STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

-by-

RAPHY BENAIM, TOVIT BENAIM, and R.B. 175 CORP.,

Respondents.

ORDER

DEC Case No.
R2-20120809-487

This administrative enforcement proceeding concerns alleged violations of the New York Environmental Conservation Law (ECL), and the Navigation Law (NL) and related implementing regulations, by respondents Raphy Benaim, Tovit Benaim, and R.B. 175 Corp. (respondents) at property located at 175-14 Horace Harding Expressway, Fresh Meadows, New York (site).

Staff of the New York State Department of Environmental Conservation (Department or DEC) commenced this proceeding by serving on all respondents, via certified mail return receipt requested, a notice of motion for order without hearing in lieu of complaint, dated September 21, 2012 (see Affidavit of Service of Edward Kang dated September 21, 2012). Department staff alleges that respondents:

1) failed to submit a required remedial investigation report (RIR) and remedial action work plan (RAWP) under a Corrective Action Plan, in violation of an executed stipulation effective May 26, 2009, in violation of ECL 71-1929 and NL 192;[1] and

2) failed to immediately undertake to contain a discharge of petroleum at the site, in violation of NL 176 and section 32.5 of title 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York (17 NYCRR).

(see Affirmation of John K. Urda, Esq., in support of motion for order without hearing, dated September 21, 2012 [Urda Aff.], at ¶¶ 20-23). In addition to requesting a civil penalty of "no less than" $62,500 (see Urda Aff., Wherefore Clause ¶ 2; see also Department Staff Letter Reply dated January 24, 2013, at 4),[2] Department staff requests that I direct respondents to "clean up

[1] The stipulation was issued, in part, pursuant to NL 176. Respondents' failure to comply with a stipulation renders them subject to penalties pursuant to NL 192.

[2] Elsewhere in the motion papers, staff requests a civil penalty in the specific amount of $62,500, and provides an extended discussion of the basis for this specific request (see Urda Aff., at 5-8, ¶¶ 24-32). Following the service and

and remove the subject contamination from the Spill under a Department-approved work plan" (id. at Wherefore clause).

In their memorandum in response to staff's motion for an order without hearing, which serves as the answer in this proceeding, respondents: (i) stipulated that, for purposes of the motion, the factual allegations in paragraphs 3-16 of staff's motion papers would be treated as true; (ii) submitted an argument against staff's proposed penalty; and (iii) requested that I dismiss staff's second cause of action for failure to plead facts sufficient to support the claim (see Response to the Department's Notice of Motion for an Order Without a Hearing, dated January 17, 2013 [Respondents' Brief], at 1-4).

The matter was assigned to Administrative Law Judge (ALJ) Daniel P. O'Connell, who prepared the attached summary report (Summary Report). I adopt the ALJ's summary report as my decision in this matter, subject to my comments below.

Factual Background[3]

Respondents Raphy Benaim and Tovit Benaim (Benaim respondents) purchased the site in August 1988 (see Urda Aff. ¶ 3, and Exhibit [Ex.] B). On January 3, 2002, a contractor working at the site notified the Department of the presence of gasoline-contaminated soil, and the Department assigned the discharge spill number 0109599 (id. ¶ 6; see also Affidavit of Andre Obligado, in support of motion for order without hearing, dated September 19, 2012 [Obligado Aff.] ¶ 4). A gasoline station had previously operated at the site (see id. ¶ 4). In May 2002, a contractor excavated seven underground storage tanks at the site, some of which had holes in them, and collected soil and groundwater samples for analysis (id. ¶ 5; see also id. Ex. B [Underground Storage Tank Removal Assessment report prepared by G. C. Environmental, Inc., dated November 8, 2002]). The sampling and laboratory analysis confirmed that the soil and groundwater at the site were contaminated (id.).

On August 29, 2002, respondent R.B. 175 Corp. made its initial filing with the New York Department of State (DOS), Division of Corporations (see Urda Aff. ¶ 4, and Ex. C). The DOS website identifies respondent Raphy Benaim as "Chairman or Chief Executive Officer" of respondent R.B. 175 Corp. (see Urda Aff. ¶ 5, and Ex. C). In October 2002, the Benaim respondents transferred title to the site to respondent R.B. 175 Corp. (id. Ex. A).

In July 2004, Department staff sent letters to respondents directing them to fully investigate and remediate the site (see Obligado Aff. ¶ 6). Because respondents never picked up the Department's certified mailing, a Department Environmental Conservation Officer hand-

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filing of the motion for order without hearing in lieu of complaint, staff has not submitted a motion or other request seeking to amend its papers to increase the requested penalty above $62,500, and I will therefore treat that figure as the specific amount requested by staff (see Matter of Reliable Heating Oil, Inc., Decision and Order of the Commissioner, October 30, 2013, at 2-3).

[3] As set forth above, respondents have stipulated to the factual allegations in paragraphs 3-16 of the motion papers, which are set forth in the Urda Affirmation. Respondents have not submitted any evidence in opposition to: (i) the factual assertions made in the September 19, 2012 Affidavit of Andre Obligado, an Engineering Geologist 1 in the Department's Region 2 office; or (ii) the information in the five exhibits attached to Mr. Obligado's affidavit.

delivered another copy of the July 2004 letter to respondents' representative at the site (id.). The respondents did not respond to that letter, or commence an investigation or remediation of the contamination at the site; indeed, at a March 25, 2005 meeting attended by Department technical and legal staff, Raphy Benaim, and his counsel, Benaim stated that he would not investigate or remediate the site, and refused to sign a stipulation (id. ¶¶ 7, 8).

The Department thereafter retained a contractor and commenced a State-funded spill investigation and cleanup of the site (id. ¶ 8). In 2006, the New York Environmental Protection and Spill Compensation Fund recorded a lien against the site in the amount of $19,048.33 for the work at the site (see Urda Aff. ¶ 8). The lien was released more than three years later, in September 2009, after respondents paid the amount due (id.).

On May 26, 2009, the Department executed a stipulation with respondents, pursuant to which respondents agreed to clean up and remove the petroleum that was discharged as part of the spill reported on January 3, 2002 (see Urda Aff., Ex. E). Respondents further agreed that the cleanup and removal would be conducted in accordance with a Corrective Action Plan attached to the stipulation (id., Ex. E, at ¶ 2). The stipulation states that it "is equivalent to an order pursuant to ECL § 17-0303 and a directive pursuant to NL § 176 and is enforceable as such" (id., Ex. E, at ¶ 5).

Respondents did not comply with the requirements of the stipulation, including submitting, within fifteen days of the effective date of the stipulation, an implementation schedule for performing the remedial investigation work plan and submitting a Remedial Investigation Report (RIR) summarizing the information gathered during the investigation (see Urda Aff. ¶¶ 10-12; see also Obligado Aff. ¶¶ 11-12). By letter dated July 26, 2010, the Department notified respondents that they were in violation of the stipulation, and required that an RIR be submitted by August 5, 2010 (see Obligado Aff. ¶ 12, and Ex. D; see also Urda Aff. ¶ 13).

