent to the western side of the Site along Varick Avenue and under the floor of the building on the Site. The 2015 investigation did not fully delineate the horizontal extent of soils impacted by HVOC and SEI recommended additional soil sampling be conducted. (*See* Sailer aff ¶ 13; SEI Report at 10.)
18. The Department was not notified of or involved in the 2015 investigation and sampling (*see* Haggerty aff ¶¶ 10-12).
19. SEI conducted additional soil sampling in July and August 2016 to further delineate the extent of the HVOCs in soils at and adjacent to the western side of the Site (*see* Sailer aff ¶ 15; letter report from Edward N. Sailer to Chris Carpentieri dated December 31, 2018, Sailer aff, exhibit L). SEI provided a preliminary evaluation of alternatives to remediate the HVOC-impacted soils (*see* Sailer aff ¶ 15; Sailer aff, exhibit L at 4-7).
20. In September 2016, the Department conducted several subsurface investigations on the sidewalk of Varick Avenue adjacent to the Site (*see* Letter from Michael Haggerty to Mark Buller, dated May 4, 2018, Haggerty aff, exhibit J.)

21. The Department sent another letter, dated January 30, 2018, to respondent requesting access to the Site and enclosing a consent form for access to the Site (*see* January 30, 2018 letter from Michael Murphy to respondent, Haggerty aff, exhibit D). The respondent did not grant the Department access to the Site at any time (*see* Haggerty aff ¶ 9).
22. Edward Sailer sent Michael Haggerty an email on March 28, 2018, with the results of soil and vapor sampling at the Site in 2015 and 2016 (*see* Haggerty aff ¶ 10; Haggerty aff, exhibit E).
23. Michael Haggerty emailed Edward Sailer on April 5, 2018, agreeing that a complete remedial investigation was required to determine the nature and extent of contamination, stating that the information Sailer provided confirmed the presence of hazardous waste on site, recommending that the respondent sign a consent order, and suggesting an on-site meeting (*see* Haggerty aff ¶ 14; Haggerty aff, exhibit I).
24. On April 17, 2018, the Department conducted an inspection under the Resource Conservation and Recovery Act (RCRA) to determine if any hazardous materials were in use at the property and ascertain whether any hazardous waste generated at the site was properly disposed (*see* Haggerty aff ¶ 15).
25. In May 2018, URS prepared a Phase I Remedial Investigation Letter Report for the Department (*see* Letter Report, Phase I Remedial Investigation 2017 Data, Former Lombardy Street Lacquer And Soap Mfg., Site No. 224182, May 2018, attached to Supplemental Subsurface Investigation Report - Former Lombardy Street Lacquer and Soap Manufacturing Facility, September 2021, revised October 2021, Sailer aff, exhibit M at 230-1055). The Letter Report noted that “[r]ecommendations are pending access to the property and Site building.” (Letter Report at 8, Sailer aff, exhibit M at pdf page 238.)
26. Chris Carpentieri sent a letter to Michael Haggerty dated June 1, 2018 regarding DEC’s RCRA inspection on April 17, 2018 (*see* Carpentieri Opp aff, exhibit D). The letter stated, “In the future, please do not enter the site without permission and without a representative of Sailer Environmental present.” (*Id.*)
27. The Department sent a letter dated April 19, 2019 to respondent informing respondent that the Department’s oversight over the investigation was required and that the respondent’s independent investigation was unacceptable to the Department (*see* Haggerty aff ¶ 16; letter from Michael Murphy to Mark Buller, April 19, 2019, Haggerty aff, exhibit K). The letter asserted the Department’s authority to enter the Site pursuant to ECL 27-1309(3)-(4) and ECL 27-1313(8) and included three copies of a “Property Owner Acknowledgement/Consent Form,” requesting that respondent sign and return two copies of the form (*see* Haggerty aff, exhibit K).
28. Chris Carpentieri sent a letter to Michael C. Murphy, dated May 24, 2019, in response to Michael Murphy’s April 19, 2019 letter (*see* Carpentieri Opp aff, exhibit G). In that

