STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Articles 17, 19 and 27 of the Environmental Conservation Law ("ECL"), and Parts 201, 225, 360, 612, 613, and 614 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

ORDER

DEC Case No. R6-20040429-24

- by -

FRENCH CREEK MARINA, LLC, and WILBURT C. WAHL, JR.,

Respondents.

Introduction and Procedural Background

This matter involves the administrative enforcement of alleged violations of petroleum bulk storage (PBS), solid waste, and air quality provisions of the New York Environmental Conservation Law (ECL) and accompanying regulations. The alleged violations are based on the presence of unregistered and inadequately maintained fuel storage tanks at a marina.

Staff of the New York State Department of Environmental Conservation (Department) commenced this proceeding to enforce provisions of ECL articles 17, 19 and 27, and title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) parts 201, 225, 360, 612, and 613 for alleged violations concerning underground storage tanks and above ground storage tanks at real property located adjacent to French Creek in the Village of Clayton, Jefferson County. French Creek is a tributary of the St. Lawrence River.

Staff originally initiated an enforcement proceeding against only respondent French Creek Marina, LLC, by service of a notice of hearing and complaint, dated October 26, 2004 (see 6 NYCRR 622.3[a]). Respondent French Creek appeared in the action through its attorney, George E. Mead, III, Esq., by serving an answer dated November 15, 2004, which denied staff's allegations. Following unsuccessful efforts between the parties to resolve the matter, Department staff withdrew its notice of hearing and complaint against

respondent French Creek in a letter dated December 1, 2006.

Contemporaneously, with papers also dated December 1, 2006, Department staff instituted the present proceeding against respondent French Creek and respondent Wilburt C. Wahl, Jr., by service of a notice of motion and motion for order without hearing against both respondents (see 6 NYCRR 622.12).[1] Staff's motion alleged that respondent Wahl, originally doing business as "French Creek Marina," owned and operated a PBS facility and a marina at 250 Wahl Street, Clayton (Jefferson County), New York, (the site) from before 1985 until December 2000. Staff maintained that, in December 2000, respondent Wahl formed a limited liability company known as "French Creek Marina, LLC" (respondent French Creek) to operate the marina at the site while respondent Wahl continued to own the property on which the marina is located and actively participated in the operation of the PBS facility at the site.

The record contains no dispute that, as of the date of staff's motion, the site contained nine (9) tanks with a combined storage capacity of over 5,000 gallons. These consisted of (i) three underground storage tanks (USTs) (Tank #1, Tank #2, Tank #3), each with a capacity of more than 1,100 gallons, used for gasoline and diesel fuel storage; (ii) four stationary aboveground storage tanks (ASTs) (Tank #4, Tank #6, Tank #7, Tank #8), three of which have a capacity of approximately 1,000 gallons each, used for storage of gasoline, waste oil, and kerosene; and (iii) two mobile aboveground storage tanks (MASTs) (Tank #5, Tank #9), each having a capacity of approximately 1,000 gallons, used for waste oil storage.

In its motion for order without hearing, Department staff charged respondent Wahl with nine (9) separate violations of the Department's regulations arising from his ownership and operation of the tanks at the site, and charged respondents Wahl and French Creek with another seven (7) separate violations of the Department's regulations stemming from their joint ownership or operation of the tanks at the site. Staff contends that some of the sixteen (16) total violations alleged against respondents date as far back as the early 1990's, while other violations are more recent (from 2005 and 2006).

In opposition to staff's motion, respondents submitted a Response to Motion for Order Without Hearing signed by Heinz W. Wahl,

[1] 6 NYCRR 622.12(a) provides, in relevant part, that "[i]n lieu of or in addition to a notice of hearing and complaint, the department staff may serve, in the same manner, a motion for order without hearing together with supporting affidavits reciting all the material facts and other available documentary evidence." I agree with respondents (Response to Motion for Order Without Hearing, at ¶ 4) that it would have been helpful if staff counsel numbered the paragraphs and enumerated the alleged violations in its motion.

Member, French Creek Marina, LLC, dated January 12, 2007, and an Attorney's Affidavit in Opposition to Motion sworn to by respondents' counsel, George E. Mead III, on January 12, 2007 (Mead Affidavit).

Staff's contested motion was assigned to Administrative Law Judge (ALJ) P. Nicholas Garlick, who prepared the attached report on motion for order without hearing. I adopt ALJ Garlick's report as my decision in this matter, subject to the following comments.

Standards for Motion for Order Without Hearing

The provisions of 6 NYCRR 622.12 are governed by the same principles that govern summary judgment motions brought pursuant to CPLR 3212 (see 6 NYCRR 622.12[d]; see also Matter of Richard Locaparra, d/b/a L&L Scrap Metals, Commissioner's Final Decision and Order, June 16, 2003, at 3). Affidavits on any motion should be made only by those with knowledge of the facts, and nowhere is this rule more faithfully applied than on a summary judgment motion. An attorney's affidavit has no probative force, unless the attorney happens to have first-hand knowledge of the facts, which is the exception rather than the rule (see Zuckerman v City of New York, 49 NY2d 557 [1980]; and Deronde Products, Inc. v Steve General Contractor, Inc., 302 AD2d 989 [4th Dept 2003]).

Staff's and Respondents' Proof - Liability

The evidence supporting staff's December 1, 2006, motion establishes that respondent Wahl owns and operates a marina and PBS facility at 250 Wahl Street, Clayton (Jefferson County), New York, and respondent French Creek operates both the marina and the PBS facility at that site. Staff's motion also establishes that respondents, either individually or jointly, caused or permitted to be caused the violations alleged in the motion.

Staff has made a prima facie showing that respondents, either individually by respondent Wahl or jointly by respondents Wahl and French Creek, violated at least sixteen (16) separate provisions of the Department's regulations at the site. Those violations, which are discussed in detail in the ALJ's report, have continued to December 1, 2006, the date of staff's motion. Respondents fail to offer any evidence sufficient to raise a triable issue of fact rebutting staff's case. Accordingly, I conclude that Department staff is entitled to summary judgment on the issue of respondents' liability for the violations charged.

In response to staff's motion, respondents submit a general denial in their Response to Motion for Order Without Hearing and an affidavit from its attorney, George E. Mead III. Neither a general denial nor an attorney's affidavit constitutes an adequate response

to a motion for order without hearing, which, as noted above, is essentially a motion for summary judgment.

For instance, the Mead Affidavit states that it "is made upon personal information, unless otherwise stated as upon information and belief. The source of such information and belief are discussions and interviews with parties and witnesses, review of documentary records of the Respondents and the Department of Environmental Conservation, review of statements and news accounts, and other anecdotal information sources" (see ¶ 2)(emphasis added). At least three substantive paragraphs of the Mead Affidavit begin with the phrase "[u]pon information and belief . . . ." Attorney Mead is simply counsel to the respondents. The record does not demonstrate that he has had any involvement or responsibilities with the site that is the subject of this enforcement matter. His information has been gleaned solely from other sources. Thus, he has not established that he has any "personal information" about the facts in this matter.

Moreover, while the Mead Affidavit includes seven exhibits, including some documents and photographs relating to the site, respondents' submissions do not include an affidavit from respondent Wahl or any other individual associated with respondents having personal knowledge of, or attesting to the veracity of, the assertions set forth in the Mead Affidavit (see 6 NYCRR 622.12[c]). The photographs submitted with the Mead Affidavit are undated, and the affidavit contains no reference as to when the photographs were taken.

In sum, both the respondents' general denial in their Response to Motion for Order Without Hearing and the Mead Affidavit are insufficient to raise an issue of fact that would preclude granting a motion for order without hearing.

Remedial Measures and Civil Penalties

This record demonstrates clearly the respondents' refusal to satisfy the obligations for operating a marina that stores petroleum-based fuel products. State regulation of PBS facilities first came into existence in 1983 with the enactment of ECL article 17, title 10 (ECL 17-1001, et seq.), "Control of the Bulk Storage of Petroleum." This ECL article was enacted because, of the 100,000 storage tanks then in New York, "data indicates that 15 to 20% of these tanks are leaking and posing a serious threat to groundwater, especially to private and public drinking water wells." Senate Memorandum in Support of S.2913, at 2. As a further rationale for the bill, the Senate acknowledged the difficulties of cleaning up a contaminated water supply, and that it was "preferable to institute a program to prevent leaks and detect them early through periodic testing." Id. To prevent leaks, or at the very least, to ensure

their earliest detection, the PBS program includes a number of important regulatory measures, such as registration of tanks, maintenance of daily inventory records, testing of tanks, and temporary and permanent closure of tanks.

The Department followed up the 1983 statutory enactment two years later with the adoption of a comprehensive set of regulations for the bulk storage of petroleum. Notice of Adoption of Amendments to 6 NYCRR Parts 610, 612, 613, and 614 (New York State Register, December 18, 2005, at 11-13). The Department estimated that 20% of underground storage tanks (USTs) (16,000 of 83,000) were leaking. Id., at 12. The Department determined that "[c]ompliance with the testing and inspection requirements of these regulations will result in the elimination of almost all of the leaking underground . . . storage tanks that exist in the State at this time." Id.

Thus, the chief purposes of both the PBS statute and its implementing regulations are to prevent leaks from happening in the first place, or, barring full prevention, to promote their early detection. The regulations also require not only initial registration of each tank (6 NYCRR 612.2[a][1], [c]), but also registration renewal every five years (6 NYCRR 612.2[a][2]). When a tank is no longer actively used, the regulations provide for both temporary and permanent closure. Temporary closure entails removing and disposing of the product from the tank and securing the fill lines to prevent unauthorized use or tampering. 6 NYCRR 613.9(a)(1). Permanent closure entails removing and disposing of liquid and sludge; rendering the tank vapor-free; disconnecting and removing connecting lines, or capping and plugging them; and either filling the tank with an inert material (sand or concrete slurry) or removing the tank altogether. 6 NYCRR 613.9(b)(1)(i)-(v).

All of these requirements are intended to protect the public health and the environment. Respondents' facility is particularly sensitive because it abuts French Creek, which is a tributary of the St. Lawrence River. Not only are the tanks at this facility unregistered, but they are in poor condition, with documented leaks. These are precisely the conditions that the statute and regulations are intended to address.

To avoid regulation as a PBS facility under the ECL, respondents claim that they are instead regulated by Jefferson County's administration of a consumer protection program that is administered by the counties under the State Agriculture and Markets Law. Specifically, respondents claim that the USTs (Tank #1, Tank #2, Tank #3) have been "closed" pursuant to the directive of the Jefferson County Sealer of Weights and Measures and that the tanks were filled with water for "firefighting purposes" (Respondents' Attorney's Affidavit in Opposition to Motion, at ¶ 4). Not only have

respondents failed to provide probative evidence of any closure, filling a tank with water is not a proper method of closure under the PBS regulations. Closure entails a more environmentally protective methodology, which, as stated above, includes removing and disposing of liquid and sludge; rendering the tank vapor-free; disconnecting and removing connecting lines, or capping and plugging them; and either filling the tank with an inert material (sand or concrete slurry) or removing the tank altogether. 6 NYCRR 613.9(b)(1)(i)-(v).

Additionally, respondents' claim that the USTs "were taken out of service and sealed by the Jefferson County Sealer of Weights and Measures in July 1993" (Respondents' Attorney's Affidavit in Opposition to Motion, at ¶ 4) is irrelevant to the Department's jurisdiction over the PBS facility here. The Jefferson County Sealer of Weights and Measures implements a consumer protection program under the Agriculture and Markets Law. See Agriculture and Markets Law § 179(19)(a) (authorizing commissioner of agriculture and markets to "[i]nspect, test, and take samples, of any and all petroleum products kept, offered or exposed for sale or in the process of delivery or transport and inspect any and all documents and records required to be maintained by this article") and § 179(19)(c) (authorizing commissioner of agriculture and markets to provide reimbursement to municipalities "for activities undertaken by municipal weights and measures programs").

The agriculture and markets program thus regulates the quality and quantity of gasoline sold. That program has no relevance to, and is no substitute for, the Department's PBS program, which seeks to protect the public health and environment from leaks and spills from tanks. Indeed, numerous provisions of the Agriculture and Markets Law that impose labeling and other requirements for fuel products expressly acknowledge the concurrent authority of the commissioner of environmental conservation to regulate the storage of petroleum products "for the purpose of preventing or decreasing pollution pursuant to the environmental conservation law." See Agriculture and Markets Law §§ 192-a(6), 192-b(11), and 192-c(12).

Finally, not only have respondents' activities run afoul of the PBS regulatory program, respondents are also storing and burning waste oil in violation of the solid waste and air permitting programs. Storing and burning waste oil are regulated under the solid waste and air pollution programs to protect the public health and environment.

Based upon the record, I conclude that Department staff established the sixteen violations against the respondents. I further conclude that the proposed civil penalties and remedial measures sought by Department staff to address the violations, and

the time recommended by staff by which respondents are to achieve compliance with applicable regulatory standards, are authorized and appropriate.[2]

I have considered respondents' remaining defenses to issues of liability, civil penalty, and remedial relief, and determine that they lack merit.

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

I. Department staff's motion for order without hearing is granted.

II. Respondent Wilburt C. Wahl, Jr., (respondent Wahl) is adjudged to have failed to register the PBS facility at the site in violation of 6 NYCRR 612.2(a) from at least 1993 to December 1, 2006, the date of staff's motion.

III. Respondent Wahl is adjudged to have failed to conduct periodic tightness testing or to have permanently closed the three underground storage tanks (USTs) (Tank #1, Tank #2, Tank #3) at the site in violation of 6 NYCRR 613.5(a)(1) from at least 1993 to December 1, 2006.

IV. Respondent Wahl is adjudged to have failed to install secondary containment around one aboveground storage tank (AST) (Tank #4) used for storing gasoline at the site in violation of 6 NYCRR 613.3(c)(6) from May 10, 2005, until at least June 26, 2006.

V. Respondent Wahl is adjudged to have failed to provide secondary containment around two ASTs (Tank #6, Tank #8) used for storing waste oil at the site in violation of former 6 NYCRR 360-14.3(e)(1)(i) from May 10, 2005, to December 1, 2006.

VI. Respondent Wahl is adjudged to have failed to provide secondary containment around two mobile aboveground storage tanks (MASTs) (Tank #5, Tank #9) used for storing waste oil at the site in violation of former 6 NYCRR 360-14.3(f) from May 10, 2005, to December 1, 2006.

VII. Respondent Wahl is adjudged to have failed to install a shut-off valve on the piping of a 1,000 gallon gravity fed AST (Tank #4) for storing gasoline at the site in violation of 6 NYCRR 613.3(c)(2) from June 26, 2006, to December 1, 2006.

[2] Appendix A to this Order is a table that sets forth staff's requested civil penalties, the ALJ's recommended civil penalties, and the penalties that I have ordered.

VIII. Respondent Wahl is adjudged to have failed to install gauges, high level alarms, or liquid pump cut-off controllers on one AST (Tank #4) at the site in violation of 6 NYCRR 613.3(c)(3) from June 26, 2006, to December 1, 2006.