Respondents submitted an RIR on or about August 19, 2010, and the Department determined that it was unacceptable because, among other things, it did not include boring logs or well installation descriptions, and sampling was either incomplete or was not performed at all (see Obligado Aff. ¶ 13, and Ex. E; see also Urda Aff. ¶ 14). The Department required respondents to submit a revised RIR by September 10, 2010 and to commence monthly gauging and quarterly sampling of all groundwater monitoring wells (see Obligado Aff. ¶ 13, and Ex. E; see also Urda Aff. ¶ 14).

Respondents have not submitted a revised RIR and have not conducted monthly gauging and quarterly sampling of all groundwater monitoring wells at the site (see Obligado Aff. ¶ 14; see also Urda Aff. ¶ 15). As of the date Department staff served and filed its motion, the site remained contaminated (see Obligado Aff. ¶ 15; see also Urda Aff. ¶ 16).

Liability

This motion for an order without hearing is governed by the same principles as those governing summary judgment under CPLR 3212 (see 6 NYCRR 622.12 [d], [e]; Matter of Alvin

Hunt, d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 7 n 2). The ALJ properly concluded that Department staff satisfied its initial burden to establish entitlement to judgment as a matter of law with respect to the alleged violations (see Summary Report at 10-14, 18-19).

I adopt the ALJ's recommendation with respect to Department staff's first cause of action, and hold that the uncontroverted evidence establishes that respondents violated ECL 71-1929 by failing to comply with the requirements of the May 26, 2009 stipulation (see Summary Report, at 10-11, 18). Respondents agreed to clean up and remove the discharge reported on January 3, 2002 (see Urda Aff. Ex. E, at ¶ 2), but have failed to do so. Respondents agreed to implement the Corrective Action Plan attached to the stipulation (id.) but have failed to do so. As the ALJ noted, respondents' failure to file an approvable RIR, or to develop a Remedial Action Work Plan as per the Corrective Action Plan, violated the stipulation. Moreover, because the stipulation is equivalent to an order pursuant to ECL 17-0303, and a directive pursuant to NL 176,[4] respondents' violations of the stipulation are therefore also violations of these statutory provisions. I therefore hold that respondents are jointly and severally liable for these violations.

I also adopt, with one modification relative to the liability of respondent R.B. 175 Corp., the ALJ's recommendation with respect to Department staff's second cause of action, and hold that respondents are jointly and severally liable for violating NL 176 and 17 NYCRR 32.5 when they did not take immediate action to contain the petroleum discharge at the site (see Summary Report, at 12-14, 19).[5]

Navigation Law 173(1) prohibits the discharge of petroleum. Navigation Law 176(1) states that "[a]ny person discharging petroleum in the manner prohibited by [NL 173] shall immediately undertake to contain such discharge." Similarly, the regulation implementing NL 176 requires persons responsible for discharges prohibited by NL 173 to "take immediate steps to stop any continuation of the discharge and … take all reasonable containment measures," 17 NYCRR 32.5(a), and to "take those measures or actions necessary for the cleanup and removal of the discharge" (17 NYCRR 32.5[b]).

Respondents do not dispute that a discharge of petroleum at the site was reported on January 3, 2002. At that time, the Benaim respondents owned the site and the underground storage tanks at the site. The evidence also clearly establishes that since the date of the reported spill, respondents have not undertaken to contain such discharge, have not stopped the continuation of the discharge, and have not taken the measures or actions necessary for the cleanup and removal of the discharge. Given that the site remains contaminated approximately twelve years after the spill was reported, the record establishes that respondents have failed to take the responsive steps required by law, "immediately" or otherwise.

[4] Navigation Law § 176 authorizes the Department to direct dischargers of petroleum to clean up and remove the discharge. The stipulation executed by respondents expressly states that it is equivalent to a directive under NL 176 (see Urda Aff. Ex. E, at ¶5; see also Matter of DiCostanzo, et al., Decision and Order of Commissioner, Nov. 23, 2004, at 4).

[5] I therefore deny respondents' request that I dismiss staff's second cause of action for failure to plead facts sufficient to support the claim.

Department staff's motion papers assert that respondents' violations commenced "either from the date of the Spill [January 3, 2002] or from June 10, 2009, the date of respondents' failure to comply with the Stipulation" (Urda Aff. ¶ 23). The ALJ concluded that, with respect to this second cause of action, respondents' violation "has continued for over 10 years from when it was initially reported to the Department on January 3, 2002" (Summary Report, at 18).

Although I agree that the violation alleged has been continuing since January 3, 2002, I clarify here that respondent R.B. 175 Corp. did not violate the statute until it became owner of the site in October 2002 (see Urda Aff. Ex. A [deed reflecting Benaim respondents' October 10, 2002 transfer of title to respondent R.B. 175 Corp.]). Because Department staff has not advanced or established a basis for holding R.B. 175 Corp. liable for violations that occurred prior to its acquisition of the property, I decline to hold it liable for the period prior to its ownership (see Matter of Benaim, Order of the Assistant Commissioner, January 25, 2008, at 2). With this clarification, I hold that Raphy Benaim and Tovit Benaim have been in violation of NL 176 and 17 NYCRR 32.5 since January 3, 2002, and respondent R.B. 175 Corp. has been in violation of NL 176 and 17 NYCRR 32.5 since October 10, 2002.

I reject respondents' argument that Department staff's claim is premised solely on respondents' ownership of the property (see Respondents' Brief, at 3-4). Indeed, the very case on which respondents rely expressly states that whether "an otherwise faultless owner is liable as a discharger turns on the owner's 'capacity to take action to prevent an oil spill or to clean up contamination resulting from a spill'" (State of New York v B & P Auto Service Center, Inc., 29 AD3d 1045, 1047 [3d Dept 2006] [quoting State of New York v Speonk Fuel, Inc., 3 NY3d 720, 724 (2004)], appeal dismissed 7 NY3d 864 [2006]). Respondents have offered no evidence that they are "faultless" or have lacked the capacity to take action to prevent the discharge or clean up the contamination.

Nor have respondents claimed (nor could they claim) that they were unaware of the existence of the tanks on the property (see e.g. Matter of Benaim, Order of the Assistant Commissioner, January 25, 2008, at 2 n 2 [citing answer by these same respondents in that case, in which respondents admit that "Raphy Benaim or an entity under his control leased the Site and/or operated a gasoline station at the Site" beginning in or about 1971 or 1972]).

Remedial Activities

It is not necessary to adopt the ALJ's recommendation to direct respondents to comply with the May 26, 2009 stipulation (see Summary Report, at 19, ¶ 4). Respondents already have a continuing obligation to perform all of the activities set forth in the stipulation and its attached Corrective Action Plan, including submission of a revised and acceptable Remedial Investigation Report (RIR) addressing all of the issues that Department staff raised in its August 27, 2010 email and letter (see Obligado Aff., Ex. E), submission of an approvable Remedial Action Work Plan (RAWP) and, upon the Department's approval of the RAWP, implementation of the RAWP (see Urda Aff., Ex. E). No further order restating respondents' duty to comply with the May 2009 stipulation is necessary (see e.g. Matter of West 63 Empire Associates LLC, Order of the Commissioner, August 9, 2012, at 2). Respondents are directed to submit the revised and

acceptable RIR to Department staff no later than fifteen (15) days after service of this order on respondents.