- letter Chris Carpentieri wrote “Sailer contacted Mr. Haggerty to obtain access to the DEC wells on the site to sample them for the continuation of the Site delineation. Mr. Haggerty declined to provide access. Consequently, the Owners will have to drill additional monitoring wells on Varick Avenue.” (*Id.* at 2.) The letter advised the Department that the owner was actively engaged in investigation and remediation of the Site, including further sampling to commence within the next month (*see id.* at 3).
29. On August 29, 2019, Department staff met with Jim Holiber, in-house counsel for respondent, Chris Carpentieri, and Edward Sailer (*see* Haggerty aff ¶ 17; Meeting Roster, Haggerty aff, exhibit L). Department staff reminded respondent of the Site’s Class 2 designation and that respondent’s ongoing unauthorized investigation constituted a violation of the Environmental Conservation Law (*see* Haggerty aff ¶ 17).
  30. After the meeting, Chris Carpentieri emailed Department staff, writing: “In accordance with our conversation today, 20 Rewe has ceased further investigative work at the site.” (Email from Chris Carpentieri to Patrick Foster, Edward Sailer, Jim Holiber, Sally Dewes, and Michael Haggerty, dated August 29, 2019, Haggerty aff, exhibit M; Haggerty aff ¶ 18.)
  31. Michael Haggerty observed Associated Drilling Company conducting drilling activities at the Site on February 4, 2021 and spoke to the employees present. They informed him that they were working at the direction of F&O. (*See* Haggerty aff ¶ 19).
  32. The Department sent respondent a Cease and Desist Notice of Violation on February 22, 2021 by email (*see* Haggerty aff ¶ 20; Agosta affirmation, exhibit E).
  33. F&O conducted an additional investigation of the horizontal and vertical extent of the HVOC-impacted soils from 2019 to 2021. This investigation included installation of two groundwater monitoring wells, and collection of soil and groundwater samples. (*See* Sailer aff ¶ 16; Supplemental Subsurface Investigation Report - Former Lombardy Street Lacquer and Soap Manufacturing Facility, September 2021, revised October 2021, Sailer aff, exhibit M).

### **Discussion**

Section 622.12(d) of 6 NYCRR provides for an order without hearing “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.” Summary judgment should be granted only if it is “clear that there are no material issues of fact to be adjudicated” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

In order to obtain summary judgment under CPLR 3212, a movant must establish the cause of action or defense “sufficiently to warrant the court as a matter of law in directing judgment” in their favor by presenting evidence in admissible form. (CPLR 3212[b]); *see also* *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].)

When Department staff moves for a motion for order without hearing, it bears the initial burden to make a prima facie showing of entitlement to summary judgment for each element of

the violations alleged, or any defenses raised. 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 of fact (*see Matter of Locaparra*, Final Decision and Order of the Commissioner, June 16, 2003, at 4). “Summary judgment, pursuant to the CPLR, is ‘a drastic remedy, to be granted only where the moving party has tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact ... and then only if, upon the moving party’s meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action.’ On a motion for summary judgment, facts must be viewed ‘in the light most favorable to the non-moving party’” (*Matter of Morgan Materials Inc.*, Decision and Order of the Commissioner, July 24, 2023 at 7, quoting *Vega*, 18 NY3d at 503 and citing CPLR 3212[b]).

Pursuant to 6 NYCRR 622.12(a), staff has supported its motion for an order without hearing with the affidavit of Michael Haggerty in Support of Motion for Order with Hearing, sworn to March 29, 2022, affirmation of Jonathon Agosta, dated June 7, 2022, affidavit of Michael Haggerty in Support of the Penalty, sworn to June 21, 2022, and attached exhibits. In opposition to the motion, respondent filed affidavits of Chris Carpentieri and of Edward Sailer, both sworn to October 4, 2022, and sur-reply affidavits of Chris Carpentieri, sworn to January 4, 2023, and of Edward Sailer, sworn to January 5, 2023, with attached exhibits. (*See Appendix.*)

Staff alleges three causes of action for violation of provisions of the Inactive Hazardous Waste Disposal Sites regulations: 6 NYCRR 375-1.11(b)(2)(i); 6 NYCRR 375-1.11(b)(2)(ii); and 6 NYCRR 375-1.11(d)(1).

#### **First Cause of Action: 6 NYCRR 375-1.11(b)(2)(i)**

Staff claims that respondent violated 6 NYCRR 375-1.11(b)(2)(i) when it prevented a proposed remedial program at the Site. The applicable regulation, 6 NYCRR 375-1.11(b)(2)(i), provides that “[i]t is a violation to engage in any activity that will, or that is reasonably: (i) anticipated to, prevent or interfere significantly with any proposed, ongoing, or completed remedial program at any site.” Staff argues the respondent’s refusal to enter a consent order, denial of access to the Site by the Department, and conducting of its own unauthorized investigation, is a violation of this subsection.