IX. Respondent Wahl is adjudged to have failed to label four ASTs (Tank #4, Tank #6, Tank #7, Tank #8) at the site in violation of 6 NYCRR 613.3(c)(3)(ii) from May 10, 2005, to at least December 1, 2006.

X. Respondent Wahl is adjudged to have failed to label the two mobile above ground storage tanks (MASTS) (Tank #5, Tank #9) at the site with the words “USED OIL” in violation of former 6 NYCRR 360-14.3(h) from May 10, 2005, to at least December 1, 2006.

XI. Respondents Wahl and French Creek Marina, LLC, (French Creek) are both adjudged to have failed to inspect three ASTs (Tank #4, Tank #6, Tank #8) at the site on a monthly basis or keep records of such inspections in violation of 6 NYCRR 613.6(a) and (c) from at least June 26, 2006, to December 1, 2006.

XII. Respondents Wahl and French Creek are both adjudged to have failed to (i) paint the exterior surfaces of three ASTs (Tank #4, Tank #8) at the site; (ii) repair a leak associated with an AST (Tank #4) used for gasoline storage at the site; and (iii) correct other deficiencies at the site, all in violation of 6 NYCRR 613.6(d) and 614.9(c) from at least May 10, 2005, to December 1, 2006.

XIII. Respondents Wahl and French Creek are both adjudged to have failed to report petroleum spills at the site (from Tank #4, Tank #5 or Tank #9, Tank #6) within two hours of discovery in violation of 6 NYCRR 613.8 from May 10, 2005, to December 1, 2006.

XIV. Respondents Wahl and French Creek are both adjudged to have failed to color code the fill ports of the ASTs (Tank #4, Tank #6, Tank #7, Tank #8) and MASTs (Tank #5, Tank #9) to indicate the type of product stored at the site in violation of 6 NYCRR 613.3(b) from June 26, 2006, to December 1, 2006.

XV. Respondents Wahl and French Creek are both adjudged to have failed to make or keep inventory monitoring records for the three USTs (Tanks #1, Tank #2, Tank #3) at the site in violation of 6 NYCRR 613.4(a) and (c) from June 26, 2006, to December 1, 2006.

XVI. Respondents Wahl and French Creek are both adjudged to have operated a solid waste management facility without a permit from the Department in violation of 6 NYCRR 360-1.7(a)(1)(i) from May 10, 2005, to December 1, 2006.

XVII. Respondents Wahl and French Creek are both adjudged to have operated an air contaminant source without a permit from the Department in violation of 6 NYCRR 201-1.1 and 225-2.5 from May 10, 2005, to December 1, 2006.

XVIII. a. Respondent Wahl is assessed a total civil penalty in the amount of $114,450, of which $60,250 is suspended contingent upon his compliance with the remedial measures set forth in paragraphs "XIX" and "XX" of this order. The non-suspended civil penalty portion ($54,200) shall be due and payable within thirty (30) days after service of this order upon respondent Wahl. Payment shall be made in the form of a cashier's check, certified check, or money order made payable to the order of the "New York State Department of Environmental Conservation" and shall be delivered by certified mail, overnight delivery, or hand delivery to the Department of Environmental Conservation at the following address:

New York State Department of Environmental Conservation
Division of Legal Affairs, Region 6 Office
Dulles State Office Building
317 Washington Street
Watertown, New York 13601-3787
ATTN: Randall C. Young, Esq.
Re: File No. R6-20040429-24

If respondent Wahl fails to comply with any of the remedial measures set forth in paragraphs "XIX" and "XX" or any other obligation of this order, including payment of the non-suspended portion of the civil penalty, the suspended portion of the civil penalty shall become immediately due and payable, and is to be submitted in the same form and by the same means to the same address as the non-suspended portion of the penalty.

b. In addition, respondents Wahl and French Creek are jointly and severally assessed a total civil penalty in the amount of $65,400 which is due and payable within thirty (30) days after service of this order upon respondents Wahl and French Creek. Payment shall be made in the form of a cashier's check, certified check, or money order made payable to the order of the "New York State Department of Environmental Conservation" and shall be delivered by certified mail, overnight delivery, or hand delivery to the Department of Environmental Conservation at the following address:

New York State Department of Environmental Conservation
Division of Legal Affairs, Region 6 Office
Dulles State Office Building
317 Washington Street
Watertown, New York 13601-3787
ATTN: Randall C. Young, Esq.

XIX. In addition to the payment of civil penalties, respondent Wahl is ordered to do the following:

A. No later than ten (10) days after service of this order upon respondent Wahl, register the PBS facility at the site with the Department pursuant to 6 NYCRR 612.2 and pay the regulatory fee of $500 pursuant to ECL 17-1009(2).

B. No later than one hundred eighty (180) days after service of this order upon respondent Wahl, permanently close the USTs at the site pursuant to 6 NYCRR 613.9(b), and provide prior notice to the Department as required by 6 NYCRR 612.2(d) and 613.9(c). As part of the closure, respondent Wahl must perform an assessment of the site pursuant to a plan approvable by Department staff to determine whether the soil around and under the USTs at the site are contaminated by or with petroleum. For purposes of this order, “approvable” shall mean an assessment plan that can be approved by Department staff either as submitted by respondent Wahl or subject to only minimal revision. Once the assessment plan is approved, Department staff shall notify respondent Wahl in writing.

C. No later than sixty (60) days after service of this order upon respondent Wahl, construct secondary containment around the ASTs at the site pursuant to 6 NYCRR 613.3(c)(6).

D. (1) If respondent Wahl elects to keep the MASTs, no later than sixty (60) days after service of this order upon respondent Wahl, have a contract to construct secondary containment around the MASTs at the site in accordance with former 6 NYCRR 360-14.3(f), and no later than 180 days after service of this order upon respondent Wahl, complete the construction of secondary containment around the MASTs.

(2) If respondent Wahl elects to close the MASTs, no later than 60 days after service of this order upon respondent Wahl, clean the waste oil stored in the two MASTs on the site in conformity with the Department’s guidance on PBS tank closure and properly dispose of the MASTs.

E. No later than thirty (30) days after service of this order upon respondent Wahl, install a shut-off valve on the pipe leading from the 1,000 gallon AST containing gasoline to the product dispenser at the site in accordance with 6 NYCRR 613.3(c)(2).

F. No later than sixty (60) days after service of this order upon respondent Wahl, paint, label, and install gauges on the ASTs and MASTs at the site in accordance with 6 NYCRR 613.3(c)(3) and former 6 NYCRR 360-14.3(h).

XX. In addition to the payment of civil penalties, respondents Wahl and French Creek are ordered to:

A. No later than thirty (30) days after service of this order upon respondents Wahl and French Creek, color code the fill ports of the ASTs and MASTs at the site in accordance with 6 NYCRR 613.3(b).

B. Immediately upon service of this order upon respondents Wahl and French Creek, take the ASTs and MASTs at the site temporarily out of service pursuant to 6 NYCRR 613.9(a) until they are painted, labeled, and equipped with gauges or high level warning alarms, secondary containment, and shut-off valves as required by this order.

C. Immediately upon service of this order upon respondents Wahl and French Creek, conduct daily inventory monitoring of the USTs at the site and keep written records of the results pursuant to 6 NYCRR 613.4 until the USTs are permanently taken out of service.

D. Immediately upon service of this order upon respondents Wahl and French Creek, stop accepting waste oil from any source, private or commercial, until respondents Wahl and French Creek obtain appropriate permits from the Department pursuant to 6 NYCRR parts 201, 225, and 360. Respondents Wahl and French Creek shall keep written records evidencing the amount of heating fuel purchased at the site, the amount of waste oil collected at the site, and its source. For two (2) years after service of this order upon respondents Wahl and French Creek, respondents shall submit these records to the Department on a monthly basis.

XXI. All communications from respondent Wahl, or respondents Wahl and French Creek, to Department staff concerning this order shall be made to Ronald J. Novak, P.E., Regional Enforcement Coordinator, New York State Department of Environmental Conservation, Region 6 Office, 317 Washington Street, Watertown, New York 13601.

XXII. The provisions, terms, and conditions of this order shall bind respondents Wilburt C. Wahl, Jr., and French Creek Marina, LLC, and their heirs, successors, and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Alexander B. Grannis
Commissioner

Dated: October 7, 2010
Albany, New York

APPENDIX A
French Creek Marina, LLC, and Wilburt C. Wahl, Jr.

Table of Civil Penalties for Violations Established in Motion for Order Without Hearing

Violation / Liable Respondent	**Regulation Cited**	**Penalty: Staff, ALJ,& Comm'r**
1. Failure to register PBS facility (Wahl)	612.2(a)	Staff: $5,000 payable ALJ: $4,750 payable Comm'r: $4,750 payable
2. Failure to tightness test or permanently close USTs (Tank #1, Tank #2, Tank #3) (Wahl)	613.5(a)(1)	Staff: $61,800 total: $31,800 payable; $30,000 suspended ALJ: $57,600 total: $27,600 payable; $30,000 suspended Comm'r: $57,600 total: $27,600 payable; $30,000 suspended
3. Failure to install secondary containment for gasoline AST (Tank #4) (Wahl)	613.6(c)(6)	Staff: $70,000 total: $20,000 payable; $50,000 suspended ALJ: $50,000 total: $20,000 payable; $30,000 suspended Comm'r: $50,000 total: $20,000 payable; $30,000 suspended
4. Failure to install secondary containment for stationary waste oil tanks (Tank #6, Tank #8) (Wahl)	former 360-14.3(e)(1)(i)	(combined with #3)
5. Failure to install secondary containment for mobile waste oil tanks (containers) (Tank #5, Tank #9) (Wahl)	former 360-14.3(f)	(combined with #3)
6. Failure to install shutoff valve on gasoline AST (Tank #4) (Wahl)	613.3(c)(2)	Staff: $1,000 payable ALJ: $1,000 payable Comm'r: $1,000 payable
7. Failure to install gauges, etc., on AST (Tank #4) (Wahl)	613.3(c)(3)	Staff: $1,500 total: $750 payable; $750 suspended ALJ: $500 total: $250 payable; $250 suspended Comm'r: $500 total: $250 payable; $250 suspended
8. Failure to label ASTs (Tank #4, Tank #6, Tank #7, Tank #8) (Wahl)	613.3.(c)(3)(ii)	Staff: $700 payable ALJ: $600 payable Comm'r: $600 payable

9. Failure to label mobile waste oil tanks (containers) (Tank #5, Tank #9) (Wahl)	former 360-14.3(h)	(combined with #8)
10. Failure to inspect ASTs, keep records (Tank #4, Tank #6, Tank #8) (Wahl & French Creek)	613.6(a), (c)	Staff: $3,000 payable ALJ: $3,000 payable Comm'r: $3,000 payable
11. Failure to paint ASTs (Tank #4, Tank #8), repair leak (Tank #4), etc. (Wahl & French Creek)	613.6(d), 614.9(c)	(combined with #10)
12. Failure to report petroleum spills (Tank #4, Tank #5 or 9, Tank #6) (Wahl & French Creek)	613.8	Staff: $4,500 payable ALJ: $4,500 payable Comm'r: $4,500 payable
13. Failure to color code fill ports (Tank #4, Tank #6, Tank #7, Tank #8) (Wahl & French Creek)	613.3(b)	Staff: $600 payable ALJ: $400 payable Comm'r: $400 payable
14. Failure to keep inventory records for USTs (Tank #1, Tank #2, Tank #3) (Wahl & French Creek)	613.4(a), (c)	Staff: $7,500 payable ALJ: $7,500 payable Comm'r: $7,500 payable
15. Operating solid waste management facility without permit (Wahl & French Creek)	360-1.7(a)(1)(i)	Staff: $51,428 payable ALJ: $50,000 payable Comm'r: $50,000 payable
16. Operating air contaminant source without permit (Wahl & French Creek)	201-1.1 & 225-2.5	(combined with #15)
Total		Staff: $ 207,028 Total: $126,278 payable ($59,250 Wahl, $67,028 joint); $80,750 suspended ALJ: $179,850 Total: $119,600 payable ($54,200 Wahl, $65,400 joint); $60,250 suspended Comm'r: $179,850 Total: $119,600 payable ($54,200 Wahl, $65,400 joint); $60,250 suspended

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1550

In the Matter

-of-

the Alleged Violations of Articles 17, 19 and 27 of the Environmental Conservation Law and Title 6, Parts 201, 225, 360, 612, 613 and 614 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

-by-

FRENCH CREEK MARINA, LLC, and
WILBURT C. WAHL, JR.,

Respondents.

DEC Project No. R620040429-24

REPORT ON MOTION FOR ORDER WITHOUT HEARING

_____/s/_____
P. Nicholas Garlick
Administrative Law Judge

SUMMARY

In this administrative enforcement case, staff of the Department of Environmental Conservation (DEC Staff) alleges sixteen causes of action against French Creek Marina, LLC, and Wilburt C. Wahl, Jr. (respondents). DEC Staff commenced this action by serving a motion for order without hearing on the respondents. Respondents deny the allegations, but do not present adequate evidence in their responding papers to warrant a hearing either on liability, the amount of civil penalty, or remediation. Based on the evidence in the record, DEC Staff has shown that respondent Wahl is individually liable for nine violations, and respondents French Creek Marina, LLC, and Wahl are jointly liable for seven violations. The Administrative Law Judge (ALJ) recommends that the Commissioner impose a total civil penalty of $180,050. Of this total amount, the Commissioner should impose a total civil penalty of $114,450 on Respondent Wahl of which $54,200 should be payable and $60,250 should be suspended upon the respondents' compliance with the terms and conditions of the order. In addition, the Commissioner should impose a payable civil penalty of $65,600 be imposed upon respondents Wahl and French Creek Marina, LLC, jointly and severally. The order should also include a compliance schedule to bring the facility into compliance with New York State law.

PROCEEDINGS

By notice of hearing and complaint dated October 26, 2004, DEC Staff alleged two causes of action against respondent French Creek Marina (Respondents' Exh. A). By answer dated November 15, 2004, respondent French Creek Marina, LLC, denied the allegations (Respondents' Exh. B). Following unsuccessful negotiations between the parties, DEC Staff withdrew the October 26, 2004 complaint, by letter dated December 1, 2006.

By papers dated December 1, 2006, DEC Staff moved for an order without hearing against respondents French Creek Marina, LLC, and Wilburt C. Wahl, Jr., alleging sixteen causes of action. DEC Staff seeks a Commissioner's Order imposing a total civil penalty of $207,028. Of this total amount, DEC Staff requests that the Commissioner impose a civil penalty of $140,000 on Respondent Wahl individually of which $59,250 should be payable and $80,750 should be suspended upon the respondent's compliance with the terms and conditions of the order. In addition the Commissioner should impose a payable civil penalty of $67,028 upon respondents Wahl and French Creek Marina, LLC, jointly and severally. The order should also include a

compliance schedule to bring the facility into compliance with New York State law.