Penalty

Department staff has requested a civil penalty of "no less than" $62,500 (see note 2 above). ECL 71-1929(1) provides that a person who violates any of the provisions of, or who fails to perform any duty imposed by titles 1 through 11 and title 19 of article 17, or the rules, regulations, orders or determinations of the Commissioner promulgated thereto, shall be subject to a penalty of up to $37,500 per day for each violation. Navigation Law § 192 establishes a penalty of $25,000 for each offense under article 12 of the Navigation Law, and each day the violation continues is subject to an additional penalty of $25,000.

As Department staff states, calculating the maximum penalty for the first cause of action as running from the date of the stipulation to the date of staff's motion results in a maximum penalty of approximately $45 million (see Department Staff Letter Reply dated January 24, 2013, at 3). Similarly, the maximum penalty for the second cause of action is approximately $97,900,000 (id.). In support of its requested penalty, Department staff discusses the Department's petroleum spills enforcement policy and cites penalties assessed in similar cases (see Urda Aff. ¶¶ 24-32).

I adopt the ALJ's recommendation that I grant Department staff's penalty request, and assess a civil penalty against respondents, jointly and severally, in the amount of $62,500.[6]

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

I. Pursuant to 6 NYCRR 622.12, Department staff's motion for order without hearing is granted in part on the issue of liability, granted on the issue of penalty, and granted as to remedial relief.

II. Respondents Raphy Benaim, Tovit Benaim, and R.B. 175 Corp. are adjudged, jointly and severally, to have violated Environmental Conservation Law § 71-1929, Navigation Law § 176, and 17 NYCRR 32.5.

III. Respondents Raphy Benaim, Tovit Benaim, and R.B. 175 Corp. are hereby assessed, jointly and severally, a civil penalty in the amount of sixty-two thousand five hundred dollars ($62,500), which shall be due and payable within thirty (30) days after service of this order upon each respondent. Payment shall be made in the form of a cashier's check, certified check or money order made payable to the "New York State Department of Environmental Conservation" and mailed or hand-delivered to the Department at the following address:

[6] I agree with the ALJ that it is not necessary to rely on or consider Matter of Benhim Enterprises Inc., Order of the Assistant Commissioner, December 31, 2010, as part of the penalty analysis (Summary Report, at 17), and I have reached my decision on penalty without any such reliance or consideration.

John K. Urda, Esq.
Assistant Regional Attorney
NYSDEC, Region 2
47-40 21st Street
Long Island City, New York 11101-5407

IV. No later than fifteen (15) days after service of this order on respondents, respondents Raphy Benaim, Tovit Benaim, and/or R.B. 175 Corp. shall submit a revised Remedial Investigation Report addressing all of the issues that Department staff raised in its August 27, 2010 email and letter.

V. All communications from respondent to Department staff concerning this order shall be directed to John K. Urda, Esq., at the address set forth in paragraph III of this order.

VI. The provisions, terms and conditions of this order shall bind respondents Raphy Benaim, Tovit Benaim, and R.B. 175 Corp., and their agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By: _____
Joseph J. Martens
Commissioner

Dated: January 27, 2014
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of the Environmental Conservation Law of the State of New York (ECL) Article 17, and Article 12 of the New York State Navigation Law and Title 17 of the Official Compilation of Codes Rules and Regulations of the State of New York (17 NYCRR) Part 32 by	Summary Report concerning Department staff's Motion for Order without Hearing
Raphy Benaim, Tovit Benaim and R.B. 175 Corp.,	DEC Case No. R2-20120809-487
Respondents.	February 27, 2013

Proceedings

With a cover letter dated October 26, 2012, Staff from the Department's Region 2 Office, Long Island City, New York (Department staff) provided the Office of Hearings and Mediation Services (OHMS) with a copy of a notice of motion for order without hearing dated September 21, 2012 with supporting papers (*see* Title 6 of the Official Compilation of Codes Rules and Regulations of the State of New York [6 NYCRR] § 622.12). In this matter, Department staff is represented by John K. Urda, Esq., Assistant Regional Attorney.

According to the September 21, 2012 motion, Raphy Benaim and Tovit Benaim purchased property at 175-14 Horace Harding Expressway, Fresh Meadows, New York (Queens County Block 6891, Lot 10) on August 26, 1988, and then transferred title to R.B. 175 Corp. on October 10, 2002. Department staff asserted that R.B. 175 Corp. is an inactive domestic business corporation, and Raphy Benaim is its chairman or chief executive officer. In the captioned matter, Department staff identified Raphy Benaim, Tovit Benaim, and R.B. 175 Corp. as Respondents.

The motion asserted two causes of action (¶¶ 20-23 Urda Affirmation). In the first (¶¶ 20-21 Urda Affirmation), Department staff alleged that Respondents did not comply with the terms and conditions of a stipulation in which Respondents agreed to clean up a petroleum spill (NYSDEC Spill No. 0109599) that occurred at their property on January 3, 2002. In the

second (¶¶ 22-23 Urda Affirmation), Department staff alleged that Respondents did not contain the prohibited petroleum discharge in violation of Navigation Law § 176 and 17 NYCRR 32.5. For these violations, Department staff requested an Order from the Commissioner that would assess a total civil penalty of $62,500, and direct Respondents to comply with the terms and conditions of the stipulation so that the spill can be fully remediated.

According to Mr. Urda's October 26, 2012 cover letter, Department staff provided Respondents' original counsel, Peter Choe, Esq. (Choe & Oh, PC, New York) with a copy of the September 21, 2012 motion papers. Prior to referring the matter to OHMS, counsel for Respondents called Mr. Urda and acknowledged receipt of the motion, but Department staff did not receive any additional response to the September 21, 2012 motion from either Respondents or their counsel.

In an email dated November 13, 2012, Mr. Urda advised that Respondents had retained new legal counsel and asked me to hold the September 21, 2012 motion in abeyance while the parties attempted to settle the matter with an order on consent. Respondents' new counsel is Aaron Gershonowitz, Esq. (Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP, Uniondale).

Subsequently, the parties advised me in an email dated December 5, 2012 that a settlement could not be reached. By letter dated December 5, 2012, Mr. Gershonowitz requested an opportunity to respond to Department staff's September 21, 2012 motion. Department staff opposed the request because Respondents' original counsel received a copy of the motion, and the time to respond had expired. Respondents' new counsel argued that Department staff was inappropriately relying on *Matter of Benhim Enterprises, Inc.*, Order dated December 31, 2010 as an aggravating factor to justify the requested civil penalty.

In a letter dated December 13, 2012, I observed that the parties did not appear to be disputing the facts asserted in the September 21, 2012 motion concerning liability (*see* ¶¶ 3-16, and ¶¶ 20-23 Urda Affirmation). Rather, it appeared that the dispute centered on determining the appropriate civil penalty. I inquired whether Respondents would stipulate to the facts alleged in the September 21, 2012 motion concerning liability. I authorized a response from Respondents limited to the requested civil penalty. I also authorized a reply from Department staff.