The Department requested access to the Site on several occasions, after the Site had been designated a Class 2 inactive waste disposal site, specifically on March 27, 2015, January 30, 2018 and April 19, 2019 (*see Findings of Fact* Nos. 14, 21 and 27). Respondent did not grant access to the Site (*see id.*; Haggerty aff ¶¶ 8, 9). Respondent does not dispute that access was requested on these occasions and that it did not grant access as requested. Respondent’s representative wrote to the Department in June 2018: “In the future, please do not enter the site without permission and without a representative of Sailer Environmental present” (*see Finding of Fact* No. 26.) However, respondent refused to grant permission.

Respondent claims that staff did not have authority to conduct remediation at the Site and



did not issue an order to respondent to remediate the Site pursuant to ECL 27-1313.<sup>1</sup> Therefore, respondent reasons that it cannot be prohibited from interfering with a remedial program since such a program was not authorized. Respondent also claims that there are multiple triable issues of fact regarding whether DEC intended to remediate contamination at the Site other than contamination that is part of the Meeker Avenue Plume.

Staff responds that respondent does not understand the State Superfund program and that respondent's contention that the Department did not intend to remediate the Site is directly contradicted by the record.

Respondent has spent considerable time and resources trying to establish that the PCE contamination on its property is not a source for the Meeker Avenue Plume.<sup>2</sup> There is no dispute, however, that there is PCE contamination on the Site and that respondent has refused to cooperate with the Department or allow the Department access to the Site to investigate, and develop and implement a remediation plan. It is not necessary to determine whether the Site is a source for the Meeker Avenue Plume to find respondent liable for this cause of action.

In order to find a violation under this subsection, there must be a proposed, ongoing or completed remedial program to interfere with. There is no requirement that a remedial program, and particularly a proposed remedial program, be the subject of an order pursuant to ECL 27-1313 to fall within the regulatory definition of a remedial program in 6 NYCRR 375-1.1(ap).

The Site is listed as a Class 2 site on the Inactive Hazardous Waste Disposal Sites Register. The Department has broad authority to access the property under ECL 27-1309(3) (*see e.g., Matter of State of New York v Lawrence Aviation Indus.*, 263 AD2d 511, 512 [2d Dept 1999], *lv denied* 94 NY2d 752 [1999] [recognizing DEC's broad powers under ECL 27-1309(3) to enter property, inspect it, and take samples, regardless of respondent's claim that it could conduct the investigation at a lower cost]; *New York State Dept. of Envtl. Conservation v Damico*, 130 AD2d 974, 974 [4th Dept 1987] [compelling property owner to provide the DEC

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<sup>1</sup> ECL 27-1313 authorizes the Commissioner of the Department "[w]henever the commissioner finds that hazardous wastes at an inactive hazardous waste disposal site constitute a significant threat to the environment," after notice and the opportunity for a hearing, to "order the owner of such site and/or any person responsible for the disposal of hazardous wastes at such site (i) to develop an inactive hazardous waste disposal site remedial program, subject to the approval of the department, at such site, and (ii) to implement such program within reasonable time limits specified in the order."

<sup>2</sup> Respondent attempts to defend itself by challenging the validity of the Department's listing of the Site on the Inactive Hazardous Waste Disposal Sites Register as a Class 2 site. However, as staff has pointed out, the course for reevaluating the site classification is to file a petition pursuant to 6 NYCRR 375-2.7(f), which provides that a current owner of a site classified under the Inactive Hazardous Waste Disposal Site Classification program may petition for:

"(i) the deletion of a site from the Registry;  
"(ii) the reclassification of a site to a different class on the Registry; or  
"(iii) the modification of any information concerning a site on the Registry."  
(6 NYCRR 375-2.7[f][2]; *see also* ECL 27-1305[2][c][1]; *Matter of Universal Waste, Inc. and Clearview Acres, Ltd.*, Decision of the Commissioner, October 15, 2011 at 8-11.)

with access to its property because ECL art 27 authorizes DEC to enter, inspect and take samples]).