DEC Staff's papers included (1) a Notice of Motion; (2) a Motion for Order Without Hearing; (3) a Brief; (4) the affidavits of DEC Staff members Gary McCullouch, Jeremy Rogers, Keith Goertz, P.E., Randall Young, Esq., Matthew J. Polge, and Thomas Morgan, P.E.; and (5) two affidavits from Peter Taylor, P.E.

After requesting and receiving an unopposed extension from DEC's Chief ALJ to answer, the respondents replied by papers dated January 10, 2007. These papers included a response to the motion for order without hearing and an affidavit of respondents' counsel, George E. Mead, Esq. (with seven exhibits) in opposition to the motion.

The matter was first assigned to ALJ O'Connell in January 2007 and then transferred to me in March 2007. On April 3, 2007, I wrote to DEC's counsel requesting a response to three items raised in the respondents' papers: (1) respondents' request for a settlement conference; (2) respondents' claim that the violations were improperly noticed; and (3) respondents' claim that DEC Staff's attempt to amend the previously filed complaint was procedurally defective. DEC Staff's response was received on April 6, 2007 and is discussed below.

FINDINGS OF FACT

First Cause of Action

1. The site of the violations is real property adjacent to French Creek in the Village of Clayton, Jefferson County. Respondent Wilburt C. Wahl, Jr., owns the site (DEC Exh. BB). According to information on the French Creek Marina website (frenchcreekmarina.com), Mr. Wahl bought the land in 1950 (DEC Exh. DD). In 1968, Mr. Wahl filed a certificate for conducting business under an assumed name, d.b.a. French Creek Marina, with the Jefferson County Clerk's Office (DEC Exh. AA).

2. On December 13, 2000, French Creek Marina, LLC, filed with NYS Department of State as a Domestic Limited Liability Company (DEC Exh. CC). The mailing address for French Creek Marina, LLC, is listed as 250 Wahl Street, Clayton, New York, 13624.

3. The site contains petroleum storage tanks with a capacity of over 1,100 gallons. This record indicates that there

are at least nine tanks at the site. The types and locations of these tanks are listed below:

A. Underground storage tanks (USTs). The site contains 3 USTs (Tanks #1, #2, and #3) which were used for gasoline and/or diesel fuel storage. The date these tanks were placed in service is not clear from this record: one DEC Staff member states this occurred after December 1985 (Rogers 5, DEC Exh. A, B) and a second states that the tanks were there since at least 1993 (Goertz 3, DEC Exh. Y). The USTs each have a capacity of more than 1,100 gallons (DEC Exh. Y), although there are varying capacities in the papers submitted. There is no tank closure report regarding these tanks in DEC's files nor do the files contain prior notice from the respondents that they intended to remove the tanks from service (Rogers 8). At some point after 1996, DEC Staff believes that these tanks were filled with water (Rogers 8) ostensibly for firefighting purposes.

B. Stationary aboveground storage tanks (ASTs). The site has four aboveground stationary tanks. The types and locations of these tanks are listed below:

1. A 1,000 +/- gallon aboveground gasoline storage tank (Tank #4) (DEC Exhs. E, F, N, O, GG1, GG2) located in a paved parking area, only a few yards from French Creek (Rogers 7). The tank shown in the DEC exhibits seems to either be encased in a metal shell or it has been replaced by a new tank some time after June 26, 2006 (respondents' Exh. G).

2. A 1,000 +/- gallon waste oil tank located in the repair shop (DEC Exhs. G, H, HH2). This tank is identified as Tank #6 in respondents' exhibit G.

3. A 1,000 +/- gallon waste oil tank located in the welding shop at the site (DEC Exhs. L, M, HH4, McCullouch 4). The record does not identify specifically the number of this tank, but it is probably Tank #8 (and this tank is identified as such for the remainder of this report).

4. A 275 gallon kerosene tank. This tank was photographed by DEC member Taylor on April 6, 2005 (DEC Exh HH3). On May 10, 2005, DEC Staff member McCullouch inspected the site. No mention

or photo of this tank is found in Mr. McCullouch's affidavit. On June 26, 2006, DEC Staff member Rogers inspected the facility and took photographs. No mention or photo of this tank is found in Mr. Rogers' affidavit. Reference to Tank #7 is made in a July 11, 2006 Notice of Violation (DEC Exh. W) which related findings of the June 26, 2006 inspection. A photo of the tank is provided by respondents' counsel (respondents' Exh. G), which was taken after the inspection and shows the tank labeled as Tank #7.

C. Mobile aboveground storage tanks. The site contains two mobile 1,000 +/- gallon waste oil storage tanks (Tanks #5 and #9).[1] These tanks were photographed by DEC Staff in 2005 (DEC Exhs. GG3, GG4, HH1, HH2, I, J, K) and 2006 (DEC Exhs. P, Q, R, S, T). Photos of these tanks are also provided by the respondents' counsel (respondents' Exh. G.). Respondents' photos were taken after DEC's photos and show the tanks labeled as Tanks #5 and #9. These photos show Tank #5 to have a design capacity of 4,000 gallons and Tank #9 to be out of service.

Tank #	Tank Type	Location
1	UST	Underground
2	UST	Underground
3	UST	Underground
4	AST	Outside
5	Mobile	Outside
6	AST	Repair shop
7	AST	Outside
8	AST	Welding shop
9	Mobile	Outside

4. The site has never been registered as a petroleum bulk storage facility (Rogers 4).

Second Cause of Action

5. DEC Staff has no record of the USTs (Tank #1, Tank #2, and Tank #3) at the site being successfully tightness tested (Rogers 14).

[1] DEC Staff's motion states there are three of these mobile tanks (p. 2), but this is contradicted by other information in the record including Mr. McCullouch's affidavit (paragraph 4(ii) and Mr. Rogers's affidavit (paragraphs 21 & 22).

6. DEC Staff has no tank closure report in its files nor do DEC's files contain prior notice from respondent Wahl that he intended to remove the USTs (Tank #1, Tank #2, and Tank #3) from service (Rogers 8).

Third Cause of Action

7. Secondary containment was not installed around the 1,000 gallon +/- aboveground gasoline storage tank (Tank #4) at the site on April 6, 2005 (DEC Exhs. GG1, GG2), on May 10, 2005 (McCullouch 5, DEC Exhs. E, F) or June 26, 2006 (DEC Exhs. N, O, Rogers 7).

Fourth Cause of Action

8. Neither of the stationary aboveground waste oil tanks (Tank #6 and Tank #8) were equipped with secondary containment when the facility was inspected on June 26, 2006 by DEC Staff member Rogers (Rogers 9, DEC Exhs. G, H, L, M).

Fifth Cause of Action

9. Neither of the mobile waste oil tanks (Tank #5 and Tank #9) were equipped with secondary containment when the facility was inspected on May 10, 2005 by DEC Staff member McCullouch or on June 26, 2006 by DEC Staff member Rogers (Rogers 9, DEC Exhs. P, Q, R, S, T).

Sixth Cause of Action

10. On June 26, 2006, DEC Staff member Rogers observed that the pipe coming out of the top of the aboveground gasoline storage tank (Tank #4) leads to the bottom of the gas pump, which is below the bottom of the tank. There was no shut-off valve installed, which means that a break or leak in the lower end of the pipe would cause the pipe to act as a siphon and cause the tank to drain by gravity, contaminating the environment (Rogers 15, 16, DEC Exh. N).

Seventh Cause of Action

11. The aboveground gasoline storage tank (Tank #4) at the site was not equipped with a gauge showing the amount of product stored in the tank, a high-level warning alarm, or a liquid pump cut-off controller or similar device on June 26, 2006 (Rogers 23).

Eighth Cause of Action

12. None of the stationary aboveground storage tanks (Tank #4, Tank #6, Tank #7, and Tank #8) at the site were marked with their design capacity, working capacity, tank number, or product stored on May 10, 2005 (McCullouch 16) or June 26, 2006 (Rogers 9).

Ninth Cause of Action

13. Neither of the mobile waste oil tanks (Tank #5 and Tank #9) were labeled with their capacity or the words “used oil” when the facility was inspected on May 10, 2005 (McCullouch 16) or June 26, 2006 (Rogers 9).

Tenth Cause of Action

14. On June 26, 2006, DEC Staff member Rogers found respondents had no record of monthly inspections of the stationary aboveground tanks (Tank #4, Tank #6, Tank #7, and Tank #8). The respondents have not subsequently provided DEC with records showing that the monthly inspections were performed (Rogers 24).

Eleventh Cause of Action

15. The aboveground gasoline storage tank at the site (Tank #4) had paint flaking off it when observed on May 10, 2005 (McCullouch 7, DEC Exh. F). This tank also had not been repaired to prevent it from leaking (DEC Exh. P, GG). In addition, the waste oil tank in the welding shop (Tank #8) is rusty and unpainted (DEC Exh. L & M).

Twelfth Cause of Action

16. On May 10, 2005, DEC Staff member McCullouch observed staining on the pavement below the gasoline dispenser attached to Tank #4 (McCullouch 6, DEC Exh. E). Mr. McCullouch also observed oil spilled on the tank in the repair shop (Tank #6) (DEC Exh. G).

17. On June 26, 2006, DEC Staff member Rogers observed staining on the pavement below the gasoline dispenser attached to Tank #4. He stated it appeared that the pipe connections under the pump had been leaking slowly for several months if not years and that this spill had not been reported to DEC (Rogers 17, DEC Exh. O).

18. On June 26, 2006, DEC Staff member Rogers observed what appeared to be a petroleum stain, partially covered by fresh crushed stone near a mobile tank (it is not clear from the record if this refers to Tank #5 or Tank #9). DEC has no record of this spill being reported (Rogers 18, DEC Exh. P).

19. On June 26, 2006, DEC Staff member Rogers observed other leaks or spills near one of the mobile tanks (it is not clear from the record if this refers to Tank #5 or Tank #9) (Rogers 20, DEC Exh. R).

Thirteenth Cause of Action

20. The fill ports for ASTs (Tank #4, Tank #6, Tank #7, and Tank #8) at the facility were not color coded to indicate the type of product stored in the tanks when the facility was inspected on June 26, 2006 by DEC Staff member Rogers (Rogers 9).

Fourteenth Cause of Action

21. As of June 23, 2006, respondents failed to keep inventory records for the USTs (Tank #1, Tank #2, and Tank #3) at the site (Rogers 10).

Fifteenth Cause of Action

22. Respondents do not possess a permit or other document authorizing the collection, storage, or processing of waste oil at the facility (McCullouch 15).

23. Respondents collected and stored of waste oil at the facility.

Sixteenth Cause of Action

24. On May 5, 2005, respondent Wahl told DEC Staff member McCullouch that he took in approximately 8,000 gallons of waste oil from marinas and auto repair shops and burned it to heat buildings at the facility (McCullouch 13). Respondent Wahl also stated that he was not testing the waste oil because testing the waste oil to ensure it was not contaminated with hazardous waste would cost almost as much as buying virgin fuel oil (McCullouch 14).

25. The respondents do not have a permit or registration authorizing operation of a stationary combustion installation to burn used or waste oil (Morgan 3).

DISCUSSION

Preliminary Matters

Before discussing the causes of action alleged by DEC Staff in its motion for order without hearing, several points raised by respondents are addressed below.

Respondents' Request for a Settlement Conference

In his affidavit in opposition to DEC Staff's motion, respondents' counsel requested that a settlement conference be scheduled with the parties and the ALJ. DEC Staff responds that such a conference is not necessary and that a proposed consent order was shared with the respondents in October 2006 and that while discussions have occurred, no response has been forthcoming from the respondents. DEC's uniform enforcement hearing procedures do not require settlement conferences; however, ALJs do, on occasion, act as mediators to settle disputes between DEC Staff and members of the regulated community. A prerequisite for mediation is the agreement of the parties to participate. In this case, DEC Staff has decided that such a mediation would not be helpful. Accordingly, no settlement conference was scheduled.

Respondents' claim that DEC Staff Improperly Amended the Complaint

Respondents argue that this enforcement action began with the service of a notice of hearing and complaint dated October 26, 2004 and that by now filing a motion for order without hearing, which includes a second respondent and additional alleged violations, DEC Staff has impermissibly amended the original complaint in violation of 6 NYCRR 622.5.

DEC Staff responds that in its December 1, 2006 cover letter with the motion for order without hearing, it withdrew its previous complaint and that there is nothing in either the ECL or the State Administrative Procedures Act (SAPA) which prohibits Staff from commencing subsequent proceedings for violations not specifically addressed in prior pleadings.

DEC Staff is correct that the instant motion for order without hearing commenced this action following the withdrawal of the previous complaint. No violation of 6 NYCRR 622.5 has occurred.

Respondents' Claim that DEC Staff Cannot Prosecute Alleged Violations When No NOV Was Served

Respondents also argue that respondent Wahl was not individually served a notice of violation (NOV) concerning any of the violations alleged, in violation of uniform procedures for enforcement prosecution. Respondents also argue that they were not served with any NOVs for the alleged violations of 6 NYCRR parts 201, 225, and 360.

DEC Staff responds that respondents provide no authority for the claim that NOVs must be served in order for DEC Staff to initiate an enforcement case, nor does any exist. DEC Staff cites the fact that the correspondence in this matter was addressed to respondent Wahl at French Creek Marina and that respondent Wahl responded to this correspondence. In addition, respondent Wahl was present during DEC Staff's inspections of the facility and participated in discussions regarding the alleged violations.

The respondents provide no authority for their argument that an NOV must be served prior to commencement of an administrative enforcement action, nor does any exist. DEC's uniform Enforcement Hearing Procedures (6 NYCRR 622) provides that an administrative hearing may be commenced by the notice of hearing and complaint (622.3[a]). This section does not require an NOV. The respondents' argument must be rejected.

Staff's Motion for Order Without Hearing

The Commissioner set forth the standards to be used in evaluating a motion for order without hearing in Matter of Loccaparra, (Decision and Order, June 16, 2003).

> Staff brings this motion for an order without hearing pursuant to 6 NYCRR 622.12. That provision is governed by the same principles that govern summary judgment pursuant to CPLR 3212. Section 622.12(d) provides that a contested motion for an 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 moving party on a summary judgment motion has the burden of establishing "his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd

[b])."[2] The moving party carries this burden by submitting evidence sufficient to demonstrate the absence of any material issues of fact.[3] The affidavit may not consist of mere conclusory statements but must include specific evidence establishing a prima facie case with respect to each element of the cause of action that is the subject of the motion. Similarly, a party responding to a motion for summary judgment may not merely rely on conclusory statements and denials but must lay bare its proof.[4] The failure of a responding party to deny a fact alleged in the moving papers, constitutes an admission of the fact.[5]

In this contested motion for order without hearing, Respondents generally deny the violations alleged by DEC Staff, but as discussed more fully below, the proof provided by respondents' counsel is insufficient to raise a triable issue of fact.

Liability

The motion for order without hearing alleges sixteen separate causes of action against the respondents. Each alleged violation is discussed separately, below.

First Cause of Action

In its motion for order without hearing, DEC Staff alleges that respondent Wahl failed to register a petroleum bulk storage facility, including waste oil storage tanks, in violation of 6 NYCRR 612.2(a). This section reads:

"612.2 Registration of facilities.
(a) Existing facilities.
(1) Within one year of the effective date of these regulations, the owner of any petroleum storage facility having a capacity of over 1,100 gallons must register the facility with the department. This shall include any out-of-service facility which has not been permanently closed.