Consistent with the schedule outlined in my December 13, 2012 letter, Respondents filed a cover letter dated January 17, 2013 and a response of the same date.[1] Department staff filed a letter-reply dated January 24, 2013 with attached Exhibits A, B, and C. A list of the papers filed by the parties is provided in Appendix A to this summary report.

Background

These Respondents and their property located at 175-14 Horace Harding Expressway (Queens County) were the subject of a prior administrative enforcement action (*see Matter of Raphy Benaim et al.*, Order dated January 25, 2008 [DEC Case No. R2-20050107-17]). A brief summary of the prior administrative enforcement matter is provided below.

Originally, the site contained two sets of underground petroleum bulk storage (PBS) tanks. The first set, which consisted of 11 tanks, was removed in November 1989. The removal of the second set, which consisted of seven tanks, commenced in January 2002 and was completed by May 2002.

In a motion for order without hearing dated April 15, 2005, Department staff alleged that: (1) the owners did not register any of the PBS tanks on the site with the Department; (2) the owners did not test any tanks for tightness; and (3) the operators did not maintain any daily inventory logs for the tanks. In addition, Department staff alleged that the owners removed all 18 PBS tanks without first notifying the Department. Finally, Department staff alleged that a petroleum discharge occurred at the site where the second set of PBS tanks was located.

In a ruling dated November 8, 2005 (*Matter of Raphy Benaim et al.*, DEC Case No. R2-20050107-17), the administrative law judge (ALJ) assigned to the matter granted Department staff's April 15, 2005 motion with respect to the alleged violations concerning tank registration, tightness testing, inventory records, and tank removal (*id.* at 2-3, 5-6). The ALJ denied the motion with respect to the alleged violations of improperly closing the tanks, discharging petroleum, and failing to report a petroleum spill (*id.* at 3, 6-7). The ALJ reserved ruling on

[1] In their January 17, 2013 response, Respondents agreed to treat all the factual allegations contained in ¶¶ 3-16 of Department staff's September 21, 2012 motion as true (Response at 1).

the civil penalty until a factual record was developed concerning tank closure, the petroleum discharge, and how it was reported (*id.* at 8).

In the November 8, 2005 ruling (*id.* at 8), the ALJ outlined the parties' contentions about when the petroleum spill initially occurred and what caused it. In addition, the ALJ found that Department staff presented unrefuted evidence with the April 15, 2005 motion to show that, in January 2002, the contractor found extensive petroleum contamination when the excavation of the second set of tanks commenced (*id.* at 8).

On January 2, 2003, the contractor reported the petroleum contamination discovered during the excavation of the second set of PBS tanks located on the site to the Department. The Department assigned NYS DEC Spill No. 0109559 to the discharge. (¶ 6 Urda Affirmation; ¶¶ 2, 3, 4 Obligado Affidavit and Exhibit A).

An adjudicatory hearing about the outstanding causes of action alleged in the April 15, 2005 motion was not held. Rather, Department staff withdrew the outstanding causes of action, and requested a determination on the civil penalty for the demonstrated violations. Accordingly, the ALJ prepared a hearing report dated November 27, 2006 and, subsequently, the Commissioner issued an Order that assessed a total civil penalty of $60,000. (*Matter of Raphy Benaim et al.*, Order dated January 25, 2008 at 8).

According to the September 21, 2012 motion, Department staff initiated a state-funded cleanup of NYS DEC Spill No. 0109599 in April 2005. The cleanup costs were $19,048.33, and the New York Environmental Protection and Spill Compensation Fund (the Fund) recorded a lien against the site. After Respondents reimbursed the Fund for these cleanup costs, the lien was released on September 17, 2009. In addition, Respondents signed a stipulation, which became effective May 26, 2009. (¶¶ 7, 8, and 9 Urda Affirmation and Exhibits D and E.)

As discussed further below, the subjects of Department staff's September 21, 2012 motion are whether Respondents complied with the terms and conditions of the May 26, 2009 stipulation, as well as the petroleum discharge initially alleged in the April 15, 2005 motion.

Findings of Fact

The following findings of fact are established, as a matter of law, for the purposes of this proceeding.

1. On August 26, 1988, Raphy Benaim and Tovit Benaim purchased real property located at 175-14 Horace Harding Expressway, Fresh Meadows, New York (the site). The site is also identified as Queens County Block 6891, Lot 10. (¶ 3 Urda Affirmation and Exhibit B.)

2. On October 10, 2002, Raphy Benaim and Tovit Benaim transferred title of the site to R.B. 175 Corp. (¶ 3 Urda Affirmation and Exhibit A).

3. R.B. 175 Corp. is registered with the New York State Department of State as an inactive domestic business corporation. The chair or chief executive officer of R.B. 175 Corp. is Raphy Benaim. (¶¶ 4 and 5 Urda Affirmation and Exhibit C.)

4. Originally, the site contained two sets of underground petroleum bulk storage (PBS) tanks. The first set, which consisted of 11 tanks, was removed in November 1989, and is not the subject of the captioned proceeding. The removal of the second set, which consisted of seven tanks, commenced in January 2002 with a preliminary site investigation and was completed by May 2002 (Exhibit B to Obligado Affidavit at 1-2).

5. Andre Obligado is an Engineering Geologist I from the Division of Environmental Remediation in the Department's Region 2 office (¶ 1 Obligado Affidavit). As part of his regular duties, Mr. Obligado manages and directs the investigation and remediation of petroleum spills. Currently, Mr. Obligado is the project manager for NYS DEC Spill No. 0109599. (¶ 2 Obligado Affidavit.)

6. On January 3, 2002, a contractor working at the site, in the vicinity of the second set of underground PBS tanks, reported a petroleum spill to the Department based on the presence of gasoline contaminated soil. The Department assigned NYS DEC Spill No. 0109599 to the petroleum spill. (¶ 4 Obligado Affidavit and Exhibits A and B.) Soil and groundwater samples were collected from the site, and the

laboratory analyses showed they were contaminated with gasoline components. (¶ 4 Obligado Affidavit and Exhibit B at 7.) NYS DEC Spill No. 0109599 remains open and unremediated (¶ 15 Obligado Affidavit; ¶ 16 Urda Affirmation).

7. By letter dated August 2, 2004, Department staff directed Respondents to undertake a site investigation and to remediate the site consistent with the guidance outlined in the Department's Division of Environmental Remediation (DER) Technical Guidance No. 10. Department staff hand delivered the August 2, 2004 letter to Raphy Benaim on August 5, 2004. (¶ 6 Obligado Affidavit and Exhibit C.)

8. With the August 2, 2004 letter, Department staff enclosed a draft stipulation. The purpose of the stipulation was to allow remediation of the discharge to proceed in an expeditious fashion. The August 2, 2004 letter stated further that if the draft stipulation was not signed and returned to the Department by August 17, 2004, Department staff would hire a contractor to perform the required remediation. (¶ 6 Obligado Affidavit and Exhibit C.)

9. Respondents did not respond to Department staff's August 2, 2004 letter, and neither signed nor returned the draft stipulation by August 17, 2004 (¶ 7 Obligado Affidavit).