In *Matter of New York State Dept. of Envtl. Conservation v Cox*, 12 Misc 3d 995, 998-999 (Sup Ct, Rensselaer County 2006), the court determined that ECL 27-1309(3) and former 6 NYCRR 375-1.2(c)<sup>3</sup>, which was similar to the current version of 6 NYCRR 375-1.11(b)(2)(i), authorized DEC and its designees to enter designated inactive hazardous waste sites and nearby lands for the purpose of inspecting, taking samples, including digging and creating monitoring wells, and remediating hazardous waste contamination. The court further found that the respondent was not entitled to insist that DEC commence a legal proceeding to enter his property (*see id.* at 1000).

In the absence of a consent order with the respondent, Department staff have sought to develop and implement a remedial program (*see* Staff Memorandum of Law in Support of Motion for Order without Hearing dated June 28, 2022 [Staff memo] at 11; Haggerty aff ¶¶ 8, 9, 14, 16, 25; Haggerty aff, exhibits A, C, D, I, J & K), and respondent has refused the access required to make that possible. The facts presented in staff's supporting affidavits, affirmation, and exhibits establish a prima facie case that respondent, by refusing to enter an agreement for remediation with the Department and refusing to allow the Department access to the Site, has taken actions that will prevent or interfere significantly with a proposed remedial program in violation of 6 NYCRR 375-11(b)(2)(i). Respondent, despite submitting close to 40,000 pages of exhibits, has not produced evidence sufficient to establish a triable issue of fact. Therefore, I find that respondent has violated 6 NYCRR 375-11(b)(2)(i) and staff's motion for order without hearing is granted on the first cause of action.

### **Second Cause of Action: 6 NYCRR 375-1.11(b)(2)(ii)**

Staff argues that respondent, by conducting sampling activities including soil boring and groundwater sampling, including the installation of monitoring wells (*see* Finding of Fact No. 33), on at least four days in 2015, and on at least eleven days from 2019 to 2021, violated 6 NYCRR 375-1.11(b)(2)(ii), which provides that "is a violation to engage in any activity that will, or that is reasonably .... foreseeable to, expose the public health or the environment to a significantly increased threat of harm or damage at any site."

Staff contends that the respondent's activities at the Site risked the spread of contaminants through the soil, air, and groundwater because the area is known to be contaminated with hazardous levels of harmful substances, and that the risk is recognized by respondent's consultant Chris Carpentieri, who expressed concern that DEC's remedial efforts "would create a conduit for the Site contamination to reach the groundwater." (Agosta affirmation, exhibit I at 4.) Staff further claims that soil boring and installing monitoring wells risk the disturbance and spread of hazardous contaminants if not implemented properly, exposing

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<sup>3</sup> Former 6 NYCRR 375-1.2(c), read:

"No person shall obstruct or attempt to obstruct any duly designated officer or employee of the Department or of any other state agency, or any agent, consultant, contractor or other person so authorized in writing by the Commissioner, acting pursuant to ECL 27-1305, 27-1309, or 27-1313, or any combination of same."

workers and potentially the public to hazardous contaminants (*see* Haggerty aff ¶ 26). Staff also points out that the activities were performed without a Department-approved work plan, or a Health and Safety Plan (HASP) and Community Air Monitoring Plan (CAMP) reviewed by the NYS Department of Health, calling into question whether appropriate safety measures were implemented (*see* Haggerty aff ¶ 27).

Respondent argues that the drilling onsite was conducted according to DEC protocols and methods specifically designed to prevent cross-contamination and interference with the existing soil and groundwater (*see* Respondent's Memorandum of Law in Opposition to Motion for Order without Hearing, dated October 4, 2022 [Opp] at 9). Edward Sailer averred: "Both SEI and F&O performed their respective investigations in accordance with OSHA's Hazardous Waste Operations and Emergency Response (HAZWOPER) standards promulgated at 29 CFR 1910.120. OSHA compliance by both companies included, but was not limited to, the preparation and implementation of Site-specific Health and Safety Plans (HASPs) and employee training." (Sailer aff ¶ 19.) F&O, and its predecessor, SEI, prepared and implemented a Health and Safety Plan for the activities at the Site (*see id.*; Sailer aff, exhibit N).