[2] Friends of Animals v Associated Fur Mfrs., Inc., 46 NY2d 1065, 1067 (1979).

[3] See Alvarez v Prospect Hospital, 68 NY2d 320, 324 (1986).

[4] See Hanson v Ontario Milk Producers Coop., Inc., 58 Misc 2d 138, 141-142 (Sup Ct, Oswego County 1968).

[5] See Kuehne & Nagel, Inc. v Baiden, 36 NY2d 539, 544 (1975).

(2) Registration must be renewed every five years from the date of the last valid registration until the department receives written notice that the facility has been permanently closed or that ownership of the facility has been transferred."

DEC Staff alleges that respondent Wahl is the owner of a petroleum storage facility having a capacity of over eleven hundred gallons. To support this claim, DEC Staff includes with its motion a copy of the deed to the real property on which the marina sits showing the ownership of this parcel by respondent Wahl (DEC Exh. BB). The respondents do not contest the ownership of the parcel by respondent Wahl. Therefore, DEC Staff has established that respondent Wahl is the owner of the facility as that term is used in 6 NYCRR 612.1(c)(18).

This alleged violation involves, in part, a long standing dispute between respondent Wahl and DEC Staff. There is no dispute that at the site there are three underground storage tanks (USTs) with a combined capacity that exceeds 1,100 gallons, although the exact capacity of these tanks is not clear from the papers submitted. (DEC Exhs. A and Y list each tank as having a capacity of 3,000 gallons; DEC Exh. X refers to a 4,000 gallon UST; and respondents' attorney's affidavit, paragraph 3, states these tanks have a capacity of 11,000 gallons).

It is also uncontested that these tanks are single-walled and installed below the seasonal high ground water level at the site. The end of one of the tanks is located below the foundation of a building at the site (Taylor 2, DEC Exh. B).

At some point in 1992, corrosive gasoline was delivered to the marina (DEC Exh. V) causing damage to several engines using the fuel (Respondents' Exh. D). The product in these tanks was subsequently pumped out, and the tanks were sealed by the Jefferson County Sealer of Weights and Measures in July 1993 (Respondents' Exh. D, Respondents' attorney's affidavit 4(a)). Litigation ensued, the outcome of which is unclear from the papers provided.

At some point in 1996, according to the respondents' attorney, all gasoline was removed from the tanks, all pumping equipment was removed, and the tanks were converted to water storage for "fire-fighting." Other than the attorney's statement, no other proof of this is offered. These actions, the respondents claim, closed the tanks and caused the premises to cease being a petroleum bulk storage facility (respondents' attorney's affidavit, 4).

DEC Staff rejects the respondents' contention that these USTs were closed and maintains that these USTs continue as petroleum tanks until they are closed pursuant to 6 NYCRR 613.9(b) and (c), which read:

> 613.9 Closure of out-of-service tanks
> …
> (b) Closure of tanks permanently out of service.
> (1) Any tank or facility which is permanently out of service must comply with the following:
>
> > (i) Liquid and sludge must be removed from the tank and connecting lines. Any waste products removed must be disposed of in accordance with all applicable State and Federal requirements.
> > (ii) The tank must be rendered free of petroleum vapors. Provisions must be made for natural breathing of the tank to ensure that the tank remains vapor-free.
> > (iii) All connecting lines must be disconnected and removed or securely capped or plugged. Manways must be securely fastened in place.
> > (iv) Aboveground tanks must be stenciled with the date of permanent closure.
> > (v) Underground tanks must either be filled to capacity with a solid inert material (such as sand or concrete slurry) or removed. If an inert material is used, all voids within the tank must be filled.
> > (vi) Aboveground tanks must be protected from floatation in accordance with good engineering practice.
>
> (2) Storage tanks or facilities which have not been closed pursuant to paragraph (1) of this subdivision are subject to all requirements of this Part and Part 612 of this Title, including but not limited to periodic tightness testing, inspection, registration and reporting requirements.
> …
> (c) Reporting of out-of-service tanks. The owner of a tank or facility which is to be permanently closed must notify the department within 30 days prior to permanent closure of the tank or facility pursuant to the requirements of section 612.2(d) of this Title."

The above-quoted regulations do not allow for a facility owner to convert petroleum USTs for "fire-fighting" purposes. Rather, such tanks must either be filled with an inert material or removed. Respondents argue that the "slavish adherence" to

the language of 6 NYCRR 613.9(b), under the facts of this case, would render the regulation unconstitutional as an uncompensated taking of private property (respondents' counsel 7). Respondents' attorney continues that by requiring the removal of these tanks before they could be converted to water storage flies in the face of common sense and cannot be done because of damage to the building above the tanks. Filling these tanks would render them unusable and destroy their value to the owner (8). Respondents' counsel also states that the requirements of 6 NYCRR 613.9(b)(i-iv) were complied with before the tanks were converted to water storage (9), but no proof of this claim is provided. Nor is proof provided of counsel's claim that this conversion was approved orally by an unidentified DEC Staff person at an unidentified date in 1996 (9). Counsel does not claim that the respondent complied with 6 NYCRR 613.9(c) before converting the tanks.

This dispute, whether or not the respondent must comply with the requirements for tank closure in 6 NYCRR 613.9, is central to deciding whether or not respondent Wahl is liable for this cause of action. While some facts are not clear from this record (such as the actual capacity of these tanks), they are not material to deciding this question. In this case, respondent Wahl operated a petroleum bulk storage facility prior to 1993 when these USTs were used for petroleum. These tanks were never permanently closed in compliance with the above-quoted regulations. The respondent's arguments that another way exists to close tanks, not contained in the regulations, and that he should not be held liable for failing to register his facility after its conversion to water storage are not supported by law.

DEC Staff has no record of these tanks ever being registered. DEC Staff member Jeremy Rogers states in his affidavit (paragraph 4) that he has reviewed DEC's files and determined that the facility was never registered. Respondents claim that respondent Wahl transmitted a registration application for these tanks to DEC in 1993, which the Department cannot find. However, this statement is made by respondents' attorney and no proof of this statement is provided (e.g. in the form of an affidavit of respondent Wahl, photocopy of the registration application, proof of payment of the registration fee, mailing receipt, etc.). Without proof, the statement is insufficient to raise an issue of fact warranting adjudication. Accordingly, DEC Staff has shown that respondent Wahl is liable for the first cause of action and has demonstrated that the facility continues to require registration.

In addition to the three USTs (Tank #1, Tank #2, and Tank #3) at the site, DEC Staff has included proof with its motion that other petroleum tanks exist at the site with a capacity exceeding 1,100 gallons. These tanks include a 1,000 gallon aboveground gasoline storage tank (Tank #4), two aboveground stationary tanks used to store waste oil (Tank #6 and Tank #8), an aboveground tank used to store kerosene (Tank #7), and two tanks on trailers (Tank #5 and Tank #9). The combined storage capacity of these tanks exceeds 1,100 gallons, requiring registration of the facility pursuant to 6 NYCRR 612.2(a). The respondents claim that the site does not now contain a bulk storage facility, but given the photographic evidence to the contrary and respondents' failure to elaborate on this claim, DEC Staff has proven that the facility is required to be registered.

Based on the evidence in the record, DEC Staff has demonstrated that respondent Wahl has failed to register his petroleum bulk storage facility since at least 1993.

Second Cause of Action

In its motion for order without hearing, DEC Staff alleges that respondent Wahl failed to tightness test or permanently close the three USTs (Tank #1, Tank #2, and Tank #3) at the facility in violation of 6 NYCRR 613.5(a)(1). This regulation reads:

> "613.5 Underground storage facilities - testing and monitoring
> (a) Periodic tightness testing.
> (1) Testing schedule.
> [(i)] The owner of any underground petroleum storage tank and connecting piping system must have the tank and pipes periodically tested for tightness as shown in Table 1 of this subdivision.
> (ii) Any tank and piping system which is due for an initial test within the first year of the effective date of these regulations or any tank which is of unknown age must be tested within two years of the effective date of these regulations.
> (iii) If the tank and piping system is due for an initial test but has been tested within a five year period prior to the due date in a manner consistent with criteria set forth in paragraph (6) of this subdivision, the department may accept this test as the initial test. The test report must be sent to the department prior to the due date for the initial test.
> (iv) Retesting of all tank and piping systems must be

completed no later than every five years from the date of the previous test.
(v) If for any reason, testing or inspection is not performed as required in this section, the tank or piping system must be replaced in accordance with sections 614.2 through 614.5 inclusive, 614.7 and 614.14 of this Title or taken out of service pursuant to the requirements of section 613.9 of this Part."

In his affidavit, DEC Staff member Rogers states that the Department has no record of these three tanks being successfully tightness tested (14) nor does the Department have tank closure reports or notice from the respondent that he intended to remove the tanks from service (8).

Respondent does not assert that these tanks have been tightness tested or taken out-of-service pursuant to 6 NYCRR 613.9. Respondent argues that these tanks are no longer part of a petroleum bulk storage facility and this requirement does not apply. This argument is addressed and rejected in the discussion of the first cause of action, above.

Respondent includes with his papers five documents dated July 27, 1993, August 20, 1993, September 27, 1993, March 24, 1994, and September 6, 1995 (Respondents' Exh. C). These documents are Device Inspection and Test Results prepared by a Jefferson County official. The first records the fluid level in the USTs when the tanks were sealed by that official and the subsequent readings. Respondent Wahl asserts that these records prove the tanks were not leaking, at least for the period. This information does not address the alleged violations of 6 NYCRR 613.5(a)(1) because these documents do not address the required tightness testing and, therefore, does not raise an issue of fact requiring adjudication.

Based on evidence in the record, DEC Staff has established that respondent Wahl failed to tightness test or permanently close the three USTs at the facility in violation of 6 NYCRR 613.5(a)(1).

Third Cause of Action

In its motion for order without hearing, DEC Staff alleges that respondent Wahl failed to install secondary containment around the aboveground gasoline storage tank (Tank #4) at the facility in violation of 6 NYCRR 613.3(c)(6), which reads:

"(6) Secondary containment system for aboveground tanks.
(i) A secondary containment system must be installed around any aboveground petroleum storage tank which:
(a) could reasonably be expected to discharge petroleum to the waters of the State, or
(b) which has a capacity of 10,000 gallons or more. The secondary containment system must be constructed so that spills of petroleum and chemical components of petroleum will not permeate, drain, infiltrate or otherwise escape to the groundwaters or surface waters before cleanup occurs. The secondary containment system may consist of a combination of dikes, liners, pads, ponds, impoundments, curbs, ditches, sumps, receiving tanks and other equipment capable of containing the product stored. Construction of diking and the storage capacity of the diked area must be in accordance with NFPA No. 30, section 2-2.3.3 (see section 613.1.[g] of this Part)."

In his affidavit, DEC Staff member McCullouch states that the 1,000 +/- gallon aboveground gasoline storage tank (Tank #4) did not have any secondary containment system during his inspection of the facility on May 10, 2005 (5).

In his affidavit, DEC Staff member Rogers states that during his June 26, 2006 inspection, the 1,000 +/- gallon aboveground gasoline storage tank (Tank #4) did not have any secondary containment system (7).

In the response to the motion for order without hearing, respondents' counsel generally denies this alleged violation (paragraph 3) and states that most of the alleged violations were remedied (paragraph 15). Respondents' Exhibit G includes photos which show that either the tank was replaced or encased in a metal structure, but no explanation of this photo is contained in respondents' papers. It may be that this violation has been remedied now, but DEC Staff has shown that this violation existed in May 2005 and continued until at least June 2006.

Based on this evidence, DEC Staff has demonstrated that respondent Wahl failed to install secondary containment around the aboveground gasoline storage tank (Tank #4) at the facility in violation of 6 NYCRR 613.3(c)(6).

Fourth Cause of Action

DEC Staff alleges that respondent Wahl failed to provide secondary containment for the stationary waste oil tanks (Tank

#6 and Tank #8) at the facility in violation of 6 NYCRR 360-14.3(e)(1)(i),[6] which provided that:

> "(i) aboveground used oil tanks with less than 10 percent volume beneath the surface of the ground must meet the following secondary containment requirements:
> (a) The secondary containment system must consist of, at a minimum:
> (1) dikes, berms or retaining walls; and
> (2) a floor. The floor must cover the entire area within the dikes, berms, or retaining walls, except, for tanks existing as of the effective date of this Subpart, where existing portions of the tank meet the ground; or
> (3) an equivalent secondary containment system.
> (b) The entire containment system, including walls and floors, must be sufficiently impervious to used oil to prevent any used oil released into the containment system from migrating out of the system to the soil, groundwater, or surface water."

It is uncontested that the facility contains at least two stationary aboveground waste oil tanks: a 1,000 +/- gallon tank located in the welding shop (Tank #8)(DEC Exh. L) and a 1,000 +/- gallon tank in the repair shop (Tank #6)(DEC Exh. G). In his affidavit, DEC Staff member McCullouch states that he observed during his inspection of the facility on May 10, 2005 (5) that the tank in the welding shop was located in a building that was not constructed in a way that makes the walls or floors liquid tight (12).

In his affidavit, DEC Staff member Rogers states that during his June 26, 2006 inspection, he observed that neither of these tanks had any secondary containment system (9).

Respondents' counsel does not address this alleged violation in its papers. Respondents' counsel states that upon information and belief, most of the alleged violations concerning the used oil tanks had been remedied, and he references a series of twelve photographs attached to his affidavit. Only the twelfth photo is of a stationary waste oil tank and it does not show secondary containment.

[6] This section was repealed, and a new section was adopted, which is now codified (but not in identical language) at 6 NYCRR 374-2.7(e)(2)(a).

Based on the evidence in the record, DEC Staff has shown that respondent Wahl is liable for failing to provide secondary containment for the stationary waste oil tanks (Tank #6 and Tank #8) at the facility in violation of 6 NYCRR 360-14.3(e)(1)(i).

Fifth Cause of Action

DEC Staff alleges that respondent Wahl failed to provide secondary containment for the mobile trailer-mounted waste oil tanks (containers) at the facility (Tank #5 and Tank #9) in violation of 6 NYCRR 360-14.3(f),[7] which provided that:

> "(f) Containers.
> (1) Condition of units. Containers used to store used oil at transfer, storage or processing facilities must be:
> (i) in good condition (no severe rusting, apparent structural defects or deterioration); and
> (ii) not leaking (no visible leaks).
>
> (2) Secondary containment for containers. Containers used to store oil at transfer, storage or processing facilities must be equipped with a secondary containment system.
> (i) The secondary containment system must consist of, at a minimum:
> (a) dikes, berms or retaining walls; and
> (b) a floor. The floor must cover the entire area within the dikes, berms, or retaining walls, except, for tanks existing as the effective date of this Subpart, where existing portions of the tank meet the ground; or
> (c) an equivalent secondary containment system.
> (ii) The entire containment system, including walls and floors, must be sufficiently impervious to used oil to prevent any used oil released into the containment system from migrating out of the system to the soil, groundwater, or surface water."