10. On March 25, 2005, Department staff met with Raphy Benaim and his attorney to discuss the remediation of the site. Mr. Benaim would not sign a stipulation. (¶ 8 Obligado Affidavit.) Subsequently, the Department retained an environmental remediation contractor who, in April 2005, commenced a state-funded spill investigation and cleanup of the site. (¶ 8 Obligado Affidavit; ¶ 7 Urda Affirmation.) The total cost of the state-funded investigation and cleanup was $19,048.33 (¶ 8 Urda Affirmation).

11. On August 4, 2006, the New York Environmental Protection and Spill Compensation Fund (the Fund) recorded a lien in Queens County against the site. The lien was released on September 17, 2009 after Respondents reimbursed the Fund for the investigation and cleanup costs. (¶ 8 Urda Affirmation and Exhibit D.)

12. On May 26, 2009, the Department executed a stipulation (NYS DEC Spill No. 01-09599, NYS DEC File No. R2-20090330-185 [Exhibit E to Urda Affirmation]), pursuant to ECL 17-0303

and Navigation Law § 176, with Raphy Benaim, Tovit Benaim and a representative of R.B. 175 Corp. According to the terms of the May 26, 2009 stipulation, Respondents agreed, among other things, to investigate and remediate the spill under a corrective action plan (CAP). The following two documents are attached to the May 26, 2009 stipulation: (1) the terms and conditions of the CAP; and (2) a remedial investigation work plan (RIWP) dated March 17, 2009. EnviroTrac Ltd. prepared the RIWP. (¶ 10 Obligado Affidavit; ¶ 9 Urda Affirmation and Exhibit E.)

13. The CAP required Respondent to undertake the following:

    a. Submit an implementation schedule within 15 days from the effective date of the May 26, 2009 stipulation (*i.e.*, June 10, 2009) for performing the approved RIWP;

    b. Submit a remedial investigation report (RIR) that summarizes the information gathered during the investigation;

    c. Submit a remedial action work plan (RAWP) for Department staff's review, within 60 days after Staff approves the RIR, which details the work that would be undertaken to remediate the spill; and

    d. Implement the RAWP according the approved schedule. (Exhibit E to Urda Affirmation.)

14. Respondents did not file the implementation schedule within the required 15 days. By email and letter dated July 26, 2010, Department staff advised Respondents of their failure to comply with the timeframe outlined in the CAP, and set August 5, 2010 as the due date for the RIR. (¶ 12 Obligado Affidavit and Exhibit D; ¶ 13 Urda Affirmation.)

15. Respondents' consultant, Don Carlo Environmental Services Inc., filed an RIR on August 19, 2010. By email and letter dated August 27, 2010, Department staff advised Respondents that the August 19, 2010 RIR was unacceptable and provided a detailed rationale to support this determination. In the August 27, 2010 letter, Department staff set September 10, 2010 as the new due date for a revised RIR. (¶ 13 Obligado Affidavit and Exhibit E; ¶ 14 Urda Affirmation.)

16. Respondents did not file a revised RIR by September 10, 2010 (¶ 14 Obligado Affidavit; ¶ 15 Urda Affirmation).

Discussion

I. Commencement of Proceedings

With service of notice of motion for order without hearing in lieu of a complaint and supporting papers dated September 21, 2012 upon Raphy Benaim, Tovit Benaim and R.B. 175 Corp., Department staff duly commenced the captioned administrative enforcement proceeding (*see* 6 NYCRR 622.3[b][1] and 622.12[a]). Based on an affidavit of service by Edward Kang, sworn to September 21, 2012, Department staff sent, by certified mail, return receipt requested, on September 21, 2012, separate copies of the notice of motion and supporting papers to Raphy Benaim[2] at 19 Hillside Avenue, Great Neck, NY 11021, as well as to Tovit Benaim and R.B. 175 Corp. at the Great Neck address. Each respondent received a copy of the papers on September 22, 2012 as demonstrated by the domestic return receipts from the US Postal Service, which are attached to Mr. Kang's affidavit of service.

In lieu of a notice of hearing and complaint, Department staff may serve a motion for order without hearing. With service of the motion upon a respondent, Department staff must also send a copy of the motion papers to the Chief ALJ with proof of service of the motion upon respondent. (*See* 6 NYCRR 622.3[b][1] and 622.12[a].)

A motion for order without hearing must be decided on the evidence presented by the parties, not on argument. Such evidence may include relevant documents and affidavits of individuals with personal knowledge of the disputed facts. (*See* 6 NYCRR 622.12[d]; Civil Practice Law and Rules [CPLR] § 3212[b].)

An attorney's affirmation "has no probative force" unless the attorney has first-hand knowledge of the facts at issue (Siegel, *NY Prac* § 281, at 442 [3d ed] [citation omitted]). The Commissioner elaborated on the standard for granting a motion

[2] Department staff also sent a copy of the September 21, 2012 notice of motion and supporting papers to Peter Choe, Esq., Choe & Oh, PC, 15 East 32nd Street, New York, New York 10016.

for order without hearing, which is equivalent to the standard applied for summary judgment:

> 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. The moving party carries this burden by submitting evidence sufficient to demonstrate the absence of any material issues of fact. [A supporting] 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. The failure of a responding party to deny a fact alleged in the moving papers, constitutes an admission of the fact.

(*Matter of Locaparra*, Final Decision and Order of the Commissioner, June 16, 2003 at 4 [internal quotation marks and citations omitted].)

Additionally, the weight of the evidence is not considered on a motion for order without hearing.

> Rather, the issue is whether the moving party has offered sufficient evidence to support a *prima facie* case for summary judgment. The test for sufficiency of evidence in the administrative context is the substantial evidence test -- whether the factual finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs.

(*Matter of Tractor Supply Co.*, Decision and Order of the Commissioner, August 8, 2008 at 3 [internal quotation marks and citations omitted].)

Based on the following discussion, I grant Department staff's September 21, 2012 motion. I recommend that the Commissioner do the same, and issue an Order that assesses a total civil penalty of $62,500, and which directs Respondents to comply with the terms and conditions of the May 26, 2009 stipulation and attached corrective action plan.

II. Department Staff's Motion for Order without Hearing

Department staff asserted two causes of action in the September 21, 2012 motion for order without hearing. Each is addressed below.

A. Failure to Comply with the May 26, 2009 Stipulation (First Cause of Action)

In the first cause of action, Department staff alleged that Respondents did not comply with the terms and conditions of the May 26, 2009 stipulation because they did not submit the remedial investigation report (RIR) and the remedial action work plan (RAWP) as required by the corrective action plan (CAP). Department staff argued that the alleged failure to comply is a violation of ECL 71-1929 and Navigation Law § 192.[3] According to Department staff the violation continued from June 10, 2009 to September 21, 2012, the date of the motion. (¶¶ 20 and 21 Urda Affirmation.)

Department staff has offered sufficient evidence to support a *prima facie* case for summary judgment (*see* 6 NYCRR 622.12[d]). Moreover, Respondents agreed, in their January 17, 2013 response, to treat all the factual allegations contained in Paragraphs 3-16 of Mr. Urda's affirmation September 21, 2012 as true (Response at 1).