Respondent contends that its practices were more protective than the sampling conducted by the Department's consultants inasmuch as F&O capped their boring holes immediately after testing, while URS, the Department's consultant, did not (*see* Opp at 9). Edward Sailer avers that the Site is not a source of groundwater contamination and there is no residential community within approximately 500 feet of the Site (*see* Sailer aff ¶ 20). Respondent also asserts that the only residential community identified by staff (*see* Haggerty aff, exhibit B) is located southwest of and upgradient of the Site and is impacted by an HVOC contaminated groundwater plume from another site, known as the Klink Cosmo Site (*see* Sailer aff ¶ 20).

Viewing the facts in a light most favorable to the respondent as the non-moving party, (*see Morgan Materials* at 7), I find that there are disputed issues of fact as to whether respondent engaged in activities which will, or which are reasonably foreseeable to, expose the public health or the environment to a significantly increased threat of harm or damage at the Site, as prohibited by 6 NYCRR 375-1.11(b)(2)(ii). Therefore, the motion is denied as to the second cause of action.

### **Third Cause of Action: 6 NYCRR 375-1.11(d)(1)**

The third cause of action is based on respondent's alleged violation of 6 NYCRR 375-1.11(d)(1), which provides:

"(d) Change of use.

(1) At least 60 days before a change of use at a site, as defined in sections 375-2.11, 375-3.11 and 375-4.11 of this Part, the person proposing to make such change of use shall provide written notification to the department."

Subsection (d) continues:

“(2) The notice shall advise the Department of the contemplated change, including, but not limited to, explaining how such change may affect the site’s proposed, ongoing, or completed remedial program.”

Staff argues that the respondent’s activities at the Site, specifically the site investigations from October to November 2015, and from August 2019 to February 2021, constituted a change in use for which notice to the Department was required. The activities included “drilling into contaminant-laden soil at the Site and the extraction of soil and groundwater samples on at least 15 occasions.” (Staff memo at 14, citing Haggerty aff ¶¶ 11, 22.) It is staff’s position that respondent’s activity was very likely to disrupt or expose contamination because that was the very purpose of respondent’s actions - to assess contamination. Furthermore, staff claims that respondent’s unauthorized sampling created pathways that would increase direct human or environmental exposure through the spread of contaminants in soil, air, and groundwater. (See Staff memo at 14; Haggerty aff ¶¶ 12, 26-27.)

Staff relies on the regulatory definition of a “change in use” in 6 NYCRR 375-2.2, which states:

“**As used in this subpart**, the following terms have the following meanings:

- (a) ‘Change of use’ means the erection of any structure on a site, the paving of a site for use as a roadway or parking lot, the creation of a park or other recreational facility on a site, any activity that is likely to disrupt or expose contamination or increase direct human or environmental exposure, or any other conduct that will or may tend to prevent or significantly interfere with a proposed, ongoing, or completed remedial program.”

(Emphasis added.) The definitions in 6 NYCRR 375-2.2, however, apply to subpart 6 NYCRR 375-2, not to the previous subpart, 6 NYCRR 375-1, under which the third cause of action is alleged.

Respondent argues that the “sixty-day notice period of 6 NYCRR § 375-1.11(d)(1) applies *not* to any change of use *but only* to “change of use at a site, *as defined in sections 375-2.11, 375-3.11 and 375-4.11*” and that DEC has not pled that there has been any change of use as defined in any of those sections, nor can it” (Opp at 10 [emphasis in original]).

I agree with respondent that the regulation which respondent is charged with violating, 6 NYCRR 375-1.11(d)(1), refers to three definitions of a change of use, none of which are in 6 NYCRR 375-2.2(a). Moreover, none of the applicable definitions are as broad as the definition in 6 NYCRR 375-2.2(a). The first definition, in 6 NYCRR 375-2.11, addresses physical alterations:

“Except in the event of an emergency, in which event the remedial party shall comply with section 375-1.5(b)(1) of this Part, no person shall undertake at a site listed in the Registry any **physical alteration that constitutes storage, treatment, or disposal** of any contaminant which served as the basis for such listing.”

(6 NYCRR 375-2.11[a][1][emphasis added]).

Staff has neither alleged nor presented evidence that respondent undertook “any physical alteration that constitutes storage, treatment, or disposal of any contaminant which served as the basis” for the Class 2 listing of the Site. Therefore, the definition in 6 NYCRR 375-2.11(a)(1) cannot form the basis for liability under the third cause of action.