At the time of the alleged violation, a container was defined as "any portable device in which a material is stored, transported, treated, disposed of, or otherwise handled" (former 6 NYCRR 360-14.2(e)).

In his affidavit, DEC Staff member McCullouch states that during his inspection of the facility on May 10, 2005, he

[7] This section was repealed, and a new section was adopted, which is now codified (but not in identical language) at 6 NYCRR 374-2.3(c)(7).

observed two waste oil tanks located outside on wheeled frames (5) and that these tanks did not have secondary containment (9) (DEC Exh. I, J, K).

In his affidavit, DEC Staff member Rogers states that during his June 26, 2006 inspection, he also observed these tanks (DEC Exh. S, T) and states that neither of the tanks had any secondary containment system (9).

DEC Staff notes that at least one of the tires on the trailers was flat and that the tanks appeared not to have been moved between the 2005 and 2006 inspections. Respondent argues that a question of fact exists requiring a hearing regarding whether or not these tanks are portable, mobile, or stationary and cites 6 NYCRR 612.1(c)(14) for the definition of "non-stationary tank" (17). This seems to be a reference to an argument in DEC Staff's brief, but since the accusatory instrument, the motion for order without hearing, only alleges a violation of 6 NYCRR 360, as written at the time of the violation, respondents' argument is not relevant and does not raise a question of fact warranting adjudication. Whether or not the tanks met the definition of non-stationary tank in 6 NYCRR 612 is not material, and no question of fact exists warranting a hearing.

Based on the evidence in the record, DEC Staff has established that respondent Wahl failed to provide secondary containment for the mobile trailer-mounted waste oil tanks (Tank #5 and Tank #9), at the facility in violation of 6 NYCRR 360-14.3(f).

Sixth Cause of Action

DEC Staff alleges that respondent Wahl failed to install a shutoff valve on the piping of the aboveground gasoline storage tank (Tank #4) at the facility in violation of 6 NYCRR 613.3(c)(2), which reads:

> "(2) Shut-off valves for gravity fed motor fuel dispensers. All tanks which cause a gravity head on a dispenser of motor fuels must be equipped with a device such as a solenoid valve which is positioned adjacent to and downstream from the operating valve required in paragraph (5) of this subdivision. The valve must be installed and adjusted so that liquid cannot flow by gravity from the tank in case of piping or dispenser hose failure. A valve meeting the standards set forth in NFPA 30A, section 2-1.7 (see section 613.1[g] of this Part) meets the requirements of this subdivision."

In his affidavit, DEC Staff member Rogers states he inspected the facility on June 26, 2006 and took a photograph of the aboveground gasoline storage tank (Tank #4)(DEC Exh. N). This tank is only a few yards from French Creek (Rogers 7), and the pipe from the tank to the dispenser does not include a shut-off valve that would prevent the tank from draining by gravity if a break or significant leak occurred at the lower end of the pipe (Rogers 16).

In the response to the motion for order without hearing, respondents' counsel generally denies this alleged violation (paragraph 3) and claims that most of the alleged violations were remedied (paragraph 15). While respondents' photos (Exh. G) show some changes to this tank since the DEC Staff inspections, no photograph or other proof was submitted by respondents showing the installation of a shutoff valve as required.

Accordingly, DEC Staff has proven that respondent Wahl failed to install a shutoff valve on the piping of the 1,000 gallon aboveground gasoline storage tank (Tank #4) at the facility in violation of 6 NYCRR 613.3(c)(2).

Seventh Cause of Action

DEC Staff alleges that respondent Wahl failed to install gauges, high level alarms, or liquid pump cut-off controllers on the aboveground tanks at the site in violation of 6 NYCRR 613.3(c)(3), which reads:

> "613.3 Overfill prevention and secondary containment systems.
> …
> (c) Requirements for valves, gauges and secondary containment systems. Within five years of the effective date of these regulations, the owner must install the following:
> …
> (3) Gauges for aboveground storage tanks.
> (i) All aboveground petroleum tanks must be equipped with a gauge which accurately shows the level of product in the tank. The gauge must be accessible to the carrier and be installed so it can be conveniently read.
> (ii) The design capacity, working capacity and identification number of the tank must be clearly marked on the tank and at the gauge.
> (iii) A high level warning alarm, a high level liquid pump

cut-off controller or equivalent device may be used in lieu of the gauge required above."

There are four aboveground storage tanks, excluding those on wheels at the facility. These four tanks are the aboveground gasoline tank (Tank #4), the waste oil tank in the welding shop (Tank #8), the waste oil tank in the repair shop (Tank #6) and the kerosene tank behind the maintenance building (Tank #7).

In his affidavit, DEC Staff member Rogers states that "none of the aboveground gasoline storage tanks at the facility were equipped with a gauge the [sic] shows the amount of product stored in the tank, nor were they equipped with a high level warning alarms [sic], liquid pump cutoff controller or a similar device" (23). This is the only evidence DEC Staff presents on this alleged violation. Since Mr. Rogers only discusses gasoline storage tanks, and not waste oil tanks or the kerosene tank, DEC Staff has only offered evidence regarding one of the four tanks, the aboveground gasoline tank (Tank #4).

In the response to the motion for order without hearing, the respondents' counsel generally denies this alleged violation (paragraph 3) and claims that most of the alleged violations were remedied (paragraph 15). No photograph or other proof showing compliance is provided by respondents or their counsel.

Because Mr. Rogers only addresses the gasoline storage tanks in his affidavit, and not aboveground tanks containing waste oil or kerosene, DEC Staff has only proven one violation with respect to the aboveground gasoline tank (Tank #4). Thus, DEC Staff has only proven that respondent Wahl failed to install gauges, high level alarms, or liquid pump cut-off controllers on the above-ground gasoline tank at the site in violation of 6 NYCRR 613.3(c)(3).

Eighth Cause of Action

DEC Staff alleges that respondent Wahl failed to label the aboveground storage tanks (Tank #4, Tank #6, Tank #7, and Tank #8) at the facility in violation of 6 NYCRR 613.3(c)(3)(ii), which reads, in relevant part:

"613.3 Overfill prevention and secondary containment systems.

…

(c) Requirements for valves, gauges and secondary containment systems. Within five years of the effective date of these regulations, the owner must install the following:

…

(3) Gauges for aboveground storage tanks.

…

(ii) The design capacity, working capacity and identification number of the tank must be clearly marked on the tank and at the gauge."

In his affidavit, DEC Staff member McCullouch states that during his May 10, 2005 inspection of the facility, none of the motor fuel or waste oil tanks at the site were labeled to identify the tank capacity or product stored (16). In his affidavit, DEC Staff member Rogers states that during his June 26, 2006 inspection, none of the aboveground tanks at the facility, including the tanks mounted on trailers, were labeled with design capacity, working capacity, tank number, or type of product stored (DEC Exh. I).

In the response to the motion for order without hearing, respondents' counsel generally denies this alleged violation (paragraph 3) and asserts that most of the alleged violations were remedied (paragraph 15). Respondents include photographs of some of the tanks at the facility with labels marking the design capacity, working capacity, and identification number (Respondents' Exh. G). These photos do not show that the gasoline AST (Tank #4) is labeled, but show the tank in the repair shop (Tank #6) and the kerosene tank (Tank #7) labeled. No photo of the tank in the welding shop (Tank #8) is provided. These photos demonstrate that the respondent has at least partially remedied these violations subsequent to the DEC Staff inspections.

Based on the evidence in the record, DEC Staff has shown that respondent Wahl failed to label the aboveground storage tanks (Tank #4, Tank #6, Tank #7, and Tank #8) at the facility at the time of the inspection in violation of 6 NYCRR 613.3(c)(3)(ii).

Ninth Cause of Action

DEC Staff alleges that respondent Wahl failed to label the trailer mounted tanks (containers)(Tank #5 and Tank #9) with the words "USED OIL" and their respective capacities in violation of 6 NYCRR 360-14.3(h),[8] which read:

"(h) Tank and container sign requirements. All containers, aboveground used oil tanks and the fill pipes of

[8] This section was repealed, and a new section was adopted, which is now codified (but not in identical language at 6 NYCRR 374-2.6(e)(5).

underground used oil tanks must display a label which indicates the capacity of the tank and clearly states 'USED OIL'."

In his affidavit, DEC Staff member McCullouch states that during his May 10, 2005 inspection of the facility, none of the motor fuel or waste oil tanks at the site were labeled to identify the tank capacity or product stored (16, DEC Exh. G, H, I, L). In his affidavit, DEC Staff member Jeremy Rogers states that during his June 26, 2006 inspection, none of the aboveground tanks at the facility, including the tanks mounted on trailers were labeled with design capacity, working capacity, tank number, or type of product stored. (9).

In the response to the motion for order without hearing, respondents' counsel generally denies this alleged violation (3) and maintains that most of the alleged violations were remedied (15). Photographs of the two tanks on trailers at the facility are provided (Resp. Exh G). One tank has a label marking the design capacity, working capacity, and identification number (Tank #5), and the other tank is labeled as out of service (Tank #9). These photos indicate that these violations may have been remedied subsequent to DEC Staff's inspection.

Based on the evidence in the record, however, DEC Staff has shown that respondent Wahl failed to label the trailer mounted tanks (Tank #5 and Tank #9) with the words "USED OIL" at the time of the inspection, in violation of 6 NYCRR 360-14.3(h).

Tenth Cause of Action

DEC Staff alleges that both respondent Wahl and respondent French Creek Marina, LLC, failed to inspect the aboveground tanks (Tank #4, Tank #6, Tank #7, and Tank #8) at the facility on a monthly basis or keep records of such inspections in violation of 6 NYCRR 613.6(a) and (c), which read:

"613.6 Aboveground storage facilities – inspections.
(a) Monthly inspections. The owner or operator of an aboveground storage facility must inspect the facility at least monthly. This must include:
(1) inspecting exterior surfaces of tanks, pipes, valves and other equipment for leaks and maintenance deficiencies;
(2) identifying cracks, areas of wear, corrosion and thinning, poor maintenance and operating practices, excessive settlement of structures, separation or swelling of tank insulation, malfunctioning equipment and structural and foundation weaknesses; and
(3) inspecting and monitoring all leak detection systems,

cathodic protection monitoring equipment, or other monitoring or warning systems which may be in place at the facility.

…

(c) Inspection reports.

(1) Reports for each monthly inspection and 10-year inspection must be maintained and made available to the department upon request for a period of at least 10 years.

(2) The reports must include the following information:

(i) facility registration number;

(ii) identification number for tank inspected;

(iii) date of inspection;

(iv) results of inspection, including a report on the need for repair;

(v) certification by the inspector that the inspection has been performed in a manner consistent with requirements of this section;

(vi) address of inspector; and

(vii) signature of inspector."

In his affidavit, DEC Staff member Rogers states that during his June 26, 2006 inspection, respondents had no record of monthly inspections of the aboveground storage tanks at the site. Respondents also had not subsequently provided DEC Staff with records showing that monthly inspections were performed (24).

In the response to the motion for order without hearing, respondents' counsel generally denies this alleged violation (3) and asserts that most of the alleged violations were remedied (15). However, no evidence is included in the respondents' papers to show that monthly inspections were performed.

Based on the evidence in the record, DEC Staff has shown that respondents Wahl and French Creek Marina, LLC, are liable for failing to inspect the aboveground tanks (Tank #4, Tank #6, Tank #7, and Tank #8) at the facility on a monthly basis or to keep records of such inspections in violation of 6 NYCRR 613.6(a) and (c).

Eleventh Cause of Action

DEC Staff alleges that both respondent Wahl and respondent French Creek Marina, LLC, failed to paint the aboveground tanks, repair the leak associated with the aboveground gasoline storage tank (Tank #4), or correct other deficiencies at the facility in violation of 6 NYCRR 613.6(d) and 614.9(c), which read:

“613.6 Aboveground storage facilities – inspections.

…

(d) Repair of equipment deficiencies. If an inspection reveals a leak, a tank or equipment deficiency, a deficiency in monitoring equipment, excessive thinning of the tank shell which would indicate structural weakness when the tank is filled with petroleum, or any other deficiency which could result in failure of the facility to function properly or store and contain the product in storage, remedial measures must be promptly taken to eliminate the leak or deficiency.”

“614.9 New aboveground tanks

…

(c) Painting of exterior tank surfaces. The exterior surfaces of all new aboveground storage tanks must be protected by a primer coat, a bond coat and two or more final coats of paint, or have an equivalent surface coating system designed to prevent corrosion and deterioration.”

DEC Staff member McCullouch states in his affidavit that the aboveground tank in the welding shop (Tank #8) is unpainted (12, DEC Exh. L). He also states that the photograph of rust on the aboveground gasoline tank (Tank #4) (DEC Exh. F) is an accurate description of conditions at the site (7). DEC Staff member Rogers states in his affidavit that he observed staining on the pavement of the parking area under the dispenser attached to the aboveground gasoline tank (Tank #4) and that it appeared that the pipe connections under the pump had been leaking slowly for several months, if not years (17, DEC Exh. 0). DEC Staff makes no specific allegation regarding Tank #6.

In the response to the motion for order without hearing, respondents’ counsel generally denies this alleged violation (3) and contends that most of the alleged violations were remedied (15). Photos attached to respondents’ papers (Respondents’ Exh. G) show that the aboveground gasoline tank (Tank #4) was either replaced or encased in a metal structure, so this may be proof that the violations relating to this tank have been remedied sometime after DEC Staff inspected the facility. No photo is provided by respondents of the tank in the welding shop (Tank #8) (Respondents’ Exh. G). The respondents’ photos do not demonstrate that Tank #4 and Tank #8 have been painted or that these violations have been remedied.

Based on the evidence in the record, DEC Staff has shown that both respondent Wahl and respondent French Creek Marina, LLC, as owner or operator of the facility failed to paint the aboveground tanks (Tank #4 and Tank #8), repair the leak

associated with the aboveground gasoline storage tank (Tank #4), and correct other deficiencies at the facility in violation of 6 NYCRR 613.6(d) and 614.9.

Twelfth Cause of Action

DEC Staff alleges that both respondent Wahl and respondent French Creek Marina, LLC, failed to report petroleum spills at the facility in violation of 6 NYCRR 613.8, which reads:

> "613.8 Reporting of spills and discharges. Any person with knowledge of a spill, leak or discharge of petroleum must report the incident to the department within two hours of discovery. The results of any inventory record, test or inspection which shows a facility is leaking must be reported to the department within two hours of the discovery. Notification must be made by calling the telephone hotline (518) 457-7362."

DEC Staff member McCullouch states in his affidavit that during his May 10, 2005 inspection of the site, he observed petroleum stained pavement under the dispenser (i.e., gas pump) connected to the aboveground gasoline storage tank (Tank #4) (6, DEC Exh. E). He also stated that he observed oil spilled on the tank in the repair shop (Tank #6) (DEC Exh. G).