As outlined in the Findings of Fact, Respondents signed a stipulation pursuant to ECL 17-0303 and Navigation Law § 176, which became effective on May 26, 2009. According to the terms of the May 26, 2009 stipulation, Respondents agreed, among other things, to investigate and remediate the spill under a corrective action plan (CAP) that was incorporated by reference into the May 26, 2009 stipulation. A remedial investigation work plan (RIWP) prepared by EnviroTrac Ltd., dated March 17, 2009, was also attached to the May 26, 2009 stipulation.

Pursuant to the terms of the CAP, Respondents were required to submit an implementation schedule for performing the approved RIWP by June 10, 2009. However, Respondents did not file the

[3] The Commissioner has determined that Navigation Law § 192 authorizes penalties and would not be a basis for a violation of the stipulation (*see Matter of Zahav Enterprises LLC*, Order dated October 24, 2011 n 1).

implementation schedule for the RIWP. Consequently, the remedial investigation report, which results from the implementation of the RIWP was not prepared. Some 13 months later, Department staff reminded Respondents of their obligation to prepare an RIR in a letter dated July 26, 2010, which set August 5, 2010 as the due date for the RIR.

Subsequently, Department staff received an RIR from Respondents on August 19, 2010, rather than by August 5, 2010, as previously directed. Department staff determined, in an email and letter both dated August 27, 2010, that Respondents' August 19, 2010 RIR was not acceptable. Department staff's August 27, 2010 letter identified additional information needed to approve the August 19, 2010 RIR, and set September 10, 2010 as the due date for a revised RIR. As of the date of Department staff's motion (*i.e.*, September 21, 2012), Respondents had not filed the revised RIR.

Respondents' failure to file an approvable RIR in a timely manner is a violation of the terms and conditions of the May 26, 2009 stipulation. Because Respondents have not filed an approvable RIR, Respondents did not develop an RAWP, which was an additional condition of the CAP. Consequently, Respondents' failure to file an RAWP is also a violation of the terms and conditions of the May 26, 2009 stipulation.

As noted above, Respondents were required to file an approvable RIR by June 10, 2009. Respondents did not do so, and as of the date of Staff's September 21, 2012 motion have yet to do so. Therefore, Respondents failure to comply with the terms and conditions of the May 26, 2009 stipulation is a violation that began on June 10, 2009 and continued until September 21, 2012.

Effective May 2003, ECL 71-1929 authorizes a civil penalty of $37,500 for each violation of titles 1 through 11 and title 19 of article 17, as well as any rule, regulation, order, or determination of the commissioner promulgated thereto, such as the March 26, 2009 stipulation, in this case. Also, ECL 71-1929 authorizes the same civil penalty per violation for each day the violation continues.

Pursuant to Navigation Law § 192, violations of the Navigation Law or duties created by the Navigation Law, such as the remediation outlined in the May 26, 2009 stipulation, are liable for a penalty of $25,000. Moreover, Navigation Law § 192

authorizes the same penalty per violation for each day the violation continues. [4]

With reference to ECL 71-1929 and Navigation Law § 192, Department staff has requested a civil penalty of $37,500 for the violation asserted in the first cause of action (¶¶ 21 and 24 Urda Affirmation). A discussion about the appropriate civil penalty is provided below.

B. Failure to Contain a Petroleum Discharge (Second Cause of Action)

Navigation Law § 176(1) requires any person discharging petroleum in a manner prohibited by Section 173 to take immediate action to contain the discharge.[5] In the second cause of action, Department staff alleges that Respondents violated Navigation Law § 176 and implementing regulations at 17 NYCRR 32.5 when they did not take immediate action to contain the prohibited petroleum discharge. Department staff offered two periods during which the violation continued. The first period is from January 3, 2002, which was the day the contractor working on the site reported the spill to the Department, until September 21, 2012, which is the date of Department staff's motion. The second period offered by Department staff is from June 10, 2009, which was when Respondents were required, by the May 26, 2009 stipulation, to file an implementation schedule for the RIR, until September 21, 2012. (¶¶ 22 and 23 Urda Affirmation.)

Respondents argued, however, that the Commissioner should dismiss this alleged violation because Department staff did not

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[4] The Commissioner may assess penalties pursuant to Navigation Law § 192 (*see Matter of Linden Latimer Holdings, LLC*, Order dated July 15, 2008 at 5, citing *Matter of Gasco-Merrick Road Gas Corp.*, Decision and Order dated June 2, 2008 at 3-11).

[5] In the April 15, 2005 motion for order without hearing, Department staff alleged violations of ECL 17-0501 (6th Cause of Action), as well as ECL 17-1743 and 6 NYCRR 613.8 (7th Cause of Action) (*Raphy Benaim et al.*, Ruling dated November 8, 2005 at 3). ECL 17-0501 prohibits the discharge of matter, such as petroleum, that may contravene water quality standards. ECL 17-1743 and 6 NYCRR 613.8 require any person to report petroleum spills immediately, according to the statutory provision, and within two hours, pursuant to the regulation. As discussed above, the ALJ denied Department staff's April 15, 2005 motion with respect to these alleged violations (Ruling at 7). Department staff subsequently withdrew these allegations (Hearing Report [November 27, 2006] at 1 attached to *Raphy Benaim et al.*, Order dated January 25, 2008).

allege sufficient facts in the September 21, 2012 motion to support summary judgment. Although Department staff alleged that the Respondents own the property, Respondents contended that being the property owners is not sufficient, in and of itself, to find liability for the petroleum spill. To support this assertion, Respondents cited *State of New York v Green*, 96 NY2d 403, 407 (2001), and *State v B&P Auto Service Center*, 29 AD3d 1045 (3d Dept 2006). Respondents maintained that the captioned matter is about whether Respondents complied with the terms of the stipulation, rather than whether they acted to contain a petroleum spill that occurred in 2002. After which, the Department initiated remedial action at the site in 2005. (Response at 3-4.)

Department staff objected to Respondents' arguments concerning the second cause of action, and argued that Respondents arguments exceeded the scope of the response authorized in my December 13, 2012 letter. In the event that Respondents' arguments are considered, Department staff offered the following comments.

With reference to *Zahav Enterprises LLC* (Order dated October 24, 2011), Department staff argued that the Navigation Law is a strict liability statute, and that petroleum discharges from tank systems are attributable to the owner of either the tank, or the site, regardless of fault or knowledge. (Letter-Reply at 1.)

In addition, Department staff contended that Respondents' reliance on *Green*, is misplaced, and argued further that the Court of Appeals is mindful of the legislature's mandate to construe questions of discharger liability liberally (*Green* 96 NY2d at 407; *see also, State v Speonk Fuel Inc.*, 3 NY3d 720; *White v Regan*, 171 AD2d 197, *lv. denied* 79 NY2d 754). With respect to the captioned matter, Department staff observed that Respondents owned and controlled the site, as well as the underground PBS tanks. (Letter-Reply at 2.)