The other two references to change of use listed in 6 NYCRR 375-1.11(d)(1) are:

“In the event that the use of the site, as set forth in the remedy selection document for the site, changes **during the implementation of the remedial program**, the Department may make a new determination whether such remedial action remains protective of public health and the environment and, if the Department makes such a determination, it will require that the remedial action be modified to be protective of public health and the environment.”

(6 NYCRR 375-3.11[b][2][emphasis added]) and

“In the event that the use of the site, as set forth in the record of decision for the site, changes **during the implementation of the remedial program**, the Department may make a new determination whether such remedial action remains protective of public health and the environment and, if the Department makes such a finding, it will require that the remedial action be modified to be protective of public health and the environment.”

(6 NYCRR 375-4.11[b][2][emphasis added].)

As respondent points out, these provisions apply during the implementation of a remedial program, which is not alleged here.

Respondent also argues that, even if it was required to give 60 days’ notice to the Department of its investigative activities on its properties, it did so, by letters dated February 19, 2015 (*see* Finding of Fact No. 13) and May 24, 2019 (*see* Finding of Fact No. 28). Respondent provided a blank copy of the notice form which the Department usually requires, which asks for similar substantive information as that provided in those letters (*see* Sailer reply aff, exhibit A).

Staff has not met the burden of establishing a *prima facie* case that there has been a violation of 6 NYCRR 375-1.11(d)(1), and the motion on this cause of action is denied.

### **Ethical Issue**

Staff, in its Reply, raised an issue regarding Chris Carpentieri’s alleged unethical behavior identifying himself as an attorney when he has been suspended from the practice of law since 2006. (*See Matter of Attorneys Who Are in Violation of Judiciary Law Section 468-a*, 36 AD3d 34, 64 [1st Dept 2006].) In this proceeding, Mr. Carpentieri has filed two affidavits describing himself as a consultant to James Holiber, Chief Counsel of Respondent (*see* Carpentieri Opp aff at 1; Carpentieri sur-reply affidavit, sworn to January 4, 2023, at 1). It is troubling that respondent’s consultant Edward Sailer refers to Chris Carpentieri with the suffix “Esq.” in his opposition affidavit and labeled his December 31, 2018 letter to Chris Carpentieri as “Attorney-Client Privileged” (*see* Sailer aff, exhibit L), although neither Edward Sailer nor

Chris Carpentieri is an attorney. Also, Chris Carpentieri's name is under the signature line for the law firm Wuersch & Gering LLP on the respondent's opposition memorandum of law, although he did not sign the memorandum. However, this office does not regulate or discipline non-attorneys purportedly practicing law. That is a matter more appropriately brought to the attention of the Appellate Division, First Judicial Department, New York State Supreme Court.

Department regulations allow for an authorized representative of a respondent to participate in enforcement proceedings (*see* 6 NYCRR 622.10[c][1]), including authorized representatives who are not attorneys. Therefore, Mr. Carpentieri may continue to participate in this proceeding, if the respondent so chooses.

### **Ruling**

Based upon the foregoing, my ruling on Department staff's motion for order without hearing is as follows.

1. Department staff's motion for order without hearing on Department staff's first cause of action is granted against respondent on the issue of liability for violation of 6 NYCRR 375-1.11(b)(2)(i) by taking actions that will prevent or interfere significantly with a proposed remedial program at the Site.
2. Department staff's motion for order without hearing on Department staff's second and third causes of action is denied.
3. I reserve ruling on the civil penalty and relief requested in Department staff's motion for order without hearing until a hearing is held on the remaining causes of action.

Accordingly, Department staff's motion for order without hearing is granted in part, as detailed herein. A conference call will be scheduled after the parties have been served with this ruling to schedule the hearing on the remaining causes of action and the requested penalty and relief. In the event Department staff elects not to pursue the remaining causes of action, a summary report will be issued with respect to the requested penalties and relief.