DEC Staff member Rogers states in his affidavit that during his June 26, 2006 inspection of the site, he observed petroleum staining on the pavement of the parking area under the dispenser attached to the aboveground gasoline tank (Tank #4) and that it appeared that the pipe connections under the pump had been leaking slowly for several months, if not years. He also stated that this spill had not been reported to DEC (17-20, DEC Exh. O). Mr. Rogers also observed a petroleum stain near one of the mobile tanks (either Tank #5 or Tank #9) (Rogers 18 and 20) (DEC Exhs. P and R).

Respondents' counsel argues in his affidavit that respondents have not failed to report any spill that under the Department's own guidelines would be required to be reported. He continues that these spills would not be considered a reportable spill under DEC's own "rule of thumb" in practice (14). Respondents' counsel does not cite any legal authority for this contention.

DEC's Spill Guidance Manual, 1.1 provides information on when petroleum spills do not need to be reported and reads:

> "What petroleum spills need to be reported?

> All petroleum spills that occur within New York State (NYS) must be reported to the NYS Spill Hotline (1-800-457-7362) within 2 hours of discovery, except spills which meet all of the following criteria:
>
> The quantity is known to be less than 5 gallons; and
> The spill is contained and under the control of the spiller; and
>
> The spill has not and will not reach the State's water or any land; and
> The spill is cleaned up within 2 hours of discovery.
>
> A spill is considered to have not impacted land if it occurs on a paved surface such as asphalt or concrete. A spill in a dirt or gravel parking lot is considered to have impacted land and is reportable."

Since the evidence in the record indicates that the spills have been ongoing for several months (not cleaned up in two hours as required), and both the 2005 and 2006 inspections show the spill in the same area by the gasoline dispenser, the exemption quoted above does not apply.

Based on the evidence in the record, DEC Staff has demonstrated that both respondent Wahl and respondent French Creek Marina, LLC, failed to report petroleum spills at the facility in violation of 6 NYCRR 613.8.

Thirteenth Cause of Action

DEC Staff alleges that both respondent Wahl and respondent French Creek Marina, LLC, failed to color code the fill ports of the four ASTs (Tank #4, Tank #6, Tank #7, and Tank #8) at the facility in violation of 6 NYCRR 613.3(b), which reads, in relevant part, "the owner or operator must permanently mark all fill ports to identify the product inside the tank. These markings must be consistent with the color and symbol code of the American Petroleum Institute...."

In his affidavit, DEC Staff member Rogers states that during his June 23, 2006 inspection of the facility, he observed that none of fill ports for the aboveground tanks at the facility were color coded to indicate the type of product stored (9).

In the response to motion for order without hearing, respondents' counsel generally denies this alleged violation (3) and asserts that most of the alleged violations were remedied

(15). However, no proof that the respondents complied with this requirement either before or after the respondents' papers were filed is provided.

Based on the evidence in the record, DEC Staff has demonstrated that both respondent Wahl and respondent French Creek Marina, LLC, failed to color code the fill ports of the four ASTs at the facility (Tank #4, Tank #6, Tank #7, and Tank #8) in violation of 6 NYCRR 613.3(b).

Fourteenth Cause of Action

DEC Staff alleges that both respondent Wahl and respondent French Creek Marina, LLC, failed to make or keep inventory monitoring records for the three underground storage tanks (Tank #1, Tank #2, and Tank #3) at the facility in violation of 6 NYCRR 613.4, which reads:

> "613.4 Inventory monitoring for underground storage facilities.
> (a) Inventory records.
> (1) The operator of an underground storage tank must keep daily inventory records for the purpose of detecting leaks. Records must be kept for each tank (or battery of tanks if they are interconnected) and shall include measurements of bottom water levels, sales, use, deliveries, inventory on hand and losses or gains. Reconciliation of records must be kept current, must account for all variables which could affect an apparent loss or gain and must be in accordance with generally accepted practices.
> (2) If the tank is unmetered or if the tank contains petroleum for consumptive use on the premises where stored, the operator may detect inventory leakage in an alternative method to paragraph (1) of this subdivision. This may include an annual standpipe analysis or other method acceptable to the department."

In his affidavit, DEC Staff member Rogers states that as of June 23, 2006, respondents had not kept inventory records for the underground storage tanks at the site (10).

Respondents' counsel argues that the underground storage tanks at the site were closed in 1996 and then converted to water storage and, therefore, inventory records need not be kept for these tanks. This argument is rejected (see discussion of First Cause of Action).

Based on the evidence in the record, DEC Staff has shown that both respondent Wahl and respondent French Creek Marina,

LLC, failed to make or keep inventory monitoring records for the three underground storage tanks (Tank #1, Tank #2, and Tank #3) at the facility in violation of 6 NYCRR 613.4.

Fifteenth Cause of Action

DEC Staff alleges that both respondent Wahl and respondent French Creek Marina, LLC, operated a solid waste management facility without a permit by collecting and storing waste oil in violation of 6 NYCRR 360-1.7(a)(1), which reads:

> "360-1.7 Permit requirements, exemptions and variances.
> (a) Permit requirements.
> (1) Except as provided for in subdivisions (b) and (c) of this section, section 360-1.13 of this Subpart or otherwise provided for in the applicable Subpart pertaining to the type of solid waste management facility in question, no person shall:
>
> > (i) construct or operate a solid waste management facility, or any phase of it, except in accordance with a valid permit issued pursuant to this Part; or
> > (ii) modify or expand any aspect of the approved construction or operation of a solid waste management facility except in accordance with the approval of the department."

A solid waste management facility is defined at 6 NYCRR 360-1.2(a)(158) as follows:

> "(158) Solid waste management facility means any facility employed beyond the initial solid waste collection process and managing solid waste, including but not limited to: storage areas or facilities; transfer stations; rail-haul or barge-haul facilities; landfills; disposal facilities; solid waste incinerators; refuse-derived fuel processing facilities; pyrolysis facilities; C&D debris processing facilities; land application facilities; composting facilities; surface impoundments; used oil storage, reprocessing, and rerefining facilities; recyclables handling and recovery facilities; waste tire storage facilities; and regulated medical waste treatment facilities. The term includes all structures, appurtenances, and improvements on the land used for the management or disposal of solid waste."

DEC Staff member McCullouch states that during his May 5, 2005 inspection of the facility, respondent Wahl told him he took approximately 8,000 gallons of waste oil from other marinas

and auto repair shops and burned it to heat the buildings at the facility (McCullouch 13, Taylor supplemental 4). This admission is not challenged in respondents' papers.

Based on respondent Wahl's admission and the large waste oil storage tanks on the site (Tank #5, Tank #6, Tank #8, and Tank #9), the facility is engaged in used oil storage (DEC Exh. G, H, I, K, L) and, therefore, is a solid waste management facility as defined at 6 NYCRR 360-1.2(a)(158). DEC Staff member McCullouch states in his affidavit that he thoroughly searched DEC's files and did not find any permit or other document authorizing the collection, storage, or processing of waste oil at the facility (15).

Based on the evidence in the record, DEC Staff has shown that both respondent Wahl and respondent French Creek Marina, LLC, operated a solid waste management facility without a permit in violation of 6 NYCRR 360-1.7(a)(1)(i).

Sixteenth Cause of Action

DEC Staff alleges in its motion for order without hearing that both respondent Wahl and respondent French Creek Marina, LLC, operated an air contaminant source by burning waste oil for heating without a permit in violation of 6 NYCRR 201-1.1, which reads:

> "201-1.1 Purpose and applicability.
> (a) Purpose. The purpose of this Part is to require owners and/or operators of air contamination sources to obtain a permit or registration certificate from the department for the operation of such sources.
> (b) Applicability. This Part applies throughout New York State. Unless specifically exempted pursuant to Subpart 201-3 of this Part, owners and/or operators of air contamination sources must comply with this Part. Owners and/or operators of major stationary sources subject to Subpart 201-6 of this Part must obtain a Title V facility permit. Owners and/or operators of other emission sources must either register, pursuant to Subpart 201-4 of this Part, or obtain a State facility permit pursuant to Subpart 201-5 of this Part. Owners and/or operators of emission sources subject to applicable requirements, or the requirement to obtain a Title V facility permit, may request limitations on such source's potential to emit regulated air pollutants in accordance with Subpart 201-7 of this Part, in order to avoid such requirements."

The permit required in the above-quoted section is also addressed in 6 NYCRR 225-2.5, which reads:

“225-2.5 Permit and/or certificate requirements.
(a) Except as provided in subdivision (b) of this section, no person may initiate construction of a new emission source, or modification, or operate an air contamination source in which waste fuel is to be burned until all applicable provisions of this Subpart have been met and the necessary permits to construct and/or certificates to operate may have been issued in accordance with Part 201 of this Title.
(b) An owner or operator of the following emission sources may burn waste oil and be excepted from the requirement of subdivision (a) of this section, subject to the conditions specified:
(1) Space heater located in automotive service facilities, where the following conditions for an exception are met:
(i) the maximum operating heat input is less than one million Btu per hour;
(ii) waste oil is generated on site; and
(iii) the waste oil to be burned contains no chemical waste.
(2) Mobile emission source where the waste oil is generated in the same emission source.”

During the April 2005 inspection of the facility, DEC Staff members McCullouch and Taylor were told by respondent Wahl that he took approximately 8,000 gallons of waste oil from other marinas and auto repair shops and burned it to heat the buildings at the facility (McCullouch 13, Taylor supplemental 4).

In the third paragraph of his affidavit, DEC Staff member Thomas Morgan states that he performed a diligent search of DEC’s Region 6, Division of Air Resources files and found no record of French Creek Marina, French Creek Marina, LLC, or Wilburt C. Wahl, Jr. having a permit or registration authorizing operation of a stationary combustion installation to burn used or waste oil in conformance with 6 NYCRR Parts 201-1 and 225-2.5.

In the response to motion for order without hearing, respondents’ counsel generally denies this alleged violation (3) and maintains that most of the alleged violations were remedied (15). However, no proof that respondents either do not burn waste oil generated offsite or that they have the appropriate DEC approvals is provided.

Based on the evidence in the record, DEC Staff has shown that both respondent Wahl and respondent French Creek Marina,

LLC, operated an air contaminant source without a permit in violation of 6 NYCRR 201-1.1 and 225-2.5.

Civil Penalty Amount and Remedial Actions

In its motion, DEC Staff seeks both a payable and suspended civil penalty to be imposed on the respondents by the Commissioner. DEC Staff requests a total civil penalty of $207,028, $67,028 of which would be assessed against both respondents jointly and severally with the remainder ($59,250) assessed against respondent Wahl. In addition, DEC Staff seeks a suspended penalty of $80,750 conditioned upon respondent Wahl's compliance with remedial actions directed in the Commissioner's order. The specifics of DEC Staff's civil penalty request are set forth below:

DEC STAFF'S REQUESTED CIVIL PENALTY

Cause of Action	Total Requested Civil Penalty	Payable Civil Penalty (Wahl)	Suspended Civil Penalty (Wahl)	Payable Civil Penalty (Wahl and FC Marina, LLC)
1	$5,000	$5,000		
2	$61,800	$31,800	$30,000	
3,4,5	$70,000	$20,000	$50,000	
6	$1,000	$1,000		
7	$1,500	$750	$750	
8,9	$700	$700		
10, 11	$3,000			$3,000
12	$4,500			$4,500
13	$600			$600
14	$7,500			$7,500
15,16	$51,428			$51,428
Total	$207,028	$59,250	$80,750	$67,028

DEC Staff also requests that the Commissioner direct the respondents to undertake a series of remedial actions. DEC Staff's requested civil penalty and remedial actions are discussed for each cause of action, below.

Respondents argue that a hearing on the civil penalty amount is needed on the issues of respondents' economic benefit

from the alleged violations, the respondents' alleged remedying of the violations at the site, and the respondents' ability to pay the civil penalty sought by DEC Staff. Each of these arguments is discussed fully below. The respondents have failed to provide evidence, in an admissible form, with their papers to warrant a hearing on either the civil penalty amount or the remedial actions sought by DEC Staff.

First Cause of Action

DEC Staff seeks a civil penalty of $5,000 for respondent Wahl's failure to register his petroleum storage facility pursuant to 6 NYCRR 612.2(a). DEC Staff also requests that the Commissioner order the respondent to register his facility and pay the $500 registration fee within ten days of the order. DEC Staff notes that the maximum potential penalty is far greater.[9] DEC Staff states that the typical settlement penalty for cases where a consent order is signed is $1,000, with a range of $500-$5,000, according to DEC's Division of Environmental Enforcement Guidance Document #22 entitled "Petroleum Bulk Storage Inspection Enforcement Policy Penalty Schedule" (DEE-22, line 1), and seeks a penalty of $4,000 in this case due to respondent's past failure to register the facility despite repeated requests. In addition, DEC Staff calculates the respondent's economic benefit from failing to register for four five-year cycles (1987, 1992, 1997, and 2002) at $1,000 (each registration fee would have been $250). The civil penalty totals $5,000.

Respondents do not address this specific penalty calculation in their papers. DEC Staff notes "that from before 1993 to the present the site has included three 3,000 gallon underground gasoline bulk storage tanks" (brief 5) but does not explain how this is four five-year cycles.[10] Rather, it appears to be only three, and the recommended penalty should be adjusted accordingly.

While some facts are not clear from this record, such as the exact size of the underground tanks and when they were first

[9] ECL 71-1929 authorizes a maximum civil penalty of up to $37,500 per day, effective May 15, 2003; prior to that, the maximum civil penalty was $25,000 per day.

[10] DEC Staff seems to claim that the USTs were in place when these regulations became effective on December 27, 1985, but DEC Staff member Taylor states that the tanks are of unknown age and the first reference in the proof provided by DEC Staff indicates these tanks were in place in 1992 (DEC Exh. V).

installed, these unknowns do not warrant a hearing regarding penalty. In this case, several aggravating factors listed in DEE-22 are present. These include (1) the length of time the violation persisted; (2) the continuing nature of the violation; (3) the failure of respondent Wahl failed to correct this violation; and (4) the large number of tanks at the site. Based on the facts in the record, I recommend that the Commissioner include a penalty of $4,750 in his order for this cause of action.

In addition to the civil penalty, DEC Staff requests that the Commissioner require respondent Wahl to register the facility pursuant to 6 NYCRR 612.2 within ten days of the order and pay the $500 regulatory fee. Based on the evidence in the record, I recommend that the Commissioner include these requirements in his final order.

Second Cause of Action

DEC Staff seeks a total civil penalty of $61,800 for respondent Wahl's failure to conduct periodic tightness testing for the 3 USTs (Tank #1, Tank #2, and Tank #3) at the site pursuant to 6 NYCRR 613.5. DEC Staff also requests that the Commissioner order respondent Wahl to permanently close the USTs at the facility within 180 days pursuant to 6 NYCRR 613.9(b), and provide prior notice as required by 6 NYCRR 612.2(d) and 6 NYCRR 613.9(c). In addition, DEC Staff requests that the Commissioner order respondent Wahl to conduct daily inventory monitoring of the USTs and keep records of the results until the tanks are permanently taken out of service.