Department staff has offered sufficient evidence to support a *prima facie* case for summary judgment (*see* 6 NYCRR 622.12[d]). As outlined in the Findings of Fact, Department staff's evidence shows that Respondents owned and controlled the site. Department staff showed further that, on January 3, 2002, a contractor working at the site, on behalf of Respondents, in the vicinity of the second set of underground PBS tanks, reported a petroleum spill to the Department based on the presence of

gasoline contaminated soil. The Department assigned NYS DEC Spill No. 0109599 to the petroleum spill.

Soil and groundwater samples were collected from the site, and the laboratory analyses showed they were contaminated with gasoline components. NYS DEC Spill No. 0109599 remains open and unremediated because Respondents have not complied with the terms and conditions of the May 26, 2009 stipulation, which outlines the tasks that Respondents, or their consultants, must undertake to complete the remediation at the site. For example, Respondents have not yet filed an approvable RIR, which was initially due by June 10, 2009. As a result, Respondents have yet to develop a remedial action work plan outlining the work to remediate the petroleum contamination on the site. (*See generally Zahav Enterprises, LLC*, Order dated October 24, 2011.)

Navigation Law § 192 authorizes a penalty of $25,000 for each violation of the Navigation Law, which prohibits any discharge of petroleum (*see* Navigation Law § 173[1]). Moreover, Navigation Law § 192 authorizes a penalty of $25,000 per violation for each day a violation continues. For the continuing violation asserted in the second cause of action, Department staff has requested a penalty of $25,000 (¶¶ 23 and 24 Urda Affirmation). A discussion about the appropriate civil penalty is provided below.

III. Relief

In the September 21, 2012 motion for order without hearing, Department staff requested an Order from the Commissioner that would assess a total civil penalty of $62,500, and direct Respondents to comply with the terms and conditions of the May 26, 2009 stipulation. Respondents objected to the civil penalty request.

A. Civil Penalty

As noted above, Department staff cited to ECL 71-1929 and Navigation Law § 192 as authority for the Commissioner to assess a civil penalty. With reference to the Division of Environmental Enforcement guidance document entitled, *Spill Site Remediation under Departmental Order Enforcement Policy*, revised December 18, 1995 (DEE-18) and related administrative decisions, Department staff argued that the total requested civil penalty

of $62,500 was reasonable and appropriate. (¶¶ 24-32 Urda Affirmation.)

Department staff noted that the primary goal of DEE-18 is to provide for a quick response to petroleum spills in order to prevent or minimize adverse impacts to public health and the environment. The policy further provides for stipulations between Department staff and responsible parties to promptly abate and remediate petroleum discharges. (¶ 25 Urda Affirmation.)

According to Department staff, the violations at the site have prevented the Department from performing its mandate to expeditiously respond, contain, and cleanup petroleum spills. Department staff noted that ten years have passed since the spill at the site was reported to the Department in January 2002. Furthermore, Respondents' obligations pursuant to the terms and conditions of the May 26, 2009 stipulation remain unfulfilled. Respondents' failure to comply with the ECL, the Navigation Law, and the terms and conditions of the May 26, 2009 stipulation, according to Department staff, has subverted the intent of the Department's spill program and required the Department to expend substantial resources. (¶¶ 26-28 Urda Affirmation.)

Respondents argued, however, that they did not prevent the Department from performing its mandate to respond to, contain, and cleanup petroleum spills expeditiously. Respondents argued further that the Department had the authority to complete the site cleanup after the initial investigation was finished rather than persuade Respondents to sign a stipulation. Respondents contended that failing to comply with the terms and conditions of the stipulation does not limit the scope of the Department's authority to finish site remediation. (Response at 2-3.)

Department staff asserted that Respondents have a poor compliance history. To support this assertion, Department staff referred to *Matter of Raphy Benaim, et al.*, Order dated January 25, 2008 (DEC Case No. R2-20050107-17). This matter is summarized above. The Commissioner held Respondents liable for several PBS related violations on the site, which is the subject of this administrative enforcement action. In the January 25, 2008 Order, the Commissioner assessed a total civil penalty of $60,000. According to Department staff, Respondents paid this civil penalty (¶ 29 Urda Affirmation).

In addition, Department staff referred to *Matter of Benhim Enterprises, Inc.*, Order dated December 31, 2010 (DEC Case No. R2-20080623-319 [*Benhim*]). According to Department staff, Raphy Benaim is a corporate officer of Benhim Enterprises, Inc., and the owner of another, former service station at a location different from the site relevant to the captioned matter. In *Benhim*, the Commissioner held the corporate Respondent liable for several PBS related violations, and assessed a total civil penalty of $88,700. According to Department staff, this matter has been referred to the Office of the Attorney General for enforcement (¶ 30 Urda Affirmation).

Respondents, however, dispute the relevance of *Benhim* as a factor in determining the appropriate civil penalty here. Respondents observed that Benhim Enterprises, Inc., is not a respondent in the captioned matter. Referencing *Burnet v Clark* (287 US 410, 415 [1932]), Respondents argued that a shareholder and a corporation are treated as separate entities for purposes of liability. Respondents argued further that a shareholder may not be held liable for the corporation's conduct unless the corporate form was misused (*United States v Bestfoods*, 524 US 51, 61 [1998]). Although Department staff has alleged that Raphy Benaim is a shareholder of Benhim Enterprises, Inc., Respondents contended that Department staff did not allege, or otherwise demonstrate, any misuse of the corporate form. Respondents maintain that to punish Raphy Benaim as an alleged shareholder for the violations of Benhim Enterprises, Inc. would be inappropriate and contrary to the case law referenced above. (Response at 2.)

Department staff explained that the reference to *Benhim* is to identify as many bases as possible for an accurate civil penalty determination. Department staff contended that Raphy Benaim exercises considerable control over Benhim Enterprises, Inc. (Letter-Reply at 3.) To support this contention, Department staff offered Exhibits A, B, and C with the Letter-Reply. (*See* Appendix A.) Department staff argued that Raphy Benaim's compliance history is a relevant factor to determine the appropriate civil penalty in this matter. (Letter-Reply at 4.)

In addition to *Benhim*, Department staff cited the following administrative enforcement cases to support the requested civil penalty in this matter: (1) *Matter of Zahav Enterprises, LLC*, *supra*.; (2) *Matter of 366 Avenue Y Development Corp.*, Order dated August 16, 2010; and (3) *Matter of Linden Latimer Holdings, LLC*, Order dated July 15, 2008 (¶ 32 Urda

Affirmation). In each of these matters, the Commissioner determined that respondents violated ECL article 17 and Navigation Law article 12 when they discharged petroleum without a permit and, subsequently, failed to contain the spills and fully remediate them. For these violations, the Commissioner assessed civil penalties ranging from $37,500 (*see 366 Avenue Y*) to $112,500 (*see Zahav Enterprises*), and ordered respondents either to develop remediation plans (*see Linden Latimer*), or complete the remediation already commenced through the stipulation process (*see Zahav Enterprises* and *366 Avenue Y*).