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Elizabeth Phillips  
Administrative Law Judge

Dated: November 9, 2023  
Albany, New York

To: Service List dated November 9, 2023

Attachment: Appendix – List of motion papers received

**Appendix**  
**20 Rewe Street, Ltd.**  
**R2-20210416-52**  
**Motion for Order without Hearing**

**Department Staff's Motion for Order without Hearing**

1. Notice of Motion for Order without Hearing, dated June 28, 2022
2. Motion for Order without Hearing, dated June 28, 2022
3. Memorandum of Law in Support of Motion for Order without Hearing, dated June 28, 2022
4. Affirmation of Jonathon Agosta, dated June 7, 2022
  - Exhibit A: New York State Department of State Business Entity Page for 20 Rewe Street Ltd
  - Exhibit B: Deed from A&I Realty Company Limited Partnership to 20 Rewe Street Ltd, recorded December 2, 1996
  - Exhibit C: New York State Department of Health fact sheet on Tetrachloroethylene, dated September 2013
  - Exhibit D: Correspondence from Christopher Carpentieri to Jessica Albin, dated February 19, 2015
  - Exhibit E: Department's Cease and Desist Notice of Violation to Respondent, dated February 22, 2021
  - Exhibit F: Email from Edward Sailer, to Department staff including a link to Fuss & O'Neill's Supplemental Subsurface Investigation Report (the "Fuss & O'Neill Report"), sent September 29, 2021
  - Exhibit G: Signed agreement between Respondent and Respondent's environmental consultant, Fuss & O'Neill Consulting Engineers, PC. dated March 11, 2019
  - Exhibit H: Soil vapor map submitted to the Department by SEI, dated July 28, 2016
  - Exhibit I: Letter from Chris Carpentieri, to Michael Murphy, dated May 24, 2019
  - Exhibit J: Letter from the Department to Respondent, dated December 23, 2013
  - Exhibit K: Delivery confirmation, dated January 13, 2014, for the above-referenced letter, Exhibit J
5. Affidavit of Michael Haggerty, sworn to March 29, 2022
  - Exhibit A: Letter from Jessica Steinberg Albin, DEC, to 20 Rewe Street, Ltd, dated July 8, 2014
  - Exhibit B: NYS DEC Site Classification Report, dated January 13, 2014 for Former Lombardy Street Lacquer and Soap Mfg. site
  - Exhibit C: Letter from Jessica Steinberg Albin, DEC, to 20 Rewe Street, Ltd, dated March 27, 2015, with Property Owner Access Acknowledgement Form attached
  - Exhibit D: Letter from Michael C. Murphy, Esq., to 20 Rewe Street, Ltd. (Attn: Mark Buller) dated January 30, 2018, attaching Property Owner Acknowledgement/Consent Form

Exhibit E: March 28, 2018 Email from Edward N. Sailer [esailer@sailerenv.com](mailto:esailer@sailerenv.com) to Haggerty, Michael J (DEC) re: 171 Lombardi Street, Brooklyn, NY

Exhibit F: Letter from Edward N. Sailer, CHMM, LEP to Chris Carpentieri dated December 21, 2015 re: Environmental Site Investigation, 171 Lombardy Street, Brooklyn, NY

Exhibit I: Email from Haggerty, Michael J (DEC) to Edward N. Sailer dated April 5, 2018, re: 171 Lombardi Street, Brooklyn, NY

Exhibit J: Letter from Michael Haggerty, QEP to 20 Rewe Street, Ltd., Attn Mark Buller, dated May 4, 2018, re: Site No. 224182, Former Lombardy Street Lacquer and Soap Mfg., 171 Lombardy Street and 514 Varick Avenue, Brooklyn, NY 11222, Kings County Tax Block No. 2821, Lot 1

Exhibit K: Letter from Michael Haggerty, QEP to 20 Rewe Street, Ltd., Attn Mark Buller, dated April 19, 2019 re: Site No. 224182, Former Lombardy Street Lacquer and Soap Mfg., 171 Lombardy Street and 514 Varick. Site No. 224182

Exhibit L: Meeting Roster dated August 29, 2019

Exhibit M: Email from Chris Carpentieri to Patrick Foster, Edward Sailer and [jholiber@marjam.com](mailto:jholiber@marjam.com), cc'ed to Sally Dawes and Michael Haggerty, dated August 29, 2019, re: 71 Lombardy Street, Brooklyn, New York (224182), with email chain

Exhibit N: Supplemental Subsurface Investigation Report: Former Lombardy Street Lacquer and Soap Manufacturing Facility, September 2021, prepared by Fuss & O'Neill