DEC Staff calculates the economic benefit of these violations at $4,800. DEC Staff member Rogers states that the cost of testing a tank is $400 (31). DEC Staff multiplies this amount by the three tanks and four testing cycles missed (1987, 1992, 1997, and 2002) for a total of $4,800 (again, DEC Staff has only proven that these tanks were in place in 1993, so only three cycles have been proven). DEC Staff recommends a gravity component of $27,000 based on a penalty of $5,000 per tank (DEE-22) and $1,000 per tank per testing cycle missed (DEC Staff claims a total of 4). This leads to a total recommended payable civil penalty of $31,800. In addition, DEC Staff seeks a suspended penalty of $30,000 conditioned upon respondent Wahl's compliance with the remainder of the order. DEC Staff believes that this would create an incentive for respondent Wahl to comply with the regulations. DEC Staff further argues that given respondent Wahl's history of non-compliance, imposition of significant suspended penalties is appropriate.

With respect to the economic benefit and gravity component, DEC Staff's recommended penalty must be adjusted to reflect three testing cycles, not four. Thus, I would recommend an economic benefit of $3,600 and a gravity component of $24,000, for a total payable penalty of $27,600. The suspended penalty should remain at $30,000.

Respondents' attorney makes arguments relative to the gravity component (paragraph 9 of respondents' attorney's affidavit). First, he claims that the requirements of 6 NYCRR 613.9(b)(i)-(iv) were complied with and only the removal before conversion to use as water tanks was not performed. However, no proof of this statement is provided. Second, respondents' attorney states "upon information and belief, the conversion to use for fire-fighting water tanks, and closure thereby, was orally approved by a DEC Staff person in 1996." Again, no proof is provided, nor is the identity of this person disclosed. Counsel also states that "[s]oil boring tests around the UST's also returned negative results" for petroleum in 2004 (paragraph 12), but again no proof is presented.

As the Commissioner stated in Matter of Locoparra (Decision and Order, June 16, 2003), in cases involving a motion for summary judgment, a party must lay bare its proof in order to show that a factual dispute exists warranting a hearing. In this case, the unsupported claims of respondents' counsel are not sufficient to raise a factual dispute.

DEC Staff also requests language in the Commissioner's order which would require respondent Wahl to permanently close the USTs at the facility within 180 days pursuant to 6 NYCRR 613.9(b), and provide prior notice as required by 6 NYCRR 612.2(d) and 6 NYCRR 613.9(c). Respondents' counsel argues that the USTs were closed in 1996 (5) and the requirements of 6 NYCRR 613.9(b)(i)-(iv) were complied with (9), although no proof of this claim is contained within respondents' papers.

In his affidavit, DEC Staff member Rogers states that when a UST is pumped empty, sludge and vapors remain in the tank and that cleaning a tank generally requires a trained professional to cut open the tank, remove the residual petroleum and sludge and render it vapor free. This would be difficult or impossible to accomplish with the tank in place and covered with soil (11). He further states that if the USTs had holes in them and were used to store water, the ground could be contaminated with petroleum. Further, if the tanks were above ground water level, the petroleum contaminated water could leak out. If the tanks were below the ground water level, water in the tanks could exchange with groundwater, also causing contamination (12). In

his affidavit, DEC Staff member Taylor states that during the closure or removal of the tanks, respondent Wahl should be required to perform a site assessment to determine if the soils around and under the tank are contaminated by petroleum (6). He also states that there are several ways to permanently close the tanks without affecting the building above (5) and that these procedures are set forth in DEC Guidance (DEC Exh. D).

In his affidavit, DEC Staff member Rogers states that if inventory records were kept, they would disclose if the USTs were leaking (12). Respondents claim that the USTs were pumped out and filled with water; however, Mr. Rogers states that sludge and vapors remain unless these residues are cleaned out (11). These residues could likely leak into soil around the tanks, and inventory records would show if this was happening (12).

Based on the evidence in the record, I recommend that the Commissioner impose a total civil penalty of $57,600, of which $27,600 would be payable and $30,000 would be suspended against respondent Wahl. The Commissioner should also order respondent Wahl to permanently close the USTs at the facility within 180 days pursuant to 6 NYCRR 613.9(b), and provide prior notice as required by 6 NYCRR 612.2(d) and 6 NYCRR 613.9(c). The Commissioner should also order respondent to conduct daily inventory monitoring of the USTs and keep records of the results until the tanks are permanently taken out of service.

Third, Fourth, and Fifth Causes of Action

The third, fourth, and fifth causes of action all relate to respondent Wahl’s failure to install secondary containment around the stationary aboveground gasoline tank (Tank #4) (third cause of action); the two stationary aboveground waste oil tanks (Tank #6 and Tank #8) (fourth cause of action); and the two trailer mounted waste oil tanks (Tank #5 and Tank #9), or containers (fifth cause of action) at the facility. DEC Staff requests a total civil penalty of $70,000 for these violations, of which $50,000 would be suspended upon respondent Wahl’s compliance with the terms of the Commissioner’s order. DEC Staff bases its penalty calculation on its assertion that there are seven tanks at the facility which require secondary containment and the penalty per tank should be $10,000 resulting in a total civil penalty of $70,000. DEC Staff requests that $50,000 of the suggested $70,000 total civil penalty be suspended because the tanks are all less than 10,000 gallons and respondent Wahl was only definitively notified of the requirement to have secondary containment installed in July 2006 (brief 13). This statement is not explained in Staff’s brief.

In addition to the civil penalty, DEC Staff asks that the Commissioner order respondent Wahl to install secondary containment for the stationary aboveground tanks within sixty days. Further, DEC Staff requests that the Commissioner order respondent Wahl to either clean the waste oil mobile tanks in conformance with DEC's tank closure guidance and properly dispose of the tanks within 60 days, or if respondent elects to keep the tanks, to construct secondary containment within 180 days.

As discussed above, the failure to install secondary containment around the aboveground gasoline storage tank (Tank #4) is a violation of 6 NYCRR 613.3(c)(6). DEC Staff states in its papers that because of this tank's proximity to French Creek, any leak or spill at this tank would likely result in gasoline entering French Creek and the St. Lawrence River. As DEC Staff notes, DEE-22, line 34, recommends a civil penalty of $10,000 for failing to install secondary containment. The maximum penalty for this violation is $37,500 per day (pursuant to ECL 71-1929), and this violation was demonstrated to have begun in early April 2005.

Also, as discussed above, the failure to install secondary containment around the stationary waste oil tanks (Tank #6 and Tank #8) at the facility is a violation of 6 NYCRR 360-14.3(e)(1)(i), and the failure to install secondary containment around the mobile waste oil tanks (containers) (Tank #5 and Tank #9) is a violation of 6 NYCRR 360-14.3(f).[11] Respondents' counsel repeats the claim that most of the alleged violations have been remediated (paragraph 16). Two photos attached to respondents' papers appear to depict Tank #6 and Tank #7; however, these photos do not show secondary containment. With respect to the mobile tanks (Tank #5 and Tank #9), respondents' counsel admits that there was no secondary containment but that "secondary containment for the mobile tanks will be provided by a building scheduled for construction in Spring 2007" (paragraph 16). Photos of these tanks included with respondents' papers show one container (Tank #5) in service and the other (Tank #9) with a sign on it stating "out of service." It is unclear from

[11] ECL 71-2703 authorizes a maximum penalty of $2,500 per violation until January 1, 1996 and $5,000 thereafter. It also authorizes a continuing penalty of $1,000 per day the violation continues. Since these violations began in April 2005 and continued at least through the date of the motion papers, the maximum civil penalty allowed far exceeds the penalty requested by DEC Staff.

respondents' papers if the proposed building would cover both of these tanks.

Respondents' counsel claims that, upon information and belief, most of the alleged violations in the July (2006) NOV had been remedied (paragraph 16). Three photos of the aboveground gasoline storage tank (Tank #4) are included with respondents' papers (respondents' Exh. G) which show some modification to the aboveground gasoline tank, but whether or not this includes secondary containment is not addressed in respondents' papers.

For these violations, I recommend that the Commissioner impose a civil penalty of $10,000 per tank based on the continuing nature of the violation. However, because this record indicates that there are only five tanks that do not have the required secondary containment (Tank #4, Tank #5, Tank #6 Tank #8, and Tank #9), the total civil penalty for these violations should be $50,000. I also suggest that $30,000 of this penalty be suspended upon respondent Wahl complying with the terms of the order. The Commissioner should also require the installation of secondary containment for the stationary aboveground tanks (Tank #4, Tank #6, and Tank #8) within 60 days of the order. In addition, the Commissioner should also order respondent Wahl to either clean the mobile waste oil tanks (Tank #5 and Tank #9) in conformance with DEC's tank closure guidance and properly dispose of them within 60 days, or if respondent Wahl elects to keep them, construct secondary containment within 180 days.

Sixth Cause of Action

DEC Staff seeks a payable civil penalty of $1,000 for respondent Wahl's failure to install a shut-off valve on the gasoline dispenser (Tank #4) at the site as required by 6 NYCRR 613.3(c)(2). DEC Staff also asks that the Commissioner order the installation of this valve within thirty days of the date of the Commissioner's order. DEC Staff notes the maximum penalty is considerably higher than the amount requested. DEC Staff justifies its requested penalty by stating that the tank creates a gravity head on the dispenser and that without the shutoff, should the piping or dispenser hose fail, a considerable spill might occur. Given the proximity of the tank to French Creek, gasoline would likely enter the state's surface waters. DEE-22, line 42, suggests a civil penalty for this violation of $500 per tank in cases where settlement occurs, which is not the case here. DEC Staff seeks a higher penalty based on the above and the leaking under the dispenser.

Respondents' counsel argues that most of the violations have been corrected (16). Photos of the aboveground gasoline tank do not clearly show that the required shutoff valve has been installed although some unexplained modifications appear to have occurred (Respondents' Exh. G).

I concur with DEC Staff and recommend that the Commissioner impose a civil penalty of $1,000 for this violation and require respondent Wahl to provide proof of installation of a shutoff valve on Tank #4 within 30 days of the order.

Seventh Cause of Action

DEC Staff seeks a total civil penalty of $1,500, $750 payable and $750 suspended, for respondent Wahl's failure to install gauges or high level warning alarms on the aboveground tanks (Tank #4, Tank #6, and Tank #8) at the site in violation of 6 NYCRR 613.3(c)(3). DEC Staff also asks the Commissioner to order respondent Wahl to install gauges or high level warning alarms on the aboveground tanks at the site within 60 days of the Commissioner's Order. DEC Staff cites DEE-22, line 39, which suggests a penalty of $250 per tank in cases where settlement is achieved. DEC Staff seeks a penalty of $500 per tank, half of which would be suspended upon respondent Wahl's compliance with the Commissioner's order. DEC Staff's basis for the penalty includes the proximity of the tanks to waters of the state and evidence of overfilling in the past.

Respondents' counsel argues that most of the violations have been corrected (16); however, no proof or specific information regarding this violation is found in respondents' papers. Photos of the tanks do not clearly show that the required gauges or high level warning alarms on the aboveground tanks have been installed (Respondents' Exh. G).

I concur with DEC Staff and recommend that the Commissioner impose a civil penalty of $500 per tank, with $250 suspended provided the respondent provides proof of installation of gauges or high level warning alarms on the aboveground gasoline tank within 60 days of the order. However, since DEC Staff has only proven one tank in violation (Tank #4), not the three alleged, the total civil penalty should be $500, with $250 suspended.

Eighth and Ninth Causes of Action

DEC Staff seeks a total payable civil penalty of $700 for respondent Wahl's failure to label the aboveground tanks (Tank #4, Tank #6, Tank #7, Tank #8) at the site with the design capacity, working capacity, and tank identification number in

violation of 6 NYCRR 613.3(c)(3)(ii) and for respondent's failure to label the waste oil containers (Tank #5 and Tank #9) with their capacity and the words "USED OIL" in violation of 6 NYCRR 360-14.3(h). DEC Staff also asks the Commissioner to order respondent Wahl to comply with these provisions within 30 days of the Commissioner's order. DEC Staff bases this amount on DEE-22, line 41, which recommends a penalty of $100 per tank in cases where settlement is reached.[12] DEC Staff again alleges there are seven tanks on site, but only six have been proven.

Respondents' counsel argues that most of the violations have been corrected (16). Photos (Respondents' Exh. G) of the tanks show that the two mobile tanks (Tank #5 and Tank #9) are labeled, but there is no proof that the aboveground gasoline tank is properly labeled. Photos of two other tanks, Tank #6 and Tank #7, are provided. These photos indicate that these violations may have been remedied subsequent to DEC Staff's inspection.

I concur with DEC Staff that the $100 per tank penalty is justified for the violations that began in April 2005 and continued at least through the 2006 inspection. The Commissioner should impose a total civil penalty of $600 and require respondent Wahl to comply and provide proof within 30 days of the date of the order.

Tenth and Eleventh Causes of Action

DEC Staff seeks a total payable civil penalty of $3,000 from respondents Wahl and French Creek Marina, LLC, for (1) failing to inspect the aboveground stationary tanks at the facility on a monthly basis and failing to keep records of these inspections as required by 6 NYCRR 613.6; and (2) failing to paint the exterior surfaces of the aboveground stationary tanks as required by 6 NYCRR 614.9. DEC Staff requests that the Commissioner order that these tanks be taken out of service until the tanks are painted, labeled, and equipped with gauges or high-level warning alarms, secondary containment, and shutoff valves.

DEC Staff requests a penalty of $1,000 per tank for a total of $3,000. However, it is unclear which three tanks DEC Staff is referencing. As discussed above, DEC Staff has proven with respect to the tenth cause of action that there are four ASTs which should have had monthly inspection reports kept and thus

[12] DEC Staff's requested penalty involving the mobile tanks (a violation of 6 NYCRR 360-14.3(h)) is consistent with penalties set forth in ECL 71-2703.

were in violation of 6 NYCRR 613.6(d) (Tank #4, Tank #6, Tank #7, and Tank #8). With respect to the eleventh cause of action, DEC Staff has shown that two tanks were not painted (Tank #4 and Tank #8) and that Tank #4 was not properly maintained in violation of 6 NYCRR 614.9.

In its papers, DEC Staff cites DEE-22, line 30, which recommends a penalty of $500 per tank in cases where settlement is reached for failure to inspect. DEC Staff requests a gravity component of $500 per tank, including the violations of 6 NYCRR 614.9 in this penalty consideration. Based on this, DEC Staff requests a payable civil penalty of $1,000 per tank for each of three, unspecified tanks. As discussed above, it is unclear why they do not count the fourth tank.

Respondents' counsel does not specifically address this requested civil penalty but argues that most of the violations have been corrected (16). The photos included with respondents' papers show that the aboveground gasoline tank (Tank #4) has been either replaced or encased in a metal structure, but this apparent change at the facility is unexplained. Photos of the other two stationary waste oil tanks (Tank #6 and Tank #8) do not show these tanks with new paint. Based on the above, Respondents have failed to demonstrate that these violations have been corrected.