Department staff noted that the requested total civil penalty of $62,500 is substantially less than the maximum potential civil penalty. For the continuing violation alleged in the first cause of action, Department staff argued that the maximum potential civil penalty would be $45 million dollars. Department staff said that the maximum potential civil penalty for the violation alleged in the second cause of action would be $97.7 million dollars. Department staff noted further that Respondents did not offer any mitigating factors that warrant a reduction in the requested civil penalty (Letter-Reply at 3-4.)

To evaluate Department staff's civil penalty request in this matter, the Commissioner does not need to rely on *Benhim*. Rather, the other administrative enforcement cases referenced by Department staff are similar to the captioned matter, and show that the requested total civil penalty for the demonstrated violations here is consistent with prior administrative precedents.

The Commissioner should consider Respondents' unwillingness to complete the remediation of the spill reported on January 3, 2002 as a significant aggravating factor that would justify a significant civil penalty. Accordingly, the Commissioner should grant Department staff's request and assess a total civil penalty of $62,500.

B. Remediation

As noted above in Finding No. 6, NYS DEC Spill No. 0109599 remains open and unremediated. Pursuant to the terms of the May 26, 2009 stipulation, Respondents agreed to implement a plan to fully remediate the site. Respondents, however, have neither met the timeline nor undertaken the tasks outlined in the stipulation despite Department staff's reminders and this enforcement action. Therefore, consistent with the original

terms and conditions of the May 26, 2009 stipulation, the Commissioner should direct Respondents to comply with the stipulation within 15 calendar days from the date of the Order.

Conclusions

1. With service of the notice of motion for order without hearing dated September 21, 2012, and supporting papers upon Raphy Benaim, Tovit Benaim and R.B. 175 Corp., by certified mail, return receipt requested, Department staff duly commenced the captioned administrative enforcement proceeding in a manner consistent with the requirements outlined at 6 NYCRR 622.3(a)(3) and 622.12.

2. Department staff has met the requirements for a motion for order without hearing as outlined at 6 NYCRR 622.12(a), with respect to the first cause of action alleged in the September 21, 2012 motion. Respondents' failure to file an approvable RIR in a timely manner is a violation of the terms and conditions of the May 26, 2009 stipulation. Because Respondents have not filed an approvable RIR, Respondents did not develop an RAWP, which was an additional condition of the CAP. Consequently, Respondents' failure to file an RAWP is also a violation of the terms and conditions of the May 26, 2009 stipulation. The violation commenced on June 10, 2009, when a schedule to implement the approved remedial investigation work plan was due, and continued until September 21, 2012, which is the date of Department staff's motion.

3. Concerning the second cause of action, Department staff has met the requirements for a motion for order without hearing as outlined at 6 NYCRR 622.12(a). Respondents violated Navigation Law § 176 and implementing regulations at 17 NYCRR 32.5 when they did not take immediate action to contain the petroleum discharge at the site. This violation has continued for over 10 years from when it was initially reported to the Department on January 3, 2002.

Recommendations

1. The Commissioner should grant Department staff's September 21, 2012 motion for order without hearing.

2. In so doing, the Commissioner should conclude that Respondents did not comply with the terms and conditions of the May 26, 2009 stipulation, which is a violation of ECL 17-1929 and Navigation Law § 176.

3. In addition, the Commissioner should conclude that Respondents violated Navigation Law § 176 and implementing regulations at 17 NYCRR 32.5 when they did not take immediate action to contain the petroleum discharge at the site.

4. The Commissioner should issue an Order that assesses a total civil penalty of $62,500, and directs Respondents to comply with the terms and conditions of the May 26, 2009 stipulation.

/s/

_____
Daniel P. O'Connell
Administrative Law Judge

Dated: Albany, New York
February 27, 2013

Attachement: Appendix A – Motion Papers

Appendix A

Motion for Order without Hearing
Raphy Benaim, Tovit Benaim and R.B. 175 Corp.
DEC Case No. R2-201208093-487

Department Staff

1. Cover letter dated October 26, 2012 by Assistant Regional Attorney John K. Urda with enclosures:
   a) Affidavit of Service sworn to September 21, 2012;
   b) US Postal Service – Certified Mail Receipts; and
   c) US Postal Service – Track & Confirm Receipts.

2. Notice of Motion for Order without Hearing dated September 21, 2012.

3. Affirmation of Assistant Regional Attorney John K. Urda, dated September 21, 2012, in support of the Motion for Order without Hearing with Exhibits A through E.

   a) **Exhibit A**: Deed dated October 10, 2002 for property located at 175-14 Horace Harding Expressway, Fresh Meadows (Queens County), New York; Queens County Block 6891, Lot 10;

   b) **Exhibit B**: Deed dated August 26, 1988 for property located at 175-14 Horace Harding Expressway, Fresh Meadows (Queens County), New York; Queens County Block 6891, Lot 10;

   c) **Exhibit C**: New York State Department of State, Division of Corporations – R.B. 175 Corp., DOS ID #2806200;

   d) **Exhibit D**:
      i. Notice of Environmental Lien recorded August 4, 2006 for Queens Block 6891, Lot 10 by New York Environmental Protection and Spill Compensation Fund; and
      ii. Release of Environmental Lien recorded January 19, 2010 for Queens Block 6891, Lot 10; and

   e) **Exhibit E**: Stipulation pursuant to ECL 17-0303 and Navigation Law § 176, Effective May 26, 2009.

4. Affidavit by Andre Obligado sworn to September 19, 2012 with Exhibits A through E.

   a) **Exhibit A:** NYSDEC Spill Report Form (Spill No. 0109599);

   b) **Exhibit B:** Underground Storage Tank Removal Assessment for 175-14 Horace Harding Expressway (NYSDEC Spill No. 01-09599) prepared by G.C. Environmental Inc., issued November 8, 2002;

   c) **Exhibit C:** Letter dated August 2, 2004 from Joe Sun, P.E., Environmental Engineer, DEC Region 2 Division of Environmental Remediation to Raphy and Tovit Benaim and R.B. 175 Corp.;

   d) **Exhibit D:** Email dated July 26, 2010 from Mark C. Tibbe, Environmental Program Specialist 2, DEC Region 2 Division of Environmental Remediation to Peter Choe, Esq. with attached letter dated July 26, 2010 from Mr. Tibbe to the Benaims and R.B. 175 Corp.; and

   e) **Exhibit E:** Email dated August 27, 2010 from Mr. Tibbe to Mr. Choe with attached letter dated August 27, 2010 from Mr. Tibbe to the Benaims and R.B. 175 Corp.

Respondent

Response to the Department's notice of motion for an order without hearing dated January 17, 2013 by Aaron Gershonowitz, Esq.

Department staff

Reply-letter dated January 24, 2013 from Assistant Regional Attorney John K. Urda with Exhibits A through C.

   a) **Exhibit A:** Order on Consent (Benhim Enterprises, Inc.) Case No. 2-347272;

   b) **Exhibit B:** Petroleum Bulk Storage Application for Benhim Enterprises, Inc. (PBS No. 2-347272); and

c) **Exhibit C:** NYC Application for Registration of Gasoline Dispensing Sites, and a Proposal dated August 26, 2010 from the office of Walter T. Gorman with a copy of a check for $250.00.