6. Affidavit of Michael Haggerty in Support of the Penalty, sworn to June 21, 2022
7. Affirmation of Service, dated July 6, 2022

### **Respondent's Opposition**

1. Respondent's Memorandum of Law in Opposition to Motion for Order without Hearing, dated October 4, 2022
2. Chris Carpentieri Affidavit in Opposition to Motion for Order without Hearing, sworn to October 4, 2022

Exhibit A: Supplemental Subsurface Investigation Report: Former Lombardy Street Lacquer and Soap Manufacturing Facility, September 2021, prepared by Fuss & O'Neill

Exhibit B: Letter from Jessica Steinberg Albin, DEC, to 20 Rewe Street, Ltd, dated July 8, 2014, with envelopes

Exhibit C: Letter from Christopher Carpentieri to Jessica Steinberg Albin, dated February 19, 2015

Exhibit D: Letter from Christopher Carpentieri to Michael Haggerty, dated June 1, 2018

Exhibit E: Letter from Edward N. Sailer to Christopher Carpentieri dated December 31, 2018, re 171 Lombardy Street, Brooklyn, NY

Exhibit F: "Agreement for Supplemental Environmental Investigation" signed by Edward N. Sailer, Christopher J. Ecedy, Fuss & O'Neill, dated March 11, 2019



and signed by Jim Holiber, Chief Counsel, 20 Rewe Street, LLC on April 29, 2019

Exhibit G: Letter from Chris Carpentieri to Michael C. Murphy, dated May 24, 2019.

Exhibit H: Cease and Desist Notice of Violation from Gerald Burke to Jim Holiber, dated February 22, 2021

3. Affidavit of Edward N. Sailer, CHMM, LEP, sworn to October 4, 2022

Exhibit A: Continuing Education Attendance Certifications

Exhibit B: Boundary & Topographic Survey for Lot 1, Block 2821, 171 Lombardy Street, Borough of Brooklyn, Kings County, City and State of New York prepared by Gallas Survey Group, dated September 29, 2014

Exhibit C: Letter Report, Phase 1 Remedial Investigation 2017 Data, May 2018, prepared by URS Corporation for NYS DEC

Exhibit D: Meeker Avenue Plume Trackdown Site characterization – Phase VII Site Location Map

Exhibit E: NYS DEC Site Record for former Klink Cosmo Cleaners, Site Code 224130

Exhibit F: NYS DEC Site Record for ACME Steel/Metal Works, Site Code 224131

Exhibit G: NYS DEC Site Record for ACME Steel/Brass, Site Code 224131

Exhibit H: November 2013 Site Characterization, Meeker Avenue Plume Trackdown, Phase VII Report prepared by URS Corporation for NYSDEC

Exhibit I: Meeker Avenue Plume, NYDEC WA C007540-5, Report prepared by Zymax Forensics for URS Corporation, April 29, 2013

Exhibit J: SEI's December 21, 2015, Environmental Site Investigation letter report to Chris Carpentieri

Exhibit K: Letter from GZA Geoenvironmental, Inc. to Edward N. Sailer, dated May 12, 2016

Exhibit L: Letter from Edward N. Sailer, CHMM, LEP to Chris Carpentieri, with attachments, dated December 31, 2018

Exhibit M: Supplemental Subsurface Investigation Report Former Lombardy Street Lacquer and Soap Manufacturing Facility dated September 2021 and revised October 2021, prepared by F&O

Exhibit N: Site Health and Safety Plan

**Department Staff's Reply**

1. Department Staff's Reply Memorandum, dated November 18, 2022

**Respondent's Sur-reply**

1. Sur-Reply Memorandum of Law in Further Opposition to Motion for Order without Hearing, dated January 5, 2023

2. Sur-Reply Affidavit of Edward N. Sailer, CHMM, LEP, dated January 5, 2023  
Exhibit A - "60-Day Advance Notification of Site Change of Use, Transfer of  
Certificate of Completion, and/or Ownership" blank form  
Exhibit B - Boundary & Topographic Survey for Lot 1, Block 2821, 171 Lombardy  
Street, Borough of Brooklyn, Kings County, City and State of New York prepared  
by Gallas Survey Group and dated September 29, 2014
3. Sur-Reply Affidavit of Chris Carpentieri in Opposition to Motion for Order without  
Hearing, dated January 4, 2023
4. Certificate of Service, dated January 5, 2023