I concur with DEC Staff that a total payable civil penalty of $3,000 is a reasonable for these two causes of action, given the ongoing nature of the violations. While DEC Staff does not explain which tanks it believes the penalty should be applicable, in this case, given the factors discussed above, I believe a $3,000 payable civil penalty is warranted and consistent with DEC guidance. The Commissioner should also order that these tanks be taken out of service until such time as the tanks are painted, labeled, and equipped with gauges or high-level warning alarms, secondary containment, and shutoff valves.

Twelfth Cause of Action

DEC Staff seeks a total payable civil penalty of $4,500 for the respondents' failure to report spills at the site in violation of 6 NYCRR 613.8. DEC Staff calculates its requested penalty as follows: (a) $1,500 for each day DEC Staff members recorded a spill under the gasoline dispenser (Tank #4) (a total of two days, May 10, 2005 and June 26, 2006) or $3,000; (b) $1,000 for the spills by the trailer-mounted waste oil tank by the repair shop (not specifically identified, either Tank #5 or Tank #9); and (c) $500 for the overfill of the waste oil tank in

the repair shop (Tank #6). DEC Staff cites DEE-22, line 7, which suggests a penalty of $500 in cases where settlement is reached. DEC Staff bases its suggested penalty on respondents' apparent disregard for continuing leaks or spills under the dispenser and the lack of secondary containment (which would have controlled the spills).

The claim by respondents' counsel that no reportable spills occurred at the site is discussed above and rejected. Respondents' counsel does not specifically address DEC Staff's penalty calculation on this cause of action.

I concur with DEC Staff's calculation and recommend that the Commissioner include a payable civil penalty of $4,500 for the unreported spills at the site.

Thirteenth Cause of Action

DEC Staff seeks a total payable civil penalty of $600 for respondents' failure to color code the fill ports of the tanks at the site in violation of 6 NYCRR 613.3(b). DEC Staff also asks the Commissioner to order the respondents to color code the fill ports of the tanks within 30 days. DEC Staff cites DEE-22, line 10, which recommends a penalty of $100 per fill port in cases where settlement is reached. DEC Staff notes that none of the tanks' fill ports were color coded and requests a penalty of $150 per fill port.

Respondents' counsel argues that most of the violations have been corrected (paragraph 16); however, no specific mention of this violation or its correction is made in respondents' papers. The photos included with respondents' papers do not appear to show this correction.

DEC Staff has proven that four tanks should have been color coded and were not: the aboveground gasoline tank (Tank #4), two stationary waste oil tanks (Tank #6 and Tank #8), and the kerosene tank (Tank #7). I concur with DEC Staff's requested penalty of $150 per tank, for a total civil penalty of $600 for this violation. The Commissioner should also order the respondents to color code the fill ports of these tanks within 30 days of the order.

Fourteenth Cause of Action

DEC Staff seeks a total payable civil penalty of $7,500 for respondents' failure to make or keep inventory records for the USTs (Tank #1, Tank #2, and Tank #3) at the facility in violation of 6 NYCRR 613.4. DEC Staff cites DEE-22, line 24,

which recommends a civil penalty of $5,000 per facility in cases where settlement is reached. DEC Staff argues that respondents' failure to tightness test the tanks and the lack of any records of delivery or sales from the tanks increased the risk that the tanks would leak petroleum to groundwater or that any leak would continue undetected.

Respondents' argument that no civil penalty should be imposed because the USTs were closed and, therefore, no inventory records needed to be maintained has been discussed and rejected above.

I concur with DEC Staff and recommend that the Commissioner impose a payable civil penalty of $7,500 for this violation.

Fifteenth and Sixteenth Causes of Action

DEC Staff seeks a total civil penalty of $51,428 for respondents' operation of (1) a solid waste management facility without a permit in violation of 6 NYCRR 360-1.7(a)(i), and (2) operating an air contamination source in violation of 6 NYCRR 201-1.1(b) and 225-2.5. DEC Staff calculates that respondents have enjoyed an economic benefit of at least $26,428.92 and that, to this amount, a gravity component of $25,000 should be added by the Commissioner. In addition, DEC Staff requests that the Commissioner order respondents to stop accepting waste oil from other commercial establishments unless and until respondents obtain permits pursuant to 6 NYCRR parts 360 and 201, and require respondents to keep records showing the amount of heating fuel purchased for the facility, the amount of waste oil collected at the facility and its source for two years, and further directing respondents to submit these records to DEC Staff on a monthly basis.

DEC Staff calculates the economic benefit to respondents based on respondent Wahl's statements to DEC Staff. Respondent Wahl stated to DEC Staff that his facility burns about 8,000 gallons of waste oil a year. This statement was not refuted by respondents. DEC Staff computes the economic benefit derived for 2004-5 heating season as the 8,000 gallons multiplied by the average cost per gallon of number 2 fuel oil at the time ($1.263) and then adding a 7.75% sales tax (the applicable rate for Jefferson County). DEC Staff then repeats the calculation for the 2005-6 heating season, when the cost of number 2 fuel oil was $1.803 per gallon. DEC Staff notes that this calculation underestimates the economic benefit because the 2006-7 heating season would likely be complete by the time the instant motion was decided and no amount is included for this heating season.

Respondents' counsel challenges DEC Staff's economic benefit analysis, stating that DEC Staff's calculation "is derived from only part of the relevant facts. Only the cost of virgin fuel oil is considered, and any other possible relevant facts are ignored, such as the obvious capital and labor costs associated with his use of used oil for heat" (19). However, respondents do not elaborate on what the capital and labor costs are that they are referring to and offer no proof of any costs associated with the use of fuel oil.

DEC Staff proved the violations alleged in the fifteenth and sixteenth causes of action. As stated above, ECL 71-2703 authorizes a maximum penalty of $2,500 per violation until January 1, 1996, and $5,000 thereafter, for operating a solid waste management facility without a permit. It also authorizes a continuing penalty of $1,000 per day for each day the violation continues. In addition, ECL 71-2103 authorizes a civil penalty of $10,000 per violation and $10,000 per day for each day the violation continues. The maximum penalty authorized by law for these violations is many times greater than the amount sought by DEC Staff.

Given the severity of the violations and their ongoing nature, I recommend that the Commissioner impose a payable civil penalty of $50,000 for these violations in his final order. DEC Staff's calculations and rationale regarding the economic benefit component of its requested penalty are not entirely clear. However, the serious nature of these violations and their continuing nature warrants a substantial civil penalty. Based on the facts and circumstances of this case, I recommend the that Commissioner impose a $50,000 civil penalty.

The Commissioner should also order respondents to (a) stop accepting waste oil from other commercial establishments unless and until respondents obtain permits pursuant to part 360 and 201; (b) require respondents to keep records showing the amount of heating fuel purchased for the facility, the amount of waste oil collected at the facility, and its source for two years; and (c) further direct that respondents submit these records to DEC Staff on a monthly basis.

Respondents' Ability to Pay

Apparently anticipating an argument by respondents regarding their ability to pay a civil penalty, DEC Staff includes information regarding the value of the real property where French Creek Marina is located. This information is

rejected as not relevant and not considered in making these recommendations for the reasons discussed below.

Respondents counsel states in his papers that DEC Staff "was provided with considerable financial information by the Respondent to address this issue directly [ability to pay], which it failed to mention in its motion. That information is relevant and should be presented to the trier of fact" (21). However, respondents did not include information relevant to ability to pay in response to DEC Staff's motion for order without hearing which, as discussed above, is equivalent to a motion for summary judgment. Nor is it clear that this information could be provided by DEC Staff if it was provided to DEC Staff in the context of settlement negotiations with respondents.

DEC's Civil Penalty Policy states "the burden to demonstrate inability to pay rests with the respondent. If the violator fails to provide sufficient credible information, Department staff should disregard this factor. An unsupported or inadequately supported claim of inability to pay should not be accepted" (p. 13-14). In this case, respondents have made an unsupported claim of inability to pay, and it is rejected.

CONCLUSIONS OF LAW

DEC Staff has shown by a preponderance of the evidence that respondent Wahl committed the following violations:

1. failing to register a petroleum bulk storage facility in violation of 6 NYCRR 612.2(a);

2. failing to tightness test or permanently close three underground petroleum storage tanks (Tank #1, Tank #2, and Tank #3) at the facility in violation of 6 NYCRR 613.5(a)(1);

3. failing to install secondary containment around the aboveground gasoline storage tank (Tank #4) at the facility in violation of 6 NYCRR 613.6(c)(6);

4. failing to provide secondary containment for the waste oil tanks (Tank #6 and Tank #8) at the facility in violation of 6 NYCRR 360-14.3(e)(1)(i);

5. failing to provide secondary containment for the mobile waste oil tanks (containers) (Tank #5 and Tank #9) at the facility in violation of 6 NYCRR 360-14.3(f);

6. failing to install a shutoff valve on the piping of the aboveground gasoline storage tank (Tank #4) at the facility in violation of 6 NYCRR 613.3(c)(2);

7. failing to install gauges, high level alarms, or liquid pump cut-off controllers on the aboveground gasoline tank (Tank #4) at the facility in violation of 6 NYCRR 613.3(c)(3);

8. failing to label the aboveground storage tanks (Tank #4, Tank #6, Tank #7, and Tank #8) at the facility in violation of 6 NYCRR 613.3(c)(3)(ii); and

9. failing to label the mobile tanks (Tank #5 and Tank #9) with the words “used oil” and their respective capacities in violation of 6 NYCRR 360-14.3(h).

DEC Staff has shown by a preponderance of the evidence that respondents Wahl and French Creek Marina, LLC, committed the following violations:

10. failing to inspect the aboveground tanks (Tank #4, Tank #6, and Tank #8) at the facility on a monthly basis or to keep records of those inspections in violation of 6 NYCRR 613.6(a) and (c);

11. failing to paint the aboveground tanks (Tank #4 and Tank #8), repair the leak associated with the aboveground gasoline tank (Tank #4), or correct other deficiencies at the facility in violation of 6 NYCRR 613.6(d) and 6 NYCRR 614.9;

12. failing to report petroleum spills at the facility in violation of 6 NYCRR 613.8;

13. failing to color code the fill ports of the tanks (Tank #4, Tank #6, Tank #7, and Tank #8) at the facility in violation of 6 NYCRR 613.3(b);

14. failing to make or keep inventory monitoring records of the underground storage tanks (Tank #1, Tank #2, and Tank #3) at the facility in violation of 6 NYCRR 613.4;

15. operating a solid waste management facility without a permit in violation of 6 NYCRR 360-1.7(a)(1)(i); and

16. operating an air contamination source without a permit in violation of 6 NYCRR 201-1.1 and 225-2.5.

RECOMMENDATIONS

The Commissioner should issue an order finding respondents liable for the violations set forth above and impose a civil penalty as set forth below.

ALJ'S PENALTY RECOMMENDATION

Cause of Action	Total Civil Penalty	Payable Civil Penalty (Wahl)	Suspended Civil Penalty (Wahl)	Payable Civil Penalty (Wahl and FC Marina, LLC)
1	$4,750	$4,750		
2	$57,600	$27,600	$30,000	
3,4,5	$50,000	$20,000	$30,000	
6	$1,000	$1,000		
7	$500	$250	$250	
8,9	$600	$600		
10, 11	$3,000			$3,000
12	$4,500			$4,500
13	$600			$600
14	$7,500			$7,500
15,16	$50,000			$50,000
Total	$180,050	$54,200	$60,250	$65,600

In addition to the payable and suspended portions of the civil penalty, the Commissioner's order should also direct respondents to undertake the following corrective actions:

1. No later than ten (10) days after the service of the Commissioner's order upon respondent Wahl, register the PBS facility at the site with the Department pursuant to 6 NYCRR 612.2 within 10 days of the order and pay the $500 regulatory fee as pursuant to ECL 17-1009(2).

2. No later than one hundred eighty (180) days after service of the Commissioner's order upon respondent Wahl, permanently close the USTs at the site pursuant to 6 NYCRR 613.9(b), and provide prior notice to the Department as

required by 6 NYCRR 612.2(d) and 613.9(c). As part of the closure, respondent Wahl must perform an assessment of the site pursuant to a plan approvable by Department Staff to determine whether the soil around and under the USTs at the site are contaminated by or with petroleum. The term approvable shall mean an assessment plan that can be approved by Department Staff either as submitted by respondent Wahl or subject to only minimal revision. Once the assessment plan is approved, Department Staff shall notify respondent Wahl in writing.

3. No later than sixty days (60) days after service of the Commissioner's order upon respondent Wahl, construct or install secondary containment for the aboveground storage tanks (Tank #4, Tank #6, and Tank #8) at the facility pursuant to 6 NYCRR 613.3(c)(6)

4. No later than sixty (60) days after service of the Commissioner's order upon respondent Wahl clean the waste oil tanks on trailers (Tank #5 and Tank #9) in conformance with DEC's tank closure guidance and properly dispose of the tanks, or if respondents elect to keep the tanks, no later than one hundred and eighty (180) after service of the Commissioner's order upon respondent Wahl construct secondary containment around such tanks.

5. No later than sixty (60) days after service of the Commissioner's order upon Respondent Wahl paint, label, and install gauges on the aboveground stationary tanks (Tank #4, Tank #6, Tank #7, and Tank #8) at the facility.

6. No later than thirty (30) after service of the Commissioner's order upon respondent Wahl paint, and label the mobile waste oil tanks (Tank #5 and Tank #9) at the facility.

7. No later than thirty (30) after service of the Commissioner's order upon respondent Wahl install a shutoff valve on the pipe leading from the 1,000 gallon gasoline tank (Tank #4) to the product dispenser (gas pump).

8. No later than thirty (30) after service of the Commissioner's order upon respondent Wahl and respondent French Creek Marina, LLC, color code the fill ports of the USTs (Tank #1, Tank #2 and Tank #3) and the aboveground stationary tanks (Tank #4, Tank #6, Tank #7, and Tank #8) at the facility.

9. Immediately after service of the Commissioner’s order upon respondent Wahl and respondent French Creek Marina, LLC, taking the aboveground storage tanks (Tank #4, Tank #6, Tank #7, and Tank #8) temporarily out of service pursuant to 6 NYCRR 613.9(a) until the tanks are painted, labeled, and equipped with gauges or high-level warning alarms, secondary containment and shutoff valves as required.

10. Immediately after service of the Commissioner’s order upon respondent Wahl and respondent French Creek Marina, LLC, conduct daily inventory monitoring of the USTs (Tank #1, Tank #2, and Tank #3) and keep records of the results until the tanks are permanently taken out of service.

11. Immediately after service of the Commissioner’s order upon respondent Wahl and respondent French Creek Marina, LLC, stop accepting waste oil from other commercial establishments unless and until respondents obtain permits pursuant to parts 360 and 201, and requiring respondents to keep records showing the amount of heating fuel purchased for the facility, and the amount of waste oil collected at the facility and its source for two years, and further directing that respondents submit these records to DEC Staff on a monthly basis.

12. Directing that all correspondence be directed to:

    Ronald J. Novak, P.E.
    Regional Enforcement Coordinator
    NYSDEC Region 6 Office
    317 Washington Street
